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SECOND SERIES

30 Cal.2d 215

In re KAY'S ESTATE.

KAY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 17387.

Supreme Court of California, in Bank.
June 2, 1947.

1. Insane persons ⇐71

A guardian's sale of the property of an insane person is not effective until it is confirmed by the court. Probate Code, § 1534.

2. Insane persons ⇐71

Whether there is sufficient evidence on which to base an order confirming the sale of realty of an incompetent person is within the discretion of the probate court which is not reviewable on certiorari. Probate Code, §§ 785, 1530.

3. Courts ⇐198
Judgment ⇐475

The probate court is not an administrative tribunal, and, though its procedure and jurisdiction are limited by the Probate Code, the court is not an inferior tribunal of limited jurisdiction, but a court of general jurisdiction whose decrees in matters clearly within its jurisdiction are supported by the same presumptions on collateral attack as the judgments of other courts of general jurisdiction.

4. Courts ⇐202(5)

The orders and decrees of the superior court sitting in probate are treated with the same dignity on appeal and on certiorari as any other orders or judgments of the superior court.

5. Insane persons ⇐71

Probate court did not enter order confirming sale of home and office owned in joint tenancy by incompetent husband and wife without evidentiary basis, though husband, who was discharged after hearing on confirmation had begun and was thereafter restored by court order, objected to confirmation. Probate Code, §§ 785, 1530.

6. Trial ⇐105(2)

In absence of objection, testimony of representative of guardian of incompetent's estate that he considered sale of home and office to be for incompetent's best interest was properly considered by the court, even if objection thereto would have been sustained.

7. Evidence ⇐571(1)

Opinion of guardian's representative that sale of home and office was for best interest of incompetent was not necessarily altered by testimony of the witness that no effort to sell would have been made if he had known of filing of petition for restoration. Probate Code, §§ 785, 1530.

8. Insane persons ⇐71

On guardian's petition to confirm sale of incompetent's home and office probate court could not assume from incompetent's discharge and subsequent petition for restoration that incompetent was sane and capable of taking care of himself and his property. Welfare and Institutions Code, § 6729; Probate Code, § 1470.

9. Insane persons ⇐29

The discharge of an incompetent person acts as a restoration to capacity only where no guardian has been appointed and where a guardian has been appointed compliance with procedural provisions of Probate Code is essential to restoration. Welfare and Institutions Code, § 6729; Probate Code, § 1470.

10. Insane persons ⇐29

A petition for restoration may be contested, and restoration may be denied on proper grounds regardless of discharge. Probate Code, § 1472.

11. Insane persons ⇐71

The propriety of probate court's failure to grant a continuance of hearing on petition to confirm sale of home and office of incompetent, who had been discharged and who had filed application for restoration and who objected to confirmation, could not be raised on certiorari to review order of confirmation.

12. Appeal and error ⇐966(1)
Continuance ⇐7

The trial court has a wide discretion in granting or denying continuances and its decision cannot be disturbed on appeal unless a clear abuse of discretion is shown.

13. Certiorari ⇐67

On certiorari matters within the discretion of the trial court are not reviewable.

14. Insane persons ⇐71

An incompetent's inability to appeal from an order confirming the sale of his property does not leave him wholly remediless, since the relation of guardian and ward is a highly fiduciary one and, where the guardian is derelict in his duty, he may be held to account in a proper proceeding brought in behalf of the ward. Probate Code, § 1400.

SCHAUER, J., dissenting.

Proceeding in the matter of the guardianship of the estate of Willard E. Kay, alias, an alleged incompetent, on the petition of Willard E. Kay, by his guardian ad litem, William O. Kay, against the Superior Court of the State of California, in and for the City and County of San Francisco, and others for a writ of certiorari to annul an order confirming the sale of alleged incompetent's home property by the Anglo California National Bank of San Francisco, a national banking association, as guardian of the estate of the alleged incompetent.

Order affirmed.

Prior opinion 171 P.2d 946.

Henry J. Rogers and Elden C. Friel, both of San Francisco, for Willard E. Kay.

Cushing & Cushing, Cullinan, Trowbridge & Gorrill, of San Francisco, for respondent Edel R. Epstein.

Fred Herrington, of San Francisco, for respondent Anglo California Nat. Bank.

TRAYNOR, Justice.

In this certiorari proceeding, petitioner seeks annulment of an order of the probate court confirming the sale of his home property. The sale was made while petitioner was incompetent, but he has been restored to capacity since the order of confirmation of sale. Before his commitment he used the property both as a home and as an office where he practiced as a physician.

Petitioner's guardian sold the property under the authority of section 1530 of the Probate Code: "If * * * it is for the advantage, benefit, and best interests of the estate or ward or of such members of his family as he is legally bound to support and maintain, his guardian may sell any of his real or personal property * * * for any of such purposes, subject to authorization, confirmation or direction by the court as hereinafter provided."

[1] A guardian's sale is not effective, however, until it is confirmed by the court. Kier Corp. v. Treasure Oil Co., 57 Cal.App. 2d 829, 842, 136 P.2d 59. Probate Code section 785 (see Prob.Code, sec. 1534) provides that "Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted * * * the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. * * *" The petition for confirmation of sale filed by petitioner's guardian recited that the sale was for his best interests and the court confirmed the sale on that ground.

Petitioner, conceding that an order confirming the sale of a ward's property is not appealable (Guardianship of Reser, 57 Cal. App.2d 935, 936, 135 P.2d 709; Prob.Code, sec. 1630), now seeks annulment of the order on certiorari. His position is stated as follows: "[I]t seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess." Rodman v. Superior Court, 13 Cal.2d 262, 269, 89 P.2d 109, 112. The probate court derives its procedure and jurisdiction from statutes and is empowered to confirm the sale of a ward's property only if one of the statutory grounds is present. Here there is no evidence to support the probate court's finding that the sale was in petitioner's best interests, which was the alleged statutory ground for confirming the sale. The probate court therefore exceeded its jurisdiction and certiorari will lie to annul its order confirming the sale.

We are unable to agree with petitioner's analysis of the issues presented by this case. The quotation from the Rodman case is not applicable to this situation. In the Rodman case the superior court applied cash bail to the defendant's fine instead of returning it to the bondsman as required by the Penal Code. In the opinion this court illustrated the meaning of the rule quoted above by citing cases in which a lower tribunal made an award larger than that permitted by statute or extended a litigant's time to plead for a period in excess of the time authorized by the code. Rodman v. Superior Court, supra, 13 Cal.2d at pages 269, 270, 89 P.2d at pages 112, 113. These acts were clearly in excess of the prescribed statutory authority. The present case is one in which the probate court made a finding and issued an order in strict conformity with its statutory grant of authority.

[2] According to Probate Code section 1530 the decision to sell the ward's property must first be made by the guardian. The sale must then be presented to the probate court for confirmation. In the proceeding for confirmation, Probate Code section 785 requires that the court shall confirm the sale, after hearing and examination, "if it appears to the court that good reason existed for the sale." It is clear, therefore, that the determination whether there was sufficient evidence upon which to base the order lies within the discretion of the probate court. That determination is not reviewable on certiorari. Howard v. Superior Court, 25 Cal.2d 784, 788, 154 P.2d 849.

In Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, the rule stated in the Rodman case was shown to rest upon a broader principle. "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." 17 Cal. 2d at page 291, 109 P.2d at page 948, 132 A.L.R. 715. Before setting forth the foregoing principle, the opinion in the Abelleira case gave numerous examples of such excesses of jurisdiction. In every case cited as illustrative, the lower tribunal had no power to proceed in the manner attempted. None of the cases was concerned with a situation where, as here, the court performed the very function and made the very finding that was intended by the statute. There is nothing in the Abelleira or Rodman cases, therefore, to suggest that certiorari will lie where the only excess of power complained of is the entering of an order unsupported by evidence.

This court was confronted with substantially the same problem in Howard v. Superior Court, 25 Cal.2d 784, 154 P.2d 849. In that case the probate court, acting under section 473 of the Code of Civil Procedure, vacated its previous order allowing fees for counsel. The order vacating the allowance was not appealable. The attorneys to whom the fees were allowed sought a writ of certiorari to annul the order vacating the allowance. They contended that

the court could vacate an order under section 473 only on the prescribed statutory grounds and that a study of the record would show that the court actually vacated the order on another ground. Our opinion states: "The petitioners' claims as to lack of a sufficient affidavit of merits, inadequacy of the showing of mistakes, etc., and insufficiency of the proposed objections to the allowance of fees, do not affect the jurisdiction of the court to act on the petition, but merely indicate the possibility of error in the exercise of that jurisdiction. The motion was made upon statutory grounds and, assuming that the trial court should have decided that the mistaken belief of the husband and his counsel was due to their negligent failure to ascertain the facts with reference thereto, the error can be reviewed only on appeal." 25 Cal.2d at page 788, 154 P.2d at page 851.

The opinion distinguished those cases annulling orders of trial courts where the orders were not made pursuant to any of the prescribed methods of procedure as defined by the Code of Civil Procedure. "Hence it should be clear that the factual situation of these cases is entirely different from a case where the court is asked to act on proper grounds and does so act, and the claimed error is that the court abused its discretion in finding that there was a mistake or excusable neglect, etc., warranting relief under section 473. In other words, if the court sets aside its final order on a ground not authorized or recognized by the statute, it may be acting in excess of its jurisdiction, but if it does so on a ground authorized by the statute, the possible insufficiency of the evidence to support its action does not go to its jurisdiction, but is a basis for review on appeal. So long as there is some showing in support of the trial court's action, the quantum of proof cannot be considered or weighed on certiorari." 25 Cal.2d at page 789, 154 P.2d at page 851.

Petitioner contends, nevertheless, that this court should search the record to determine whether there is evidence to support the order, on the ground that the probate court is a court of limited jurisdiction. His theory is that a reviewing court should treat the decrees and orders of the probate court as though they had issued from an administrative agency and thereby demand that there be some evidence to establish the "jurisdictional fact."

[3, 4] It is not necessary here to determine whether or not the finding that the sale was in petitioner's best interests would constitute a "jurisdictional fact," as that phrase is used in administrative board cases. The probate court is not an administrative tribunal in any sense of the term. Although the procedure and jurisdiction of the superior court sitting in probate are limited by the provisions of the Probate Code, and in that sense "limited and special" (Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, 39, 53 P.2d 127), that court is not an inferior tribunal of limited jurisdiction. In certain probate proceedings the superior court has only the power given it by the Probate Code and no more. McPike v. Superior Court, 220 Cal. 254, 258, 30 P.2d 17, 18. This does not mean that the Legislature has created a new court. The Legislature has, in exactly the same manner, circumscribed the jurisdiction of the superior court in many of its other proceedings. Nevertheless it remains a court of general jurisdiction.

The control by the Legislature over probate jurisdiction does not, therefore, lessen the dignity of decrees and orders of the superior court sitting in probate. "* * * the decrees of the probate court in matters which, like these, are clearly within its statutory grant of jurisdiction, have the same effect, and are supported by the same presumptions on collateral attack, as the judgments of a court of general jurisdiction." Estate of Keet, 15 Cal.2d 328, 335, 100 P.2d 1045, 1049; see, also, Marlenee v. Brown, 21 Cal.2d 668, 677, 134 P.2d 770; Texas Co. v. Bank of America etc. Ass'n, supra, 5 Cal.2d at page 41, 53 P.2d at page 127; Burris v. Kennedy, 108 Cal. 331, 336, 41 P. 458; Wood v. Roach, 125 Cal. App. 631, 635, 14 P.2d 170. Even though the probate court exercises a particular statutory jurisdiction, it has many incidental powers in pursuance thereof. See, Bennett v. Forrest, 24 Cal.2d 485, 491, 492, 150 P.2d 416;

Dobbins v. Title Guarantee & Trust Co., 22 Cal.2d 64, 67–69, 136 P.2d 572. The orders and decrees of the probate court are treated with the same dignity on appeal as any other orders and judgments of the superior courts. Estate of Caspar, 172 Cal. 147, 149, 155 P. 631; Estate of Snowball, 157 Cal. 301, 305, 107 P. 598. A fortiori they receive equal treatment on certiorari. Howard v. Superior Court, 25 Cal.2d 784, 788, 154 P.2d 849; Lilienkamp v. Superior Court, 14 Cal.2d 293, 301, 93 P.2d 1008; Heydenfeldt v. Superior Court, 117 Cal. 348, 351, 49 P. 210.

[5] Although we have found it unnecessary to look to the record for evidence in support of the probate court's finding, the writ of certiorari has already issued and we have the record before us. It is at once apparent, upon examining that record, that the court did not enter its order without evidentiary basis. In fact, even if an appeal were possible in this case it is doubtful whether we could, under the holdings of this court governing the scope of review of decisions based upon conflicting evidence, reverse the order.

Petitioner was committed to Napa State Hospital in January 1946 and transferred to the United States Veterans Administration Facility in Palo Alto in March 1946. His wife had previously been committed to a mental hospital in 1940. The Anglo California Bank was appointed guardian of the estates of both incompetents and, in April 1946, sold the home they owned in joint tenancy for $40,400. The petition for confirmation of the sale was filed on April 15, 1946. The hearing on the confirmation began on May 3, 1946, but two continuances were granted in order to afford petitioner an opportunity to appear with counsel and present his objections to the sale.

M. L. Glover, Acting Assistant Trust Officer of the Bank, was examined on behalf of the guardian. He testified, in part, as follows: "Q. Do you believe it to be to the advantage and best interests of Dr. Kay's estate, and Dr. Kay, that the property be sold? A. We do." This testimony was later substantially repeated: "Q. As representative of the Bank, representing the Bank, they feel that the property should be sold, that it is to the best interests of the estate, and of the incompetent? A. Yes." Glover was also questioned with regard to the interest of petitioner's wife: "Q. You believe it to the best interest of the incompetent and her estate that the property be sold? A. Yes."

Glover admitted on cross examination that no effort had been made to lease the property, although it could readily have been leased. He stated also that the Bank had not made inquiries of the hospital staff in order to ascertain petitioner's condition before selling the property. In fact, the hospital staff had determined preliminarily on March 22nd that petitioner was sane and competent. Further consultations were necessary, however, and he was not discharged as sane and competent until May 13th, after the hearing on confirmation of sale had begun. Glover also testified that petitioner had about eight or ten thousand dollars in securities in addition to disability payments from an insurance policy, but that these payments would cease upon petitioner's recovery. According to Glover, the accepted bid constituted the highest price obtainable for the property.

Petitioner produced two medical witnesses, one of them from the hospital at Palo Alto. The latter testified that petitioner was sane and competent and had been given a certificate by the hospital to that effect. He was of the opinion that all sane men are competent, thus demonstrating unfamiliarity with the legal distinction between competency and sanity (Prob.Code, sec. 1460), but he stated definitely that the hospital staff had determined that petitioner was not only sane but competent to handle business affairs.

The other medical witness was also of the opinion that petitioner was sane and competent but his opinion was qualified:

"Q. And what is your opinion— A. I believe that he could go back to work and take care of himself and his property, if he doesn't go too fast and too hard.

"Q. Do you think that his condition is such—in other words, would he be able, in

your opinion, to return to active practice today? A. Today—not today, right away—I would advise that he take quite a few months further rest before going into practice.

"Q. At the present time, as of today, you would say that he is not able— A. He might be able to get by with it, but I would think it better for him to go slowly.

"Q. And you think that he is able today to handle his business affairs, his money, his insurance, stocks and bonds, and things of that sort? A. That is something I would hesitate to say, because I don't know enough about those things—a man might be quite capable of doing one thing, and his judgment might not be good in business matters.

"Q. Might it impede his further recovery if he were to be saddled down now with financial matters, financial worries—on the stock market, for example, and the matter of handling money? A. That would add to his difficulties."

The witness had testified earlier that the sale of petitioner's home would be detrimental to him, but this opinion was also qualified on cross examination:

"Q. I will ask you if you read this part of the Veterans Bureau report—on the history of the case—these excerpts here, about the neighbors sending messages to the District Attorney's office relative to peculiar actions—visiting homes of neighbors throughout all hours of the night—ringing doorbells making inquiry about property—all nine rooms of his home being strewn with papers, decayed food lying all about the kitchen—I call your attention to those portions of the report; you read that before you testified? A. I did.

"Dr. Kay [interrupting]: That is not true sir. * * *

"Q. When you testified on Mr. Lang's [petitioner's attorney] question concerning the effect it would have on Dr. Kay in not moving back into this same house, did you have in mind then the facts of the case concerning the neighbors' actions at the time referred to? A. I was not thinking of them particularly; I merely felt this: that any man who was moved out of his house these days, and had difficulty getting another one, would not be affected favorably thereby—how much effect it would have on him, or how much it would do to him, I couldn't say.

"Q. In other words, you would say the same of any person? A. I would say the same about anybody.

"Q. Sane or insane, competent or incompetent? A. Yes."

The trial court, after hearing the evidence and the arguments on behalf of petitioner, the guardian, and the purchaser, ordered confirmation of the sale. Subsequent to the order of confirmation, on June 7, 1946, petitioner was restored to capacity by an order of another department of the superior court.

It is clear even from the foregoing account of the record that the probate court had some evidence upon which to base its finding that the sale was for the best interests of petitioner. The evidence shows that a good price, the best obtainable, was bid for the house and that petitioner's finances are not so secure that the court could be certain of his ability to maintain a large house after his insurance disability payments cease, particularly in view of the medical testimony. Petitioner had between eight and ten thousand dollars in stocks and his income consisted primarily of insurance disability payments. The evidence also showed that the neighborhood was unfriendly to petitioner. The court may reasonably have concluded that his return to this neighborhood would be inimical to his best interests.

The probate court was also fully aware that even if the sale of petitioner's share of the property were vacated, the purchaser might remain the owner of his wife's joint interest. In that event petitioner would not be entitled to exclusive possession of the property but would be a tenant in common with a stranger. The representative of the Bank, Glover, testified that the sale of the wife's share of the property was for her best interests and there is no contest over the order of the probate court confirming the sale of her interest.

[6] Finally, the representative of the guardian stated that he considered the sale to be for petitioner's best interests. Wheth-

er or not an objection to this opinion, if made at the hearing, would have to be sustained (see, 7 Wigmore On Evidence, sec. 1960), it is clear that in the absence of any objection by petitioner, the opinion was properly considered by the court. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Parsons v. Easton, 184 Cal. 764, 769, 195 P. 419; Williams v. Hawley, 144 Cal. 97, 102, 77 P. 762; Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App. 2d 157, 163, 85 P.2d 961.

[7] Petitioner contends that this opinion is worthless because he later recalled Glover to the stand and asked: "Q. Did you have any reason to make any investigation at that time? Had anyone informed you that Dr. Kay had made any application for restoration? A. No. If there had been, we would have made no effort to sell the property." Petitioner interprets this testimony as an admission that the sale was not for his best interests and that the guardian would not have made the sale had it been advised that petitioner would soon be discharged from the institution. This testimony is open to another interpretation, however, consistent with the guardian's postition that the sale was for petitioner's best interests. If a petitioner for restoration to capacity has been filed, a guardian in all likelihood would hold in abeyance any plans to sell the property. He would have to envisage the possibility that a judgment of restoration to capacity, with accompanying revocation of letters of guardianship and order to restore the estate of the ward, might follow before the sale could be confirmed. If a contrary judgment were made, it might serve to confirm his conclusion that a sale would be for the best interests of the ward. The probate court could reasonably construe Glover's statement as a declaration that negotiations for sale would not be initiated if application was made for restoration to capacity. The petition for restoration was not filed until the day that Glover testified in the hearing for confirmation of the sale. His opinion that the sale was for petitioner's best interests, therefore, is not necessarily altered by his later statement that he would not have made an effort to sell the property after the filing of a petition for restoration.

[8-10] Petitioner finally contends that since he was on the verge of restoration to capacity at the time of the confirmation, the court should have granted him another continuance until after the hearing and determination of the petition for restoration. But the probate court could not assume, from the discharge and subsequent petition for restoration, that petitioner was sane and capable of taking care of himself and his property. The discharge acts as a restoration to capacity only where no guardian has been appointed. Welfare and Institutions Code, sec. 6729. In petitioner's case a guardian had been appointed and he could be restored to capacity only by the procedure under section 1470 of the Probate Code. In re Des Granges, 102 Cal.App. 592, 599, 283 P. 103; see Vigne v. Superior Court, 37 Cal.App.2d 346, 352, 99 P.2d 589. His petition for restoration was subject to contest (Prob.Code, sec. 1472), and the court before which the petition was brought could have denied restoration to capacity upon proper grounds irrespective of the discharge. Guardianship of Gordon, 56 Cal.App.2d 523, 527, 132 P.2d 824.

[11-13] Although the probate court might have granted petitioner a continuance, the propriety of its failure to do so cannot be raised in this proceeding. Petitioner was granted two continuances in order to allow him an opportunity to be present with counsel and to prepare his objections to the confirmation. The trial court, of course, has a wide discretion in granting or denying continuances, and its decision is not even disturbed on appeal, unless a clear abuse of discretion is shown. Marcucci v. Vowinckel, 164 Cal. 693, 695, 130 P. 430. It need hardly be added that on certiorari we do not review matters within the discretion of the lower court. Spanach v. Superior Court, 4 Cal.2d 447, 450, 50 P.2d 444.

[14] A ward's inability to appeal from an order confirming the sale of his property does not, however, leave him wholly without a remedy. The relationship of guardian and ward is a highly fiduciary one. The conduct of a guardian is carefully regulated both by statute and case

law. Prob.Code, sec. 1400. Were the guardian as derelict in its custodianship of petitioner's estate as petitioner contends it could be held to account in a proper proceeding brought on behalf of the ward. Were there collusion between the guardian and the purchaser, though there is no inkling of it in the record, petitioner could seek redress through an action to impose a constructive trust on his property. See Restatement, Restitution, sec. 201.

The order is affirmed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance, and I am in full accord with the views expressed in the opinion prepared by Mr. Justice TRAYNOR.

In view of the showing made in the trial court I cannot see how it can possibly be said that the trial judge did not have sufficient evidence before him to justify his conclusion that the sale in question was for the best interests of the incompetent ward in this case. It is not the function of an appellate court to weigh the evidence or to pass upon the reasonableness of conflicting inferences which may be drawn from the evidence even if that evidence is undisputed. Under our system of jurisprudence the weighing of the evidence and the determination of the effect of the inferences to be drawn therefrom is solely for the trier of fact. Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Eagles v. United States ex rel. Samuels, 329 U.S. 304, 67 S.Ct. 313; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Ellis v. Union Pacific Ry. Co., 67 S.Ct. 598; National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170; Commissioner v. Scottish American Invest. Co., 323 U.S. 119, 65 S.Ct. 169, 89 L.Ed. 113; Unemployment Compensation Commission v. Aragan, 329 U.S. 143, 67 S.Ct. 245; Cardillo v. Liberty Mut. Ins. Co., 67 S.Ct. 801.

The rules governing an appellate court in reviewing the decision of a trial court in probate as well as other civil cases are admirably stated by Mr. Justice Schauer in Estate of Bristol, 23 Cal.2d 221, 143 P. 2d 689, 690, as follows:

"The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, *are the same in a will contest* as in any other civil case. (Estate of Snowball (1910), 157 Cal. 301, 305, 107 P. 598; Estate of Barr (1924), 69 Cal.App. 16, 33, 230 P. 181.) [2] The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is 'substantial'; it is a door which can lead as readily to abuse as to practical or enlightened justice. [3] *It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record.* Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical. Upon such view of the law we cannot hold that any essential finding in this case is unsupported." [Emphasis added.]

I am in full accord with the views expressed in the foregoing excerpt. These views were again restated by Mr. Justice Schauer with exceptional force and clarity in his dissenting opinion in the case of Isenberg v. California Employment Stabilization Comm., 30 Cal.2d 34, at page 45, 180 P.2d 11, 19, where he said: "The functions of trial and appellate courts are constitutionally disparate and no rule should be more scrupulously observed by courts of appeal than that in their appellate work they should not encroach upon or usurp a trial court function. The resolution of factual questions including the determination of the inferences to be drawn from the evidence whether that evidence be documentary or undisputed or otherwise, is in a major sense exclusively the province of the trial court (or of the jury). It is exclusive in the trial court (or jury) in the sense that the appellate court is given no right to resolve factual conflicts or to indulge its preference as to the selection of inferences from the evidence. It is only where clearly there is no substantial evidence from which essential inferences can be drawn that the appellate court may properly interfere in a factual sense; and its interference then should be both in form and in substance by a statement of the law not a declaration of fact. Any other course by an appellate court is dictatorial in nature and tends toward depriving litigants of the constitutional standards of a fair trial."

In the light of the foregoing pronouncements as to the function of an appellate court in reviewing a factual determination by a trial court there can be no escape from the conclusion reached in the majority opinion.

SCHAUER, Justice (dissenting).

"To thus interpret law doth cuckold justice." The "dim and odious annals of the past" (Lytton Strachey, Elizabeth and Essex) are, indeed, come down to date. Is an adult man who is sane and competent in fact, who has served his country as well as his community as a physician and surgeon, who is convicted of no crime, who owes no debts, who has thousands of dollars of cash in the hands of a bank which had been appointed his guardian, who owns a house which he built on a lot which he bought with funds which he earned, who is possessed of ample income, who needs and wishes to keep the house to use as an office for his practice and as a home for himself and his two young daughters, but who at one time was mentally ill for 67 days, who, it is res judicata, had recovered and was "sane and competent" at the time of the court order here involved, helpless to prevent a sale by his "guardian" of his property? To the shame of our system of jurisprudence the majority of this court so hold.

Dr. Willard E. Kay, a physician and surgeon, the husband of Nancy Kay and the father of Nancy Ann and Kathryn, who has honorably ministered in the armed forces as well as in his civilian community, about ten years ago built a house at the northwest corner of Scott and Broadway in San Francisco. He built it for himself and his wife Nancy and their two young daughters. Nancy became incompetent several years ago. Dr. Kay used the house both as family residence and professional office. On January 14, 1946, he was adjudged mentally ill and was committed to the Napa Hospital. On January 22, 1946, the Anglo California National Bank of San Francisco was appointed guardian of his estate. (It also, previously, had been appointed to act as guardian of Nancy's estate.) Fifty-nine days later, on March 22, 1946, the staff of the Veterans Administration Hospital, to which institution Dr. Kay had been transferred on March 20, 1946, examined him and found him "sane and competent." This is not disputed. He was, nevertheless, temporarily retained under examination. On April 6, 1946, Dr. Kay was again "presented * * * to the staff and at that time he was also considered sane and competent; there was another case review on May 1st, 1946 * * * at which he was also considered competent, and the last review was on the 13th of May, at which time he was discharged from the hospital as sane and competent." He was at that time (May 13, 1946) "Discharged to his own custody" to take care of his own affairs and was given a formal certificate of com-

petency as provided for by statute. (Welfare and Institutions Code, § 6729.)

Prior to May 16, 1946, Dr. Kay filed his petition for legal restoration to adjudicated competency. He alleged among other things that "Ever since May 1, 1946, petitioner has been, and he now is sane, and competent and of sound mind, and is entitled to be restored to mental competency and capacity, and ever since said date, he has been, and now is, fully capable of caring for himself and of managing his affairs and his estate, and is entitled to an adjudication to that effect." On June 7, 1946, all the above allegations were adjudicated to be true. Not one allegation in that petition was challenged by Dr. Kay's guardian, by the trial judge, by Mr. Edel Epstein who had a deal pending with the guardian to purchase Dr. Kay's property at private sale, or by anyone else. Nevertheless, with that petition pending hearing, the trial court undertook, on May, 1946, to confirm (apparently the trial judge believed that he was merely refusing to "set aside") a sale of Dr. Kay's property, over his protests, to Mr. Epstein. The sale was confirmed for a price of $20,200 for Dr. Kay's interest ($40,400 for the entire property); the property had previously by the court appraiser, been appraised at $25,000 for Dr. Kay's interest ($50,000 for the entire property). The property had not been offered publicly or listed with any broker. It was offered by the guardian at private sale to Mr. Epstein and the guardian undertook to make the sale to Mr. Epstein for $40,400 while the property stood appraised at $50,000. That sale was undertaken by the guardian (petition for confirmation filed) on April 15, 1946. It will be remembered that according to the undisputed evidence Dr. Kay, in the opinion of the Veterans Administration Hospital staff, had recovered and was "sane and competent" as early as March 22, 1946, more than three weeks before the guardian even filed the petition for confirmation and nearly two months before the "confirmation." The excuse stated by the guardian for offering to sell under the circumstances shown was that it did not know that Dr. Kay had recovered. Its representative admitted that no effort had been made to ascertain his condition. Nevertheless, on May 16, 1946, assertedly under the mistaken belief that the property had already been sold and that it did not have the right "to set aside the sale," the trial (probate) judge confirmed the sale. This egregious error and failure to pursue jurisdiction, the majority hold, cannot be rectified.

None of the essential facts are disputed. This is not a case wherein, there being a conflict in the testimony or in the inferences to be drawn from the testimony or documents or circumstances shown, it is the duty of the reviewing court to sustain the inferences and conclusions of the trial court. The holding in Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689, inferentially relied upon, although not cited, in the majority opinion, has no pertinency here. That case deals with a question as to the sufficiency of evidence; here we are confronted not merely with a paucity of evidence to support a finding which was made but, more particularly, with an overwhelming, undisputed, affirmative showing that the act of the probate court exceeded its "defined power" as "defined by * * * express statutory declaration." (Abelleira v. District Court of Appeal (1941), 17 Cal.2d 280, 291, 109 P.2d 942, 132 A.L.R. 715.) It has frequently been held, in substance, that if from all the facts only a single inference and one conclusion may be drawn, then such single inference becomes a fact in the case and the "one conclusion" must be drawn as a matter of law. (Baugh v. Rogers (1944), 24 Cal.2d 200, 206, 148 P.2d 633, 152 A.L.R. 1043; Perguica v. Industrial Acc. Comm. (1947), 29 Cal.2d 857, 179 P.2d 812; Fields v. Sanders, 1947, 29 Cal.2d 834, 180 P. 2d 684. Justice Traynor, on another occasion (Mosley v. Arden Farms Co. (1945), 26 Cal.2d 213, concurring opinion, page 223, 157 P.2d 372, concurring opinion, page 377, 158 A.L.R. 872), stated his view to be that "If reasonable men could not differ as to whether the evidence does or does not establish the existence of a fact, the court will not submit the issue to the jury.") Here, all the essential facts are either undisputed or are res judicata. Only one conclusion in respect to departure from jurisdictional procedure can be

drawn by a reasonable mind. If the same rule of law which was followed in the Abelleira case is applied here the order rendered must be annulled.

It is undisputed that there was no necessity for the sale. Dr. Kay was at all times concerned in receipt of a cash income of some $500 or $600 a month from insurance policies and it was not disputed that such income would continue as long as he remained unable to carry on his practice. He had thousands of dollars of cash on hand. It is also undisputed that he was possessed of some $8,000 to $15,000 worth of readily marketable securities. No cash was needed in the estate and the personal property securities were not offered for sale. The real property was never offered for rent; the guardian held it vacant.

Dr. Kay was incompetent for but a few weeks, or at most even in a legalistic sense, months. As previously noted the guardian was appointed on or about January 22, 1946. On March 22, 1946, Dr. Kay was pronounced sane and competent by the hospital staff; on May 13 he was discharged and given his formal certificate of competency; and on June 7 it was formally adjudged that he was then, and at all times subsequent to May 1, 1946, had been, "sane, competent and of sound mind and * * * entitled to be restored to mental competency and ever since said date, he has been, and now is, fully capable * * * of managing his affairs and his estate."

In apparent haste to sell Dr. Kay's property before he was fully restored to legal competency, the petition for confirmation was filed April 15, 1946, without consulting him and without inquiry as to his then condition of health. The petition alleges, among other things, that "the interest of this estate in said parcel has been appraised at $25,000.00, but your petitioner is informed and believes, and therefore alleges, that said appraisement is too high, and therefore respectfully requests that a new appraisement be forthwith had. (6) That said sale was made directly with said purchaser [Edel R. Epstein] without the employment or assistance of any broker or agent and no real estate broker's commission is payable." Such petition was set for hearing on May 3, 1946. This was some six weeks after Dr. Kay had been found sane and competent by the staff at the Veterans Administration Hospital but while he was still under observation there. On that day a telegram which had been received by the clerk of the court on the preceding day, was called to the attention of the trial judge. The telegram purported to come from the brother-in-law of Dr. Kay and read as follows: "Dr. Kay's home is not to be sold or sale confirmed in court without his personal consent. Arrangements were made for his release on May 1st from Veterans Hospital. Mrs. Kay may arrive May 2nd. Dr. Kay's condition was only temporary and not permanent and is well now. They must be allowed to occupy the house and sale must not be confirmed until and unless Dr. Kay consents to it. Meanwhile confirmation can be continued two or three weeks or a month." The trial judge remarked, "I really see no reason why this matter should be postponed. I can't pay any attention to telegrams from somebody that knows nothing about the circumstances, or from relatives. * * * We cannot be postponing these sales for trivial matters * * * I understand Dr. Kay was—before Dr. Kay was committed, the whole neighborhood was out hiring attorneys—he was firing shots through the ceiling—isn't that true? [The record before us is devoid of evidence to this effect.] * * * This incompetency has been going on for a long time, hasn't it?" "Mr. Herrington: Not Dr. Kay—it is only three or four months old." "The Court: Well, that is some time * * *." The matter was, however, continued until May 10 and at that time Dr. Kay and his counsel appeared and opposed the confirmation of sale. Among other things stated to the court the following appears: "Dr. Kay, who is one of the incompetents here, is in court, as your Honor said. We have been informed by the medical staff, or by a member of the medical staff, of the Veterans Administration Hospital in Palo Alto, that Dr. Kay should be restored, and that he is no longer incompetent, and that proceedings should be commenced for the purpose of having his competency adjudicated, and having him restored.

"We are asking on behalf of Dr. Kay for a continuance in this matter, and that the sale either not be confirmed or that it be continued for a sufficient period of time *to enable this incompetent to have an opportunity to be restored.* [Italics added.] The reason this request is made is because this is his home, and he has no place to go and live and have his office, since he is a practicing physician—he was before he was adjudicated an incompetent—and he asks the Court to continue the matter, or to disapprove the sale for that reason. We believe that it is within the Court's discretion to do that, to enable him to save his home. Legally, he is incompetent and insane today, but in a few days, from the information that we have, he will be declared competent. * * *"

"The Court: * * * I think the only thing I can do, *to preserve the rights of Mr. Cullinan and his clients* [the Epsteins]—after all, they have some rights—this sale is legitimate, in spite of the natural sentiment we have about taking a home from somebody. I think a few days' continuance should be granted. * * * And I want a substantial showing at that time—I don't want to hear what is going to be done, and all that; I want some substantial showing at that time." (Italics added.) There is in the record not the slightest basis for holding that either the prospective purchasers or their attorney had any "rights" in the premises to be "preserved." It was Dr. Kay and his wife, Nancy, who had rights which should have been the primary concern of the court and the guardian.

On May 16 the hearing resumed. At that time it appeared that not only had Dr. Kay been released from the hospital as restored to sanity and competency in the opinion of the medical staff, but that he had filed a petition for restoration by the court to full legal competency and that hearing on such petition had not been set for June 6, only some three weeks away. The petition averred that petitioner was in fact sane and competent as of the date of its filing and that he had been sane and competent "ever since May 1, 1946." As previously noted none of its allegations was challenged by anyone and on June 7 they were adjudicated true.

The evidence upon which the majority rely to support the jurisdiction of the trial court in its purported confirmation of the sale—actually, its denial of rescission—is that of one Myron L. Glover, an employe of the trust department of the guardian bank. In response to leading questions he undertook to state *the naked belief* and *feeling, not his personal opinion, of his corporate employer* as to the advantage to Dr. Kay and his estate of making the sale in question. He gave no reason, whatsoever, for the "belief" or "feeling" of the bank except the indicated basic belief that Dr. Kay was insane and incompetent and would remain so indefinitely. The transcript shows:

"Q. Do you *believe* it to be to the advantage and best interest of Dr. Kay's estate, and Dr. Kay, that the property be sold? A. *We* do. * * *

"Q. As representative of the Bank, representing the Bank, *they feel* that the property should be sold, that it is to the best interest of the estate, and of the incompetent? A. Yes * * *.

"Q. (Mr. Lang) I will ask you if you made an investigation or caused any investigation to be made as to the possible recovery of Dr. Kay on or before April 15, 1946 [the date the petition for confirmation was filed]? * * * A. No.

"Q. Did you have any reason to make any investigation at that time? Had anyone informed you that Dr. Kay had made any application for restoration? A. No. *If there had been, we would have made no effort to sell the property.*

"Q. You did not know that he was found to be sane and competent by the medical staff on March 22? * * * A. *No, we had no knowledge.*" (Italics added.)

It is thus obvious that the "belief" of the bank clerk as to the "feeling" of the bank was based on the further erroneous belief that Dr. Kay continued insane and incompetent when in fact he had recovered. The attitude of the bank on the final hearing (May 16, 1946) in relation to the question of Dr. Kay's restoration to legal competency, is reflected by the following passage from the transcript: [By Mr. Herrington] "Mr. Cullinan is here representing the pur-

chasers, and Mr. Lang is also here, and I think your Honor has the picture in mind from last week. *As far as the petition for restoration,* I might say that the Bank's position on that is neutral; if the doctor can establish that he has recovered and is entitled to handle his own affairs, the Bank will be only too happy to cooperate and abide by any order the Court may make in that connection. We do not expect to oppose *that* at all." (Italics added.) But the effort to confirm the sale went on.

Evidence was introduced which, without any substantial dispute, established that Dr. Kay had in fact largely recovered his health and strength, that he was then sane and competent but should avoid overworking and worry for some months. It was undisputed that he had been released, as restored to sanity and competency, to return to his own home, that he was able to resume to some extent his practice of medicine, and that he needed and wanted his home place in which to reside and maintain his family and his office. The property had been kept vacant during the months that Dr. Kay had been in the hospital and, upon Dr. Kay's recovery and restoration, his guardian refused to allow him to enter it.

It is to be remembered that we are here concerned with a guardianship matter and with the limited power of the court, sitting in probate, in a special statutory proceeding. No case in modern legal literature, in California or elsewhere, which indulges hyper-technicality to a similar end and to the extent of the majority opinion in this case, has been cited. Section 785 (Probate Code) declares that "Upon the hearing the court *must* examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and *must* examine the return and witnesses in relation to the sale * * *." (Italics added.) In Abelleira v. District Court of Appeal (1941), supra, 17 Cal.2d 280, 291, 109 P.2d 942, 948, 132 A.L.R. 715, this court said: "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

It is Hornbook law that the jurisdiction of a probate court, as such, is limited and special. (Olcese v. Superior Court (1930), 210 Cal. 566, 568, 292 P. 964; Haynes v. Meeks (1862), 20 Cal. 288, 312, 314; Janes v. Throckmorton (1881), 57 Cal. 368, 387; 21 Am. Jur. § 582, p. 709. See also Estate of Davis (1902), 136 Cal. 590, 597, 69 P. 412; McPike v. Superior Court (1934), 220 Cal. 254, 258, 30 P.2d 17; Texas Co. v. Bank of America (1935), 5 Cal.2d 35, 39, 53 P.2d 127. In Rodman v. Superior Court (1939), 13 Cal.2d 262, at page 269, 89 P.2d 109, at page 112, this court said: "An examination of the numerous cases which deal with this problem impels the conclusion that some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess." See also Spreckels Sugar Co. v. Industrial Acc. Comm. (1921), 186 Cal. 256, 260, 199 P. 8. There is no appeal, in a guardianship proceeding, from an order confirming a sale of property. (Guardianship of Reser (1943), 57 Cal.App. 935, 936, 135 P.2d 709.)

The trial court, seeming to be of the view that the purchaser acquired vested rights as of the date of his bid and that those "rights" must prevail unless and until Dr. Kay proved some "grounds" for rescinding or "setting aside the sale,"

placed the burden on Dr. Kay to prove grounds for "*setting aside* the sale," rather than on the guardian or Mr. Epstein to prove existence of jurisdictional facts necessary to warrant *confirming* the projected sale. The court further held that the recovery of sanity and competency by Dr. Kay was not a sufficient ground for "setting aside the sale," that the sale could not be set aside or confirmation withheld "for the grounds that we have heard here today" and concluded the hearing with these words: "I think the showing here is absolutely insufficient. I have heard all this evidence here today *just to accommodate those who came here,* and to give everyone a hearing—*I do not think it affects the issues of the case at all.* The order is that this sale is confirmed." (Italics added.)

Regardless, therefore, of the sufficiency of the evidence otherwise to show jurisdiction to confirm the sale, it unmistakably appears that the probate court in ordering that "this sale is confirmed" was not actually complying, in any sense, with section 785 of the Probate Code but was holding merely that as a matter of law the recovery of Dr. Kay was insufficient to constitute, and wholly immaterial as a ground for "setting aside" the sale which, in its conception, had already been made by the guardian to Mr. Epstein. As repeatedly indicated by the trial judge he was concerning himself not with a diligent inquiry into the best interests of Dr. Kay and his estate, as the statute requires, but rather with protecting the "rights" of those whom he considered already to be purchasers. He said "I think the only thing I can do, to preserve the rights of Mr. Cullinan and his clients [Mr. and Mrs. Epstein]—after all, they have some rights—this sale is legitimate, in spite in the natural sentiment we have about taking a home from somebody. I think a few days' continuance could be granted; and * * * I don't want any of these certificates that I get here, they are of very little weight. Where anybody is likely to be deprived of his rights, that is the position that this court is going to take * * *.

Mr. Herrington: Does your Honor care to appoint doctors?

"The Court: There is nothing before the court now. This is a case where both of these parties were committed * * *. *At the time this was submitted for sale* was there any question then about his petition for recovery here? * * *" (Italics added.)

The bank representative then testified that at the time the property was offered by the bank to Mr. Epstein, the bank did not know that Dr. Kay had recovered his reason. The following then appears:

"Q. [by Mr. Lang] I will ask you if you made any investigation or caused any investigation to be made as to the possible recovery of Dr. Kay on or before April 15, 1946?

"Mr. Herrington: I will object to the question on the ground—

"The Court: Do you think that it is the duty of the Bank—before confirmation of a sale—that they should go—when a man is in some institution, and has been regularly committed—that it is the duty of any bank to go, before property is offered for sale, and find out whether there is a possibility that this man may be restored to competency; is that your question?

"Mr. Lang: Yes, your Honor, in view of the fact that it is home and his castle.

"The Court: *That is not the point at all here*—I do not want any of this sentiment in this case about a man's home being his castle—we had all that up here before. Let us get down to the legal points. * * * I am giving a great deal of time to this case—*this type of testimony would be appropriate on an application for restoration, which is not before the Court at all at this time* [it was filed and pending, awaiting hearing], but I did not want these doctors to come up here without hearing them. Of course, they have not impressed me that much on the issue here, which is the question of this confirmation of sale—that is the issue.

Mr. Lang: The whole question is whether the sale would be detrimental—I intimated or suggested that it would seem to me the fair thing to do would be to lease this property out.

"The Court: *What about all the legal steps that have been taken here?* The sale was advertised; the bids were received; the Court called for further bids—all of those things have been done. *I just went out of my way to do what I suppose I had no authority to do, over Mr. Cullinan's objection here, to go into this matter;* and upon your personal request to me the other day—you told me you had been retained in the case; but whether those things affect the issue here is another question. * * *.

"Mr. Herrington: * * * The question seems to be: Is this sale, as it now stands, for the advantage, benefit, and best interest of Dr. Kay?

"Mr. Lang: That is the whole question. It has been my procedure, or at least it has been the custom of myself and the Bank of America or the Anglo California Bank—I can't say the Anglo California—to make an investigation before going into a matter like this.

"The Court: *I never heard of such a custom.* * * *

"Mr. Cullinan: There is not much for me to say in addition to what I have already said at previous hearings—*this is a difficult time for purchasers to find places,* and when they find a place and put a lot of money and obligate themselves for the title search and make arrangements for contractors, painters, and other trades to fix the place up—

"Mr. Lang: You know, Mr. Cullinan, don't you, that all sales are subject to the confirmation of the Court?

"The Court: *But not for the grounds that we have heard here today.* * * * I think the showing here is absolutely insufficient. *I have heard all this evidence here today just to accommodate those who came here,* and to give everyone a hearing —*I do not think it affects the issues of the case at all.* The order is that this sale is confirmed." (Italics added.)

It is manifest from the record hereinabove quoted that the trial judge did not comply with the procedure prescribed by section 785 of the Probate Code and that he wholly ignored section 40 of the Civil Code.* He made no pretense of examining "into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made" in relation to the interest of Dr. Kay as a living competent person, or in relation to the "sale" as a mere contemplated or proposed, rather than a consummated, project. He considered that the sale had already been made; that the purchaser had "rights" which it was the court's duty to "preserve"; that the proceeding was one whereby Dr. Kay sought to "set aside" the sale; and that he was passing on the legal sufficiency of grounds for "setting aside the sale." He held those grounds insufficient as a matter of law to "set aside the sale"; he did not comply with section 785 of the Probate Code, and the order sought to be annulled is not in actuality an order which the court in this proceeding had jurisdiction to make. It is unmistakably an order denying rescission of what the court denominated a "legitimate" sale.

Of course, under our procedure a sale is not made until it is confirmed. (Estate of Rule (1944), 25 Cal.2d 1, 10, 152 P.2d 1003, 155 A.L.R. 1319.) Mr. Epstein had not *bought* Dr. Kay's property; he had merely offered to buy it. The court did not have before it, and did not have jurisdiction to pass upon, any issue as to rescission or "setting aside" of an otherwise binding sale. Yet it did not assume to pass upon any other issue. (Whether mandate should issue, upon proper application, to require the court to exercise the jurisdiction given it by section 785 of the Probate

* Section 40 of the Civil Code provides that "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract * * * until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge." Here Dr. Kay had been released as "sane and competent"; he had been provided with the formal certificate of "Discharge of Insane Person as Recovered" and the document was read into evidence.

Code, is not now before us.) It is obvious that the court did not follow the procedure prescribed by section 785 of the Probate Code; that it entered no order whatsoever based on that procedure; i. e., on a settlement of issues projected by that statute; and that the order it did enter, by which it undertook to deny a rescission or "setting aside" of what it erroneously conceived to be an accomplished sale, is wholly void. As such, it should be annulled.



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PEOPLE v. PARKER.

Cr. 2457.

District Court of Appeal, First District, Division 1, California.

June 2, 1947.

1. Criminal law ⇐511(2)

The testimony of accomplice alone is sufficient to establish commission of the crime charged and statutory requirement as to corroboration of such testimony is sufficiently met, if there is some other evidence which tends to connect defendant with commission of the offense or from which such connection is reasonably inferable. Pen.Code, § 1111.

2. Criminal law ⇐511(1)

That some of the circumstances tending to corroborate testimony of accomplice can be reasonably reconciled with innocence of defendant does not warrant reversal of conviction, if the circumstances reasonably justify jury's verdict.

3. Criminal law ⇐511(4)

Testimony of one who admittedly assaulted and robbed drinking companion that defendant participated in offense and shared in proceeds thereof was sufficiently corroborated to sustain conviction of second-degree robbery defendant did not try to prevent assault and robbery and by evidence that immediately after assault joined assailant in flight from the scene and did not inform police of crime though he had assured victim he would do so. Pen.Code, § 1111.

4. Criminal law ⇐1036(1)

Alleged error in admitting evidence cannot be raised for the first time on appeal.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

William Parker was convicted of second-degree robbery and, from the judgment of conviction and an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Geo. D. Pollock, of Salinas, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

PETERS, Presiding Judge.

Defendant William Parker was found guilty by a jury of second degree robbery. He appeals from the judgment of conviction and from the order denying his motion for a new trial. His principal contention is that the testimony of the principal witness against him, one J. C. Martin, who was admittedly the chief actor in the robbery, was an accomplice, and it is contended that Martin's testimony was not sufficiently corroborated as required by § 1111 of the Penal Code. Martin, prior to appellant's trial, had pleaded guilty to the offense in question.

The robbery was committed in the early afternoon of June 13, 1946, near Salinas, California. The victim was Floyd Archer, aged 22. There is no dispute that Martin knocked Archer down and removed over $500 and a wrist watch from his person. The question is whether Martin's story that Parker was a participant and split the proceeds with him is sufficiently corroborated. It must be conceded that the corroboration is not as strong as might be desired, but, for reasons hereafter stated, we think it legally sufficient.

Archer testified that prior to June 13, 1946, he had not known either Martin or

Parker; that he worked for the Permanente Company and that June 13th was his day off; that on the morning of that day about 10:30 a. m. he entered a bar in Salinas to cash a check; that he ordered a drink and cashed a check for $141.86, he then having, in addition, over $360 in bills in his wallet; that Martin was sitting next to him, saw him cash the check, and started a conversation with him by asking him if he wanted another drink; that the two had a drink together; that at this time appellant Parker was "about two guys" up the bar away from Archer and Martin; that about ten minutes later Martin introduced Parker to the witness; that they sat down and had several more drinks, most of which Martin bought; that they remained drinking for some time and then appellant suggested that they get a cab and pick up some girls; that the three left the bar and got into a taxicab; that they picked up appellant's girl friend but were unsuccessful in finding any other girls; that Martin bought a bottle of wine and they all drank from the bottle in the cab; that they then drove back to town, left appellant's girl friend at a restaurant, and then went back to the bar from which they had started and began drinking again; that then the witness told Martin and Parker that he was going out to the Permanente plant to pick up some tools; that he had his "pickup" truck parked nearby; that Martin and Parker decided to go with him; that at this time he, the witness, was "pretty drunk," and they all agreed that appellant Parker should drive; that they proceeded toward the Permanente plant all partaking of drinks from the bottle; that Parker drove past the Permanente plant without stopping for about a mile and a half and then stopped the car; that Martin got out of the truck and so did the witness; that up to this point there had been no argument of any kind; that, without warning, Martin then hit Archer in the eye and knocked him into a ditch; that Archer was briefly unconscious from the blow and from hitting his face on a big rock in the ditch; that Martin then removed the witness' wrist watch and wallet; that appellant Parker did not join Martin in this attack, but in fact told Martin to "leave me [Archer] alone"; that Martin then drove a short distance away with the truck and appellant Parker came over and tried to wipe the blood from the witness' face; that Parker then told the witness "to take it easy, as soon as he got to town he would call the police"; that Martin then returned with the truck, told Parker to get in and Martin and Parker then drove away leaving the witness in the road; that Archer then walked back to the Permanente plant and reported the robbery to the police.

J. C. Martin was next called as a witness for the prosecution. He had already pleaded guilty to the offense in question. He testified that he and appellant Parker had been acquainted for about a month; that on the morning in question he met Parker at a restaurant and the two then proceeded to the bar; that about twenty minutes after they arrived Archer came in and cashed a check; that Parker was then about five feet from Archer; that he started to converse with Archer and then Parker came over; that he and Archer then bought several drinks and then Parker suggested getting some girls. His testimony as to the ride in the taxicab and the return to the bar and the further drinking there is substantially similar to that of Archer. He then testified that Parker drove the truck and finally stopped at his, Martin's, suggestion; that he then hit Archer and robbed him; that he and Parker had had no previous conversation about "rolling" Archer; that when he, Martin, hit Archer, the appellant Parker was by the side of the truck drinking from the bottle and about eight feet from the scene of the attack; that Parker made some mention about Archer "having enough," but made no effort to prevent Martin from robbing Archer; that Martin then got in the truck, drove it a short distance, turned around, came back to the scene of the attack, and told Parker to get in; that Parker said "Let's don't go, we can do this easier than this"; that Parker then got into the truck and insisted on driving. Archer had testified that Martin was driving at this time. Martin testified that Parker drove the truck back to Salinas and they

then abandoned the truck and procured a taxicab and drove to the home of some friends of Martin's; that Martin told the cab driver to return in an hour and a half or two hours and that he and Parker went into the house; that Parker then said: "How much did we get?"; that they then divided the money equally; that the cab then returned and they rode further towards town and Parker got out and left. He also testified that he told Parker that he, Martin, was going to leave town and Parker replied that he was going to do the same thing. Martin also testified that he and appellant had never talked about robbing people before this day; that Archer cashed the check within Parker's sight and that when the check was cashed Parker looked at him and nodded his head.

The police chief of Salinas identified a statement made by Parker on the day of his arrest. That statement conforms substantially with the testimony of appellant hereafter set forth. It should be here noted that Martin fled from town and was not captured for some time. Appellant remained in Salinas and was arrested the day following the robbery. At that time he had but $7 in his possession. The police chief testified that he saw the three men come out of the bar on the day in question and get into a taxicab; that all of them apparently had been drinking; that he followed the cab during the time Martin went into the store and emerged with a bottle, and while appellant picked up his girl friend; that he then lost the cab.

This constitutes the case for the prosecution. Appellant was then called as a witness in his own behalf. He admitted a prior 1942 conviction of robbery. His testimony as to meeting Martin and proceeding to the bar, and meeting Archer there is substantially similar to that of Martin and Archer, except that he denied seeing Archer cash the check. The rest of his testimony about the taxicab ride, the return to the bar and finally leaving in Archer's truck is substantially similar to that of the other witnesses. He testified that when he stopped the truck he did so upon Martin's direction; that he got out and took a drink from the bottle; that Martin and Archer walked around back of the truck and that Martin hit Archer; that after Martin had robbed Archer, Martin drove away in the truck and he, Parker, refused to accompany him; that he, Parker, assisted Archer by picking him up and wiping the blood off his face; that Martin returned in the truck and was going to hit Archer again but he, Parker, prevented him from doing that. Martin denied that he attempted to hit Archer again, and Archer had no recollection of this threatened second attack. Parker testified that when Martin returned with the truck that he, Parker, asked Archer's permission to ride back with Martin in the truck, and Archer granted him that permission. This was denied by Archer. Parker testified that he told Archer that when he, Parker, got to town he would inform the police of the robbery; that then he left with Martin and Martin drove the truck back to Salinas; that on the way back Martin was mad at him because he, Parker, had refused to assist in the robbery; that they abandoned the truck in Chinatown and took a cab to the home of Martin's friends; that he, Parker, did not get out of the cab but sat in the cab for fifteen minutes while Martin was inside; that when Martin came out he told Parker that his brother had a gun, and also told Parker that if he, Parker, ever mentioned the robbery "it would not be good for me"; that he, Parker, told Martin that he would not bother him. Martin denied making any threats to Parker. Parker testified that he rode in the cab a short distance and then got out; that he started towards the police station to report the robbery and then changed his mind because he still had the wine bottle and, of course, had been drinking; that he was arrested the next afternoon and told the officers all that he knew about the affair.

This is a fair summary of the evidence. Appellant urges that without the testimony of Martin there is nothing in the record to indicate that appellant in any way participated in or shared in the proceeds of the robbery. It is argued that the prosecution failed to corroborate Martin's testimony sufficiently to satisfy the requirements of § 1111 of the Penal Code. That section

provides: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *"

[1] There have been many cases interpreting that code section. It is now too well settled to require extended discussion that all of the elements of the offense need not be shown by corroborating testimony. The testimony of the accomplice is alone sufficient to establish the commission of the crime charged, and all that the law requires in addition to the testimony of the accomplice is some evidence which tends to connect the defendant with the commission of the offense or from which such connection is reasonably inferable.

The rule is stated as follows in People v. Briley, 9 Cal.App.2d 84, 86, 48 P.2d 734, 735: "The corroboration of an accomplice required by section 1111 need not be such as tends to establish the commission of the offense or to corroborate the precise facts testified to by the accomplice. [Citing cases.] All that the law requires is that, in addition to the testimony of the accomplice, there be some evidence which, though slight, tends to connect the defendant with the commission of the offense. The testimony of the accomplice, standing alone, is sufficient to establish the commission of the crime charged [citing cases], and the extrajudicial declarations of the defendant are sufficient corroboration to sustain a conviction where the effect of such declarations is to tend to connect him with the commission of the crime charged. [Citing cases.]"

In People v. King, 40 Cal.App.2d 137, 141, 104 P.2d 521, 523, the following is said: "The entire conduct of the accused may be looked to for corroborative circumstances and if therefrom his connection with the commission of the crime may be fairly inferred the corroboration is legally sufficient. [Citing cases.]" See, also, People v. Yeager, 194 Cal. 452, 229 P. 40.

[2, 3] While it must be admitted that the corroborating testimony is not very strong it cannot be held, as a matter of law, that it does not tend to connect appellant with the commission of the charged offense. Appellant admittedly was friendly with Martin before the robbery. Admittedly he accompanied Martin to the bar where they struck up an acquaintance with Archer. It is a reasonable inference that appellant saw the check being cashed by Archer. Admittedly appellant engaged in a drinking bout with the victim, and admittedly the victim got pretty drunk. Archer corroborates the accomplice's testimony that appellant, without explanation, drove a mile and a half beyond the Permanente plant. Neither at the trial nor at any other time, so far as the record discloses, did appellant offer a reasonable explanation of why he did not stop at the Permanente plant when that was their ostensible destination. Another suspicious and corroborating circumstance is that appellant stood by and made no attempt to assist Archer or to prevent the robbery. Appellant admits that the reason that he drove the truck was that he was the least intoxicated of the three. It is reasonable to infer that appellant and Archer together could have prevented the robbery. His mild remonstrance and assisting Archer after the attack may well have been part of a deliberate plan to make Archer believe that appellant was innocent. A most important and significant corroborating circumstance is that, immediately after the attack, appellant joined Martin in his flight from the scene of the attack. People v. Rice, 29 Cal.App.2d 614, 85 P.2d 215. An innocent man does not normally voluntarily join a robber immediately after the robbery and drive off in the victim's truck leaving the dazed victim in the middle of the road. The failure of appellant to inform the Salinas police of Martin's acts after having assured Archer that he would do so is another corroborating circumstance. People v. Ward, 40 Cal.App.2d 143, 104 P.2d 537. While appellant denied that he went into the house with Martin, and testified that he sat in the cab for fifteen minutes awaiting the return of Martin, this testimony does not ring true. Here is a man who claims to be innocent. He has just witnessed a brutal assault and robbery. He claims to have

been afraid of Martin—yet he expected the jury to believe that, in spite of such fear, he sat alone in the cab for fifteen minutes and made no effort to escape. While some of these corroborating circumstances can be reasonably reconciled with innocence, that factor is not determinative. "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. See, also, People v. Kessler, 62 Cal.App.2d 817, 145 P.2d 656. It is our view that the above corroborating circumstances do more than raise a mere suspicion of appellant's guilt—even though slight, they do tend to connect the appellant with the crime involved. That is all the law requires.

Appellant charges error in the admission of evidence in two respects, and, while fairly admitting that the alleged errors normally might be thought not very important, he contends that in view of the slight corroboration, the errors must be deemed to have been prejudicial. The first alleged error occurred while the police chief of Salinas was on the stand. After the Chief had testified that he saw the three men come out of the bar and get into a taxicab the following occurred (R.T. 46):

"The Court: You were following them? A. Yes, I was following them.

"Q. You were suspicious of something? A. I was.

"Mr. Pollock: Your Honor, that is—

"The Court: The question and answer will remain in. I want to know why this officer followed them.

"Mr. Pollock: If my client is the one, that is admissible.

"The Court: It does not make any difference who it was, I have a right to know why he followed these men. Go ahead."

The other instance of claimed error in the admission of evidence occurred during appellant's cross-examination (R.T. 68):

"The Court: * * * Q. Didn't you talk to this fellow Martin about how easy it was to get money off drunks? A. No, sir, I never robbed but one time, and you know what it was, that is the only time I have ever did that."

As to the first excerpt above quoted it is urged that the court allowed the "suspicions" of the police chief to get before the jury. It will be noted that no objection was made to this line of questioning. It would appear that appellant's counsel started to object and then conceded that the reasons why the Chief followed the three men were admissible as long as his client was one of the men being followed.

[4] In connection with the second excerpt above quoted, appellant contends that by the question the trial judge got into the record his "suspicion" of a previous conversation between Martin and Parker about robbing drunks. It is hard to follow this reasoning. If a prior conversation had taken place, that fact was most relevant. The only way to find out whether such a conversation in fact occurred was to ask. Appellant denied that such a conversation took place and gratuitiously added that he had only robbed once. No objection was made to this question. Normally, under such circumstances, the point cannot be raised for the first time on appeal. People v. Fleming, 218 Cal. 300, 23 P.2d 28; People v. Harvey, 22 Cal.App.2d 532, 71 P.2d 841.

The judgment and order appealed from are affirmed.

WARD and BRAY, JJ., concur.

79 Cal.App.2d 762

THOMPSON v. LEVEREAU.

Civ. 15448.

District Court of Appeal, Second District, Division 3, California.

May 20, 1947.

1. Appeal and error ⇐1194(3)

Where former opinion held that agreement for the operation by decedent of defendant's interest in a partnership indicated that no interest was transferred, the statement included both present and future interest, precluding subsequent litigation on question as to whether agreement transferred a future interest.

2. Partnership ⇐95

Agreement by which decedent was to act for defendant insofar as defendant's interest in partnership was concerned was properly construed as excluding a transfer of defendant's interest in partnership to decedent with a reservation of a life interest.

3. Appeal and error ⇐1194(2)

Where a reversal of the judgment which was entered was required, so that reviewing court dismissed questions presented as to correctness of findings, conclusions and judgment upon issues raised by cross-complaint as unnecessary to be decided, those issues remained for decision on the second trial.

4. Action ⇐6

In declaratory action to construe a contract for the management of a partnership interest, cross-complaint alleging that defendant reposed great trust and confidence in plaintiff's decedent, that defendant signed agreement under pressure and received no consideration for entering into agreement stated facts sufficient to charge exercise of undue influence.

5. Partnership ⇐94

Evidence authorized inference that defendant gave her consent to contracts for the management of her interest in a partnership under undue influence.

6. Partnership ⇐94

Where contract under which decedent was authorized to manage sister's interest in a partnership was shown to have been procured by undue influence and evidence warranted finding that consideration was grossly inadequate, decedent's executrix had burden to satisfy court that inference of use of undue influence should not be drawn by evidence that decedent made a full disclosure to sister of all material facts, that he did not abuse trust and confidence reposed in him, that sister's consent was free and voluntary and that agreement as to her was equitable and just.

7. Partnership ⇐94

Whether agreement for the management of defendant's interest in a partnership was procured by use of undue influence was immaterial where defendant not only did not seek to disaffirm agreement but ratified it.

8. Appeal and error ⇐1073(1)

Decision on cross-complaint in favor of defendant was harmless where even if findings and judgment on cross-complaint had been adverse to defendant, judgment would have been the same, insofar as real issues were concerned.

9. Partnership ⇐94, 95

Evidence required finding that agreement procured by decedent from defendant authorizing decedent to operate defendant's interest in partnership and retain all profits therefrom except a specified sum payable to defendant monthly was ratified by defendant as a transfer of her interest, that defendant consented to retention by decedent of sums received by him and waived right to recover such sums from his estate, but that defendant was entitled to share of profits accruing to her interest after decedent's death.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Rosalyn E. Thompson as executrix of the estate of Louis William Thompson, deceased, against Anna Belle Thompson Levereau for declaratory relief for the construction of a contract wherein

defendant cross-complained. Judgment for defendant and plaintiff appeals.

Affirmed as modified.

Rollin L. McNitt and Edythe Jacobs, both of Los Angeles, for appellant.

James T. Boyle and McLaughlin & McGinley, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Rosalyn E. Thompson, as executrix of the estate of Louis William Thompson, deceased, brought this action against Anna Thompson Levereau for declaratory relief, calling for the construction of an agreement reading as follows:

"This Agreement, made and entered into this 11th day of November, Nineteen Hundred and Thirty-eight (1938) in the City of Los Angeles, County of Los Angeles, State of California

"By and between Belle Thompson Levereau, of the City of Los Angeles, County of Los Angeles, State of California, Party of the First Part, and Louis W. Thompson, of the same place, Party of the Second Part,

"For and in consideration of Ten ($10.00) Dollars in hand paid each to the other, receipt of which is hereby acknowledged, and the further consideration of the covenants herein contained,

"The said parties hereto agree as follows, to-wit:

"That whereas the party of the first part is a copartner to the extent of a quarter interest in that certain business known and designated as the United States Burglar Alarm Co., sometimes designated as the U. S. Burglar Alarm Co., located at 1315 West Pico Street, in the City of Los Angeles, County of Los Angeles, State of California, and whereas the said party of the first part is unable to devote any time or take any active part in the conduct or management of said business,

"Now, Therefore, the said party of the first part, and the party of the second part, covenant and agree as follows, to-wit:

"The said party of the second part agrees to act for and represent the said party of the first part in the conduct and management of said business so far as her interest therein requires, and pay to the said party of the first part from the earnings of her interest in said business during the period of her lifetime not less than One Hundred ($100.00) Dollars each and every month for the said period of her life.

"The said party of the first part agrees to accept the said sum of not less than One Hundred ($100.00) Dollars each and every month for the period of her life as hereinbefore provided, and in consideration therefor, upon her the first party's death the said quarter interest which she has in said business shall go to the said Louis W. Thompson, party of the second part, as his separate property, and in the event of his death prior to the death of the said party of the first part then upon the death of the said Belle Thompson Levereau, party of the first part, said quarter interest in said business shall pass to the Estate of Louis W. Thompson.

"It is Further Covenanted and Agreed, between the parties hereto that in the event of the sale or other disposition of said business during the lifetime of said party of the first part, the parties hereto shall agree to a fixed sum to be paid to the party of the first part by the party of the second part, or his representative, such sum to be based upon a fair and reasonable proportion of the sale price received as her quarter interest bears to the price received for said business.

"This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto.

Belle Thompson Levereau
Party of the First Part
Louis W. Thompson
Party of the Second Part

Witnesses:
Fred J. Spring
Marie K. Thompson

As a Copartner, I have no objection to this agreement.

Marie K. Thompson,
Copartner.

[Verification]

Defendant answered and filed a cross-complaint alleging facts upon which she

sought to have the agreement declared void and of no effect, upon the ground that it was without consideration and that her consent to it was obtained through the exercise of undue influence by Louis W. Thompson, who was her brother.

Upon a former trial the court gave judgment declaring the agreement to be an assignment of Mrs. Levereau's quarter interest in the partnership, subject to the payment to her by Louis W. Thompson of at least $100 per month from the earnings of said quarter interest. Mrs. Levereau appealed and this court reversed the judgment. Thompson v. Levereau, 66 Cal. App.2d 795, 153 P.2d 206, 210. The action was retried before another judge and resulted in findings and judgment for the defendant; from that judgment plaintiff appeals. As conclusions of law the court found:

"1. On the appeal from the judgment rendered after the first trial in this action, the District Court of Appeal held that the instrument set forth under Paragraph III of these Findings of Fact was not a present assignment, and this constitutes the law of the case, but that court did not pass upon the question as to the validity of the said instrument.

"2. The instrument set forth under Paragraph III of these Findings of Fact is void.

"3. The instrument set forth under Paragraph III of these Findings of Fact is wholly lacking in consideration."

[1] We shall consider first conclusion No. 1, but before doing so will state the theory of appellant with reference to the proper construction of the instrument and the effect that should be given to our former decision with relation thereto. The former opinion should be read in connection with the present one, and it is unnecessary to quote from it at any length. There is no uncertainty as to what was decided on the first appeal and no doubt that the point here involved was decided adversely to the present contentions of appellant. Plaintiff was contending, and the trial court had determined, that the agreement effected a transfer of defendant's interest in the partnership business to Louis W. Thompson. We held that the agreement could not be given that effect. Upon the second trial plaintiff conceded that our judgment was a final adjudication that no present transfer of interest took place, but contended that our opinion did not hold that the agreement did not effect a transfer of a future interest. She says that if the agreement did not effect a transfer of the entire interest, it amounted to a present transfer, with reservation of a life interest in defendant, consisting of the right to receive from the earnings of her quarter interest not less than $100 per month, and that the question whether the agreement should be so construed was not presented to this court and was not decided on the former appeal. With this contention we cannot agree. We decided two questions, which were stated in the opinion as follows: "(1) Does the agreement of November 11, 1938, constitute a present assignment (i. e. an assignment as of that date) of defendant's quarter interest in the partnership; (2) do the circumstances surrounding the execution of the agreement and the subsequent conduct of the parties indicate an intent to make such an assignment? Both of these questions must be answered in the negative." In the course of that opinion, which was prepared by Mr. Justice pro tempore Fox, the several provisions of the agreement were carefully analyzed and were clearly shown to be inconsistent with an intention or an attempt to transfer defendant's interest in the partnership business. It was said in the opinion: "Whether we consider the agreement in its entirety or analyze it paragraph by paragraph, we are unable to find an intention expressed therein to make a present assignment of defendant's interest in the business to Louis," and the opinion went on to state that the agreement expressed only an agreement that Louis W. Thompson would look after and represent defendant's interest in the business, receive the earnings, as compensation for services rendered, which he had been re-

ceiving under a former direction from defendant, and pay to defendant from her share of the earnings not less than $100 per month. We thereby decided that no part of defendant's interest in the business was transferred to Louis W. Thompson by the agreement in question. To be sure, the opinion did not state that no interest "present or future" was thereby transferred, but that was not necessarily to make our meaning clear. Consideration was given to plaintiff's contention that defendant had assigned her interest in the business, retaining only a qualified life estate therein, but our conclusion was to the contrary. Some importance seems to be attributed to the terms used in the opinion, "present assignment" and "presently assigned," but the reason for the use of these expressions appears in the statement in the opinion, "They were also attempting to cover the situation that would arise in the event of a sale of the business or upon the death of the defendant." Plaintiff was not claiming and does not now claim validity for the agreement as a testamentary disposition of defendant's partnership interest. We held that title to the quarter interest remained in Mrs. Levereau, and by that was meant title to the entire interest, notwithstanding the provisions of the agreement with respect to the disposition of the profits accruing to that interest. With reference to the provision in the agreement for the disposition of the proceeds of a sale in the event the partnership should be sold, we held that the amount to be received by defendant was not to be limited to the value of her interest as of the date of the agreement, namely, November, 1938.

[2] The trial court correctly construed the opinion on the former appeal as a determination that the November, 1938, agreement did not effect a transfer of all or any portion of defendant's quarter interest in the partnership business and therefore properly rejected plaintiff's contention that there was a transfer of said interest, with a reservation of a life interest therein.

[3] Upon the first trial findings and conclusions were in favor of plaintiff upon defendant's cross-complaint, and it was accordingly found that the agreement was executed for a valuable consideration and was not induced by fraud or undue influence of Louis W. Thompson, and that he took no unfair advantage of defendant in the transaction. Inasmuch as a reversal of the judgment was required, the opinion on the former appeal dismissed the questions presented as to the correctness of the findings, conclusions and judgment upon the issues raised by the cross-complaint as unnecessary to be decided in a disposition of the appeal. Those issues therefore remained for decision on the second trial. Upon that trial the case was submitted upon the transcript of the evidence taken at the first trial, and that transcript is now before us.

The court found in favor of defendant and cross-complainant upon the cross-complaint, and decreed the agreement to be without consideration and void and of no effect. Plaintiff attacks the judgment insofar as it decrees invalidity of the agreement based upon want of consideration and the exercise of undue influence by Louis W. Thompson, contending, first, that the allegations of the cross-complaint were insufficient to state a cause of action for rescission, and, second, that the evidence was insufficient to establish failure of consideration or the exercise of undue influence.

[4-6] We are of the opinion that the cross-complaint alleged sufficient facts to charge the exercise of undue influence by Louis W. Thompson. It was alleged that defendant reposed great trust and confidence in him, that he exerted pressure to induce her to sign the agreement, and that she received no consideration for entering into it. It was not alleged that she had ever attempted to disaffirm or rescind the agreement. The evidence was sufficient to establish the confidential relationship and also that defendant signed the agreement reluctantly and only upon the insistence of her brother that she do so, and it was sufficient to justify the inference that her consent was obtained by the exercise of undue

influence. We think it was not shown that the contract was without consideration, but the court would have been justified in finding that the consideration was grossly inadequate. Under these circumstances the burden was cast upon plaintiff to satisfy the court that the inference of the use of undue influence should not be drawn. This she could have done by evidence that Louis W. Thompson made to defendant a full disclosure of all material facts, that he did not abuse the trust and confidence which she reposed in him, that plaintiff's consent to the agreement was free and voluntary, and that the agreement as to her was equitable and just. The evidence was not such as to have required the trial court to determine the issue in favor of plaintiff, and the findings upon the cross-complaint should not be disturbed.

[7, 8] However, it is immaterial in the disposition of this appeal whether the agreement was subject to rescission upon the ground of the use of undue influence. Also immaterial is the conclusion of the trial court that the agreement is void. There are two reasons for this. The first is that defendant not only did not seek to disaffirm the agreement but, as we shall see, she ratified it. In the three and one-half years between the date of the agreement, November 11, 1938, and the date of Louis W. Thompson's death, May 20, 1942, large profits were earned by the partnership, namely $12,000 in 1938, $19,000 in 1939, $18,000 in 1940, $25,000 in 1941, and in 1942, between January 1 and May 19, more than $11,000. There was no allegation or proof that defendant was under the influence of her brother during this period. She willingly allowed him to retain all the profits accruing to her interest in excess of the sums which he paid to and for her monthly. In fact, the same practice had been followed since the formation of the partnership, April 13, 1937, in accordance with defendant's written instructions that her share of the profits should be paid to her brother. Defendant has never sought the recovery of any of these sums. She filed no claim for the same against his estate nor did she by her cross-complaint seek the recovery of any sums received by her brother under the agreement. She disclaims now any right to recover such sums from his estate. It does not appear that Louis W. Thompson ever asserted to plaintiff a claim that her quarter interest had been transferred to him. That claim was asserted by plaintiff as executrix, and defendant asserted the defense of the use of undue influence in resisting plaintiff's claim. The agreement constituted the basis for two claimed rights in favor of Louis W. Thompson and his estate, namely, that defendant's interest was transferred to her brother and, if it was not, that he had the right to retain as compensation for his services all profits received during his lifetime which had accrued to defendant's interest, in excess of the sums withdrawn by her to meet her needs. The first claim has been held groundless, and defendant concedes the validity of the second claim. If the agreement had been construed upon the former appeal, or should now be construed, as having the effect of transferring defendant's partnership interest to her brother, or if defendant had sought to establish invalidity of the agreement as a basis for the recovery of the sums which she had allowed her brother to collect and retain, a judgment upon the cross-complaint declaring the agreement to be invalid would have been of value to her. As it is, the adjudication that the agreement was void does not alter the rights or the claims of the parties in any respect. Defendant has expressly waived any claim to the sums so retained by her brother. She has ratified the agreement insofar as it gave him the right to retain those sums and has thereby ratified it completely because, as we have said, that was the entire agreement, except for certain provisions that are not in question here. The second reason for holding the decision on the cross-complaint to be immaterial is that if findings and judgment on the cross-complaint had been adverse to defendant, the judgment would have been the same, insofar as the real issues and controversies were concerned. To the extent that the judgment is based upon the cross-complaint, it awards

defendant nothing which she would not have otherwise received.

Defendant's share of the profits since the death of her brother and to the time of trial amounted to more than $30,000, and the sums accruing to her share have been impounded, subject to disposition as directed by final judgment herein. Plaintiff's only claim to said earnings is based upon the alleged assignment of defendant's partnership interest to Louis W. Thompson.

[9] The conclusions and judgment declare the contract to be void, from which we understand that the court considered it to be voidable. That would have been a proper conclusion of law from the facts found if defendant had accomplished a rescission of the agreement. There was no finding or conclusion as to whether defendant had affirmed and ratified the agreement, although there was a finding that she did not ratify it as a transfer of her interest. A further finding and an appropriate conclusion should be made to the effect that defendant at all times consented to the retention by Louis W. Thompson of the sums received and retained by him and has waived all right to recover the same, or any part thereof, from his estate.

The trial court is directed to make such finding and conclusion and to enter judgment that defendant is the owner of a quarter interest in the copartnership, United States Burglar Alarm Co. or U. S. Burglar Alarm Co., that plaintiff or the estate of Louis W. Thompson, deceased, has no interest in or claim upon said quarter interest, and that plaintiff, or said estate, has no right to receive all or any of the profits accruing to defendant's quarter interest since the death of Louis W. Thompson, May 20, 1942, but that defendant is entitled to receive and have paid over to her such profits as have accrued since that date and those that may accrue to her said quarter interest, and that defendant recover her costs of suit.

As so modified the judgment is affirmed.

WOOD, J., and KINCAID, J. pro tem, concur.

80 Cal.App.2d 114

DUTRA v. CABRAL.

Civ. 7310.

District Court of Appeal, Third District, California.

May 29, 1947.

1. Landlord and tenant ⇐331(1)

In lessee's lease of farm lands on a share crop basis, evidence sustained finding that defendant lessor had agreed to provide water sufficient to irrigate the crops planted but had failed to do so upon demand.

2. Landlord and tenant ⇐331(2)

In lessee's suit for breach of lease of farm lands on a share crop basis, award of damages for lessor's failure to furnish water was properly based on a crop from 38 acres as against contention that well on farm would only supply 28 acres with water, where parties contemplated crops on nearly the entire property of lessor which consisted of 40 acres and lessor knew lessee had planted 38 acres and lessor had agreed to repair the well to supply the crops planted.

3. Landlord and tenant ⇐331(2)

In lessee's breach of lease of farm lands on a share crop basis for failure of lessor to furnish irrigation water, evidence that lessee planted 38 acres which with proper irrigation would have produced 3½ to 4 tons per acre with a market value of $25 net per ton exclusive of cost of harvesting and marketing the crop supported damage award of $1433.20. Civ.Code, § 3300.

4. Appeal and error ⇐1033(9)

On appeal from judgment for damages for breach of lease, defendant who profited by trial court's conservative fixing of damages could not complain of inadequate allowance of damages to plaintiff.

5. Damages ⇐105

The measure of damages for the total destruction of a growing or standing crop

is the value of the crop in the condition it was at the time and place of destruction.

6. Landlord and tenant ⇐331(2)

In suit for breach of lease of farm lands on share crop basis for lessor's failure to furnish irrigation water, evidence that lessee planted 38 acres, that the land except for the lack of water would have produced 15 sacks per acre at market value of $5.40 per sack, and that cost of harvesting would be no more than $60, sustained damage award of $1,682.40. Civ.Code, § 3300.

7. Damages ⇐105

Ordinarily, the measure of damages for the partial or complete destruction of planted crops, as distinguished from perennial crops of grazing or pasturing land, is the local market value of the crops at the time and place of destruction, less the cost of producing and marketing the crops. Civ. Code, § 3300.

8. Damages ⇐105

Where crops partially or completely destroyed through breach of a lease or contract are produced on a stipulated share, the portion only which belongs to the complaining party is to be considered in estimating the damages sustained. Civ.Code, § 3300.

9. Damages ⇐120(1)

If crops are matured at time of destruction through breach of contract entitling each party to a specific share of crop proceeds, and costs of production have been paid by aggrieved party pursuant to the contract, such costs should not be deducted from the market value in determining damages. Civ.Code, § 3300.

10. Damages ⇐120(1)

Where crops produced under contract entitling each party to specific shares and requiring aggrieved party to pay cost of harvesting and hauling to market are completely destroyed through breach of contract before harvesting and hauling, all costs of harvesting and hauling should be deducted from market value in determining damages. Civ.Code, § 3300.

11. Damages ⇐175

In suit for destruction of unmatured planted crops through breach of lease or contract entitling each party to a specific share of crop proceeds, evidence of the average yield per acre of similar crops on land of the same character in the immediate vicinity is competent in determining market value of crops at time and place of destruction. Civ.Code, § 3300.

12. Damages ⇐163(2)

In lessee's suit for breach of lease of farm lands on share crop basis for lessor's failure to furnish irrigation water, lessor had burden of showing facts in mitigation of damages sustained through destruction of planted crops as result of lessor's failure to furnish the required irrigation water.

13. Damages ⇐182

In lessee's suit for breach of lease of farm lands on share crop basis for lessor's failure to furnish irrigation water evidence sustained finding that no sufficient supply of water was available to irrigate more than a small portion of the land and then only at an expense to lessee out of proportion to damages resulting from lessor's failure to furnish water so that failure of lessee to procure such water was not grounds for mitigation of damages.

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Suit by A. S. Dutra against M. S. Cabral for damages for breach of an oral lease of farm land wherein defendant cross-complained. From an adverse judgment, defendant appeals.

Judgment affirmed.

Arthur C. Huston, Jr., of Woodland, for appellant.

Leo C. Dunnell, of Fairfield, for respondent.

THOMPSON, Acting Presiding Justice.

The defendant has appealed from a judgment which was rendered against him in a suit for damages for breach of an oral lease

of 40 acres of farm land, by the terms of which the respective parties were to receive specified shares of the proceeds of crops of spinach and beans to be produced. The beans were planted on the same land after the spinach crop was removed. The defendant failed to supply a well and to pump water for necessary irrigation of the crops. The crops therefore failed.

The defendant owns forty acres of farm land in Solano County. The complaint alleges that, on December 1, 1944, the respective parties entered into an oral lease of the property for the ensuing crop season, by the terms of which plaintiff agreed to plant, cultivate and harvest successive crops of spinach and beans, and the defendant agreed to furnish and supply a well and pump the water therefrom necessary to irrigate the crops; that the defendant failed and refused to provide the well or to pump water for irrigating the crops. There was no other adequate supply of water for irrigation and the spinach and beans which plaintiff planted and cultivated therefore failed, to plaintiff's damage in the sum of eighty per cent of the value of the crops lost. It was alleged plaintiff agreed to pay the defendant as rental for the property twenty per cent of the crops produced, and that the defendant agreed to furnish necessary water for irrigation of the crops.

The defendant answered the complaint, denying the material allegations thereof, except that he admitted the execution of the oral lease and the alleged agreed division of the crops. The defendant also filed a cross-complaint, alleging plaintiff's breach of the contract by failure to properly plant, cultivate or harvest the crops, as a result of which the crops were a total failure, to defendant's damage in the sum of $1,400. It was affirmatively alleged that the plaintiff agreed to procure and supply necessary water for irrigating the crops from adjoining property owners, but failed and neglected to do so. The plaintiff answered the cross-complaint, denying the essential affirmative allegations thereof.

The court adopted findings favorable to the plaintiff in every essential respect. It was determined that the oral lease was executed as alleged in the complaint; that the defendant agreed thereby to provide a well and to pump water sufficient to irrigate the crops, but, upon subsequent demand, he failed and refused to do so; that it is not true that plaintiff agreed to procure water for irrigating the crops from adjoining landowners, or at all, and that it is not true that said water from adjacent landowners was available; that plaintiff entered the property pursuant to the lease and properly planted, cultivated and cared for the spinach crop, which failed for the lack of water, with the exception of forty crates of spinach which were harvested and sold for the sum of $50; that the reasonable value of plaintiff's share of the spinach crop which would have been produced except for the breach of contract and failure of defendant to furnish necessary water for irrigating the crop, was the sum of $1,433.20. The court further found that, after the loss of the spinach crop, the defendant renewed his promise to furnish the well and pump the water therefrom necessary to irrigate the bean crop, and in reliance thereon plaintiff properly planted, cultivated and cared for that crop, but that the defendant, upon subsequent demand, failed and refused to provide the well or supply water for irrigation purpose, which resulted in a total loss of the bean crop, to plaintiff's damage in the further sum of $1,682.40. The court further found that water for irrigating the crops from adjacent land, as alleged in the cross-complaint, was not available. The court found that all allegations of the answer and cross-complaint, inconsistent with the foregoing, are untrue. Judgment for damages for breach of contract was accordingly rendered against the defendant in the total sum of $3,115.60. From that judgment the defendant has appealed.

On appeal it is contended that neither the findings nor judgment is supported by the evidence; that the award of damages is excessive, and that plaintiff failed to exercise care to prevent loss of the crops or to minimize damages.

[1] We are of the opinion the findings and judgment are adequately supported by the evidence.

[2] The appellant contends that the award of damages is excessive because the evidence shows that not more than twenty-eight acres could be irrigated from the well on the premises. The evidence indicates that the parties contemplated the raising of successive crops of spinach and beans on nearly the entire property. The leased farm consists of forty acres of land. The plaintiff testified that he planted and cultivated thirty-eight acres of spinach. The defendant knew that fact. He testified that plaintiff planted "the whole place * * *, except a little corner by the house." His agreement to supply water for irrigation was not limited to twenty-eight acres or to any other specified acreage. The defendant admitted there was a well on the property, but said that it had "caved in before he got the place." When the lease was agreed upon, the plaintiff suggested that there would not be sufficient water for the spinach and bean crops. The defendant testified that he then replied that he would clean the well; that he had talked with a well driller by the name of Percy Stohler who promised him he would fix the well for him for $300. He said he then told the plaintiff "I would fix the well." It must be inferred, in support of the findings, that the defendant agreed to repair the well and furnish all the water necessary to irrigate the crops which were planted, and that the agreed supply of water was not limited to any specified acreage.

[3, 4] The evidence supports an amount of damages to which plaintiff was entitled in excess of the sum for which judgment was rendered in his favor. The court found that the defendant was to furnish water sufficient to irrigate the crops, and that he was to receive, as his share of the crops, twenty per cent of "the gross receipts from said crops." The court then found that the gross market value of the spinach crop which was planted, except for defendant's failure to furnish the agreed water, was the sum of $2,054. Twenty per cent of that sum, to which the defendant was entitled to credit, is about $411. That would leave a balance of plaintiff's damages on account of loss of spinach in the sum of $1,643. But the court awarded plaintiff only the sum of $1,433.20, from which the cost of harvesting and marketing the crops should be deducted. Those figures are amply supported by the evidence. The plaintiff testified that he planted thirty-eight acres of spinach; that with proper irrigation the farm would have produced three and a half to four tons per acre, and that its market value was $25 net per ton. The plaintiff testified that the value of $25 per ton for the spinach was exclusive of the cost of harvesting and marketing the crop. The foregoing figure, estimating the crop at the minimum figure of three and a half tons per acre, amounts to $3,325. That sum is greatly in excess of the net value of the crop, as determined by the court. The defendant profited by the court's conservative figure, and may not complain of an inadequate allowance of damages to plaintiff.

[5] There is much argument in the briefs regarding the cost incurred by the plaintiff in planting, cultivating and caring for the crop. But that appears to be immaterial. Plaintiff's damages on account of his costs of planting and cultivating the crop were merged in his share of the market value of the crop, as we understand the agreement. In Teller v. Bay & River Dredging Co., 151 Cal. 209, on page 212, 90 P. 942, on page 943, 12 L.R.A.,N.S., 267, 12 Ann.Cas. 779, it is said: "The true measure of damages for the total destruction of a growing or standing crop is the value of the crop in the condition it was at the time and place of destruction."

[6] The evidence also supports the finding that plaintiff sustained damages on account of the loss of the bean crop for lack of water, in the sum of $1,682.40. The court also found that the market value of the bean crop would have been $3,078.00, except for the lack of water. The plaintiff testified that he planted thirty-eight acres of beans; that the land, except for the lack of water, would have produced fifteen sacks per acre, and that the market value was $5.40 per sack. That would amount to exactly $3,078, as the

court determined. The plaintiff's 80% of that sum would amount to $2,462.40, from which the court deducted costs incurred by the plaintiff in planting and cultivating the beans. The plaintiff testified that the value of the bean crop was $3,078, and that it would cost $55 or $60 to harvest that crop. Accepting the maximum figure of $60 cost for harvesting, leaves a total value of $3,018 for the crop, from which the cost of hauling should be deducted. Plaintiff's share of that sum would amount to $2,415.40. The plaintiff was awarded damages for that crop in the sum of only $1,682.40. The evidence would have supported a judgment on that account of $2,415.40, from which the costs of hauling should be deducted. It may not be held that the award for the crop of beans is excessive, since the cost of hauling could not possibly amount to the difference between the last mentioned figure and the sum which was awarded. The total amount of damages which was awarded to plaintiff is therefore supported by the evidence.

The measure of damages for breach of a contract is the amount which will compensate the aggrieved party for all detriment proximately caused thereby. Sec. 3300, Civil Code. That section provides:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[7-10] Ordinarily, the measure of damages for the partial or complete destruction of planted crops, as distinguished from perennial crops of grazing or pasturing land, is the local market value of the crops at the time and place of destruction, less the cost of producing and marketing the same. Staub v. Muller, 7 Cal.2d 221, 228, 60 P.2d 283; Fay v. Cox, 45 Cal.App. 696, 702, 188 P. 623; Strecker v. Gaul, 35 Cal.App. 619, 627, 170 P. 646; Dennis v. Crocker-Huffman L. & W. Co., 6 Cal.App. 58, 66, 91 P. 425; 4 Sutherland on Damages, 3rd ed., 2997, sec. 1023; 8 Cal.Jur. 819, sec. 76; 25 C.J.S. Damages, § 85b, p. 610. When the crops are produced on stipulated shares under lease or contract, the portion only which belongs to the complaining party is to be considered in estimating the damages sustained. Teller v. Bay & River Dredging Co., supra, 151 Cal. at page 213, 90 P. at page 942, 12 L.R.A., N.S., 267, 12 Ann.Cas. 779. If the crops are matured at the time of destruction and all costs of production have been paid by the aggrieved party, it is apparent that such costs should not be deducted from the market value, for, since they have been expended pursuant to contract, they represent an element of damages for which he is entitled to compensation under Section 3300 of the Civil Code. It is, of course, true that when the crops have been completely destroyed, and the producer thereof is saved the cost of harvesting and hauling them to market, such last mentioned costs should be deducted from the market value.

[11] In a suit for the destruction of planted crops, the evidence which is necessary to prove the loss sustained thereby depends on the state of maturity of the crops at the time of the destruction, and various other circumstances. Evidence of the average yield per acre of similar crops on land of the same character in the immediate vicinity is competent. Fay v. Cox, supra; 25 C.J.S., Damages, § 85b, p. 611. In the Fay case a crop of barley was destroyed by fire. A judgment for damages was rendered in favor of the plaintiff. On appeal, the court quoted with approval from Lester v. Highland Boy Gold Mining Company, 27 Utah 470, 76 P. 341, 101 Am.St.Rep. 988, 1 Ann.Cas. 761, regarding the character of evidence which is competent to prove the value of the crops destroyed, as follows [45 Cal.App. 696, 188 P. 626]:

"'In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops,

at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops. * * * The true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction.'"

Regarding the proof of the value of unmatured planted crops which have been destroyed, it is said in 25 C.J.S., Damages, § 85b, at page 611:

"* * * It is obvious that the true value of a growing and unmatured crop must be arrived at from a consideration of numerous facts, among which are the kind of crops which the land will ordinarily yield, the probable yield under proper cultivation, the average yield per acre of similar land in the neighborhood cultivated in the same way, the stage of advancement at which the crop was when injured or destroyed, the expenses which would have been incurred after the injury in fitting the crop for market and transporting it to market, the market value of the crop, the market value of the probable crop without the injury at the time of maturity, and circumstances bearing on the probability of maturing the crop in the absence of the injury."

The evidence in the present case substantially conforms to the foregoing rules for ascertaining the values of the crops of spinach and beans destroyed. The plaintiff planted, cultivated, harvested and marketed the same kinds of crops in that same year on similar soil of another farm in that immediate vicinity, and testified to all the essential facts necessary to support the damages awarded by the court. It is true that the court deducted from the ascertained market value of the crops the value of the labor performed and the money expended by plaintiff in planting and cultivating the crops, and awarded him damages in a sum much less than he was entitled to as full compensation under the evidence. But that is immaterial. The plaintiff did not appeal from that judgment, and the defendant may not complain of a method of computation which was favorable to him. The damages which were awarded are not excessive.

[12, 13] Finally the appellant contends that plaintiff may not recover damages in this case because he failed to exercise reasonable care to save the crops from destruction by purchasing water for irrigation purposes from the adjoining premises. The burden was on the defendant to show facts in mitigation of the damages sustained. 25 C.J.S., Damages, § 96, p. 643. He failed to do so. The court adopted a finding in that regard as follows:

"* * * There was not at any time available any other sufficient supply of water to irrigate more than a small portion of said lands and then only at a large expense to plaintiff; that it is not true that plaintiff could have obtained water from adjacent land owners at slight expense, sufficient to irrigate said lands."

The foregoing finding is adequately supported by the evidence. It is true that it is the duty of an aggrieved party to exercise reasonable care to minimize anticipated damages growing out of the breach of a contract. But, ordinarily, it is not the duty of a party to a contract to assume the burden which the adverse wrongdoer has violated, nor to incur relatively large expenses on that account. Schultz v. Town of Lakeport, 5 Cal.2d 377, 384, 54 P.2d 1110, 55 P.2d 485, 108 A.L.R. 1168; 8 Cal.Jur. 782, sec. 43. Where the cost of procuring water from a source other than that which is contemplated by the contract is relatively large as compared with the damages sustained, the California cases have held that the failure to thus minimize damages will not warrant the reversal of a judgment in favor of the aggrieved party. In the Schultz case, supra, after reviewing several similar cases, the Supreme Court said, 5 Cal.2d at page 384, 54 P.2d at page 1113, 55 P.2d 485, 108 A.L.R. 1168:

"However, it is also a fact that the courts of this state have refused to hold the recognized principle applicable in a case where the expense to the plaintiff in procuring performance by the defendant of its duty or fulfillment of the contract from another source, is out of proportion to the damages ensuing or is otherwise unreason-

able; for in such cases the plaintiff is required to do no more than can be done at reasonable expense."

We think the foregoing principle is applicable to the facts of this case. The defendant failed to prove that water was available from the neighbor's property or that the cost thereof, if available, would not be proportionately large as compared with the damages sustained by the loss of crops. The plaintiff relied on the defendant to repair his well and supply the necessary water to irrigate the crops. The crops were partially matured before plaintiff had reason to anticipate a breach of that covenant on the part of the defendant. If any substantial quantity of water could have been procured from another source, it is apparent that it would have required considerable time, and labor and expense to have secured it. It would have required the purchase of the water and the laying of pipes or the digging of ditches from the adjoining property over and upon defendant's land. In support of the findings in that regard, we think the outlay of costs, time and labor would be too unreasonable to warrant this court in holding that the judgment should be reversed on the doctrine of failure to minimize damages under such circumstances.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.



79 Cal.App.2d 828

PEOPLE v. MORTON.

Cr. 4017.

District Court of Appeal, Second District, Division 3, California.

May 22, 1947.

Hearing Denied June 20, 1947.

1. Homicide ⇐268

In prosecution for murder where issue was whether defendant killed wife or she committed suicide, the weight of the conflicting inferences to be drawn from the evidence as to the position of revolver with relation to the wife's body when it was fired was for jury.

2. Homicide ⇐332(2)

On appeal from conviction of murder, it is not for the Court of Appeal to weigh the probabilities but only to determine whether there was evidence which leads to the conclusion of guilt without doing violence to reason and logic.

3. Homicide ⇐268

In prosecution for murder where issue was whether defendant had killed wife or she had committed suicide, whether fact that defendant fired fatal shot was proved beyond a reasonable doubt was for jury.

4. Homicide ⇐308(1)

Instruction that in first degree murder intent to kill must be accompanied by deliberation and premeditation, the true test of which was not the duration of the time but the extent of the reflection, that thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly and that it was for jury to determine whether intent to kill existed and if so whether it was accompanied by deliberation and premeditation, was erroneous because it eliminated the single element of the offense which distinguishes it from second degree murder. Pen.Code, § 189.

5. Homicide ⇐9

Under the code section relating to first degree murder, an intent to kill must accompany the commission of the fatal act and it must be an intent formed with deliberation and premeditation. Pen.Code, § 189.

6. Homicide ⇐308(2)

One whose life is in jeopardy under a prosecution for first degree murder is entitled to have the applicable rules of law stated as clearly and simply as possible and with meticulous accuracy. Pen.Code, § 189.

7. Criminal law ⇐823(17)

An erroneous instruction concerning first degree murder was not rendered harmless by the giving of another instruction

which gave the statutory definitions of the offenses of manslaughter and first and second degree murder. Pen.Code, § 189.

8. Homicide ⇐253(3)

In prosecution for first degree murder, evidence that defendant might have formed an intention to kill decedent after giving the matter deliberate consideration is insufficient, but the evidence must furnish a reasonable basis for the belief that the intent to kill was formed after deliberation and premeditation. Pen.Code, § 189.

9. Homicide ⇐253(3)

In prosecution for first degree murder, that defendant formed an intention to kill decedent after giving the matter deliberate consideration may be proved by circumstantial evidence, but evidence proving only the killing and no other act and no statement logically tending to prove a deliberately formed intention to kill is insufficient. Pen.Code, § 189.

10. Homicide ⇐253(3)

In prosecution for first degree murder, evidence that many months prior to shooting of wife defendant uttered veiled threats of what he might do if his wife and a paramour should attempt to rub it in was insufficient to prove that the act of shooting was deliberate or premeditated where such threats had been followed by many months of cohabitation. Pen.Code, § 189.

11. Homicide ⇐253(3)

In prosecution for first degree murder, evidence showing frequent quarrels between defendant and his wife, separations and resumptions of married life and that an extended quarrel took place immediately before the shooting was insufficient to show that the shooting was deliberate and premeditated rather than impulsive, and judgment of first degree murder could not be allowed to stand. Pen.Code, § 189.

12. Criminal law ⇐822(17)

In prosecution for murder, the instructions as a whole fairly stated the distinction between manslaughter and murder and the issue as between manslaughter and murder was fairly tried. Pen.Code, § 189.

13. Homicide ⇐347

In prosecution for murder, where jury found on sufficient evidence that offense was not manslaughter and there was insufficient evidence to prove murder of the first degree, the offense proved was that of murder of the second degree, and the judgment would be modified accordingly. Pen.Code, § 189.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

John Farris Morton was convicted of murder of the first degree, and from such conviction and from an order denying his motion for a new trial, he appeals.

Judgment modified by reducing it to murder of the second degree, and as so modified, affirmed. Order denying motion for new trial affirmed and cause remanded with directions.

Leola Buck Kellogg and Montgomery G. Rice, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Defendant appeals from a judgment entered upon a jury verdict by which he was found guilty of murdering his wife, Nora Hudson Morton, the crime being determined by the jury to be first degree murder and the penalty being fixed as life imprisonment. He also appeals from the order of the court by which his motion for a new trial was denied.

He advances three contentions: first, that the evidence submitted to the jury was legally insufficient to establish the corpus delicti, since it tended as strongly to prove suicide as to prove homicide; second, that if it proved homicide, it was insufficient to prove murder of the first degree, and, third, that the jury was improperly instructed in some respects and inadequately instructed in others.

Mrs. Morton was shot through the heart at approximately 7:00 p. m. of August 27, 1945, with a .38 caliber revolver. Only Mr. and Mrs. Morton were in their home,

where the shooting occurred. There was an elevation of ½ inch from the point of entrance of the bullet to the point of exit and a deviation of one inch to the left. There were powder marks around the wound but no burning, and the evidence was that the gun had been fired from a distance of not less than four inches. Mrs. Morton died within a few minutes. Defendant immediately went into his yard following the shot and told his next door neighbors, Mr. and Mrs. Fogelsong, that his wife had just shot herself. Within the next hour, and in the room where his wife lay dead, he made a statement concerning the shooting to Officers Stone and Potts of the Redondo Beach police force and also to Harry Peterson, the Redondo Beach Chief of Police. Officers Stone and Peterson made written notes of that statement and testified from them at the trial. Defendant's next statement was made shortly after midnight to a group of officers at the Redondo Beach police station, including Chief Peterson of the local police and several deputy sheriffs. One of these, Mr. Lynch, a statement reporter, made a record of the proceedings, which lasted approximately two hours, and that record was read to the jury. On August 31, 1945, four days after the tragedy, defendant, at great length, told the coroner's jury the details of his life with his wife and particularly described the manner in which she met her death. When the case came to trial in the superior court several months later he took the stand, told his story, and was rigorously cross-examined not only as to the shooting but also as to the intimate domestic details of his life with his wife. It appears from the foregoing that on at least five different occasions defendant made statements concerning the details of his wife's death. The jury became acquainted with all five of these recitals.

Mrs. Fogelsong testified that she saw Mrs. Morton drive into her driveway upon her return from work at about 5:00 p. m. and "about ten minutes to 7:00 I saw her sitting on her front steps * * * she had her head in her hands and she was sobbing hard. * * * I saw her get up and go into the house * * * I saw her come back out of the house and get into her car * * * she was racing the motor." Immediately thereafter Mr. Morton placed his hand inside the car and the motor stopped. Mrs. Morton left the car and Mrs. Fogelsong about ten minutes later heard a gunshot. "I saw Mr. Morton right after that * * * he came out of the house and said to come over, his wife had shot herself." When they entered the house the body of Mrs. Morton was seen on the floor of the bedroom. "Mr. Morton knelt down beside her and shook her * * * he asked her why she did it * * * He said, 'Nora, honey, why did you do it. Tell me why did you do it?'" No answer was made by Mrs. Morton and the defendant said, "'She took that pistol out of that drawer and shot herself.' * * * Mr. Morton said he could show me what it was all about * * * He opened the dresser drawer, took a letter out of it and let me read it." This was a letter signed by a nephew of a former wife of the defendant, mailed to him from his former home in Kentucky. In the letter, which was read to the jury, it was suggested to defendant that he come home. "We all miss you very much, especially Aunt E. J. [Eliza Jane, defendant's former wife] * * * John, she wants you to come home. She says all has been forgiven. If you wish to write her, write me, and enclose a sealed letter in with mine. I will deliver it to her. She gave me your address and said to tell you to write her and that she would answer at once." On the back of the letter, which defendant showed to Mrs. Fogelsong, he had written the following reply: "Friend [L]: Just received your letter * * * Glad to know your wife and kids are all okay, also your mother. * * * as to me coming home, I am at home and a very nice little home at that. Plenty of work, nice climate, and I am perfectly satisfied. My wife and I expect to visit her folks and my sisters at Bardstown in the Spring." Mrs. Fogelsong told the jury, "He said that she was jealous over his first wife and was afraid that he would go back to her and that is why she took her life, over that letter." (Concerning this letter and the proposed answer written on its reverse side, the defendant made the following statement a

few hours after the shooting took place: "This one arrived and I got in about the time she did and she got one out of the letter box. You turn it over on the back and you will see there is an answer I started to write. That is why she didn't burn that one because I started an answer on the back of it. I told her, I said, 'Here is this letter. You take it and mail it. I want you to know I am not trying to put anything over on you. Here is the letter. Here is the answer. You mail it back.' So it has laid there. She didn't mail it back and there it is.") Mrs. Fogelsong also testified that when she entered the Morton home by the front door she had noticed that a pane of glass had been broken and that the glass was upon the floor. Further, that "the revolver was about five feet away from the body;" that Morton "was kneeling down by her and shaking her and talking to her * * * she never answered." Mrs. Fogelsong also stated that, in her opinion, Mr. Morton at the time was intoxicated. On cross-examination this witness testified as follows:

"Q. * * * Now, do you remember him saying anything about the wife, that she came from work, rammed her hands through the window and took the gun out of the drawer and shot herself; and the last thing she said was 'Johnnie, I love you.' A. That is right * * *

"Q. And then do you recall what happened after that, what Mr. Morton did? A. He was going to show me what it was all about.

"Q. Do you recall his crying? A. Yes, he stooped down by her, like I said before, and shook her, and said, 'Oh, my God, Nora, why did you do it? Tell me why you did it?'

"Q. At that time did he sit down and cry? A. He sat down at the bed and put his face in his hands, and he cried some."

Officers Stone, Potts and Chief Peterson testified to the several statements made by defendant. The reporter testified at length from his notes of the interrogation of defendant the night of the shoooting. The several accounts of the shooting, as given by defendant, did not differ substantially from his testimony on the stand. There were some discrepancies, which we shall mention later, but in the main he told a consistent story of the shooting throughout and it was substantially to the following effect: Mrs. Morton was 29 years of age, defendant 56. They came from the mountain regions of Kentucky and both were experienced in the use of firearms. Defendant had been married before to one Eliza Jane, sometimes mentioned as "E.J." but he was divorced from her and she was still living in Kentucky. Defendant and Nora Morton married in 1935 and came to California in 1942. He was a carpenter and blacksmith and she went to work as a welder for a manufacturing concern. They lived in a small house which they had built at Redondo Beach. Both were given to drinking and they had numerous quarrels but had never been separated except upon two occasions when Mrs. Morton left the home for short periods. On the day of the tragedy, Morton did not work; he stayed home and during the day consumed amout three-fourths of a fifth of whiskey. He was lying on the bed reading the papers when his wife returned from work at about 5 p. m. The front door was locked but both had keys. He heard her approach the house and heard the crash of glass when she thrust her hand through the door to unlatch it. She received a slight cut on the arm. She entered the house, went to the kitchen and either poured herself a drink or warmed up a cup of coffee. She had been drinking some. She was out of house on several occasions and there was a good deal of quarreling in the two hours preceding the shooting. Mrs. Morton resented defendant's corresponding with his first wife and was not satisfied with defendant's written statement to the nephew that he did not intend to return to his first wife. She said, "I would rather be dead and in hell than see you return to E. J." another source of trouble between them was an illicit affair between Mrs. Morton and one Dallimore, a married man with whom she had become acquainted at her place of employment. We shall refer to this later.

In considering defendant's contention that the evidence was insufficient to prove a homicidal death, we are obliged to consider

only the circumstantial evidence, since the jury rejected the testimony of defendant that his wife committed suicide. The crucial circumstantial evidence is that which tends to show a reason or motive for Mrs. Morton to commit suicide and that which tends to show a motive of defendant to kill his wife, and in addition thereto, the evidence of the physical facts of the shooting. We shall discuss the evidence from the standpoint of the defendant and from the standpoint of the People, taking up first the undisputed evidence as to the position of the gun with relation to Mrs. Morton's body at the time the shot was fired and the course of the bullet, which, except for the deviation of an inch to the left and a half inch upward, passed straight through Mrs. Morton's body. The People, in attack upon the theory of suicide, contended at the trial that it would have been impossible for Mrs. Morton to have held the gun at least four inches from her body, pointed straight through her body, and to have pulled the trigger with the index finger of either hand. This contention has firm support in certain established physical facts. The gun is a .38 caliber, double action, Smith & Wesson, of the "lemon squeezer" type. It has a heavy trigger pull, 11½ pounds, which, of course, must be overcome in order to operate the double action of the gun. The term "lemon squeezer" refers to the safety action, which is operated by pressure on a bar extending the length of the butt of the gun at the back. This bar must be depressed against the tension of a spring to release the safety and permit trigger action. A firm grip on the butt is required to release the safety. With the gun held four inches from the body, the wrist turned as nearly as possible to a 90 degree angle, and the butt held firmly in the hand, with the safety bar depressed, it is practically impossible to operate the trigger with the index-finger, against the 11½ pound pull, whether the gun be held in one hand or in both hands. Defendant's gun expert, Mr. Moxley, and the prosecution's expert, Mr. Layne, testified substantially to this effect, but Mr. Moxley also testified and illustrated that the gun could have been fired easily, using the thumb on the trigger instead of the index finger, and that he had seen many cases in which the thumb had been so used. At the trial it was insisted, on defendant's behalf, that the trigger could have been pulled with the index finger of either hand so as to fire the shot in the direction it was fired, although it would have been easier with the right hand. It appears from the record that defendant's attorney made unsuccessful attempts to illustrate to the jury that it could be done. Even on appeal defendant refuses to alter his position and he places no reliance whatever upon the testimony of Mr. Moxley that the easy, natural, and simple way would have been to pull the trigger with the thumb. Defendant made several statements to the effect that his wife took the gun from the dresser drawer and shot herself while holding it in her left hand. He testified that in target practice before coming to California she had fired a revolver with her right hand. In his testimony as to the manner in which she was holding the gun immediately after the shot was fired, he illustrated the position to the jury. It was vaguely described for the record as follows: "The side of the gun directly against the stomach with the right hand open pressing the barrel—I mean the butt, and the left hand open and pressing the barrel against your side." And he testified, in answer to his counsel's question, that she had the butt of the gun in her right hand and that the barrel was toward the left side. He also testified: *"It seemed she was momentarily paralyzed in that position* and then her arms dropped and the gun fell and bounced out on the floor on the carpet." He also testified that he did not see the gun as the shot was fired and that his statements that she fired it with the left hand were based upon an impression that he got from the fact that she was left-handed. The issue which was determinative of the question of guilt was tried as if the answer depended upon whether Mrs. Morton was right or left-handed and whether she held the gun in one hand or the other or in both. The argument of the People that she was left-handed and could not have shot herself, with the bullet ranging to the left, and the argument of the defendant that if she had

the gun in her right hand she could have shot herself, with the bullet ranging to the left, assumed that the gun was held in an extreme and unnatural position, with the index finger upon the trigger. The evidence of Mr. Moxley, the unsuccesssful attempts of defendant's counsel to illustrate to the jury that the gun could be held and fired in this manner, and the construction of the gun itself, all make it too clear for argument that it would have been little short of impossible for Mrs. Morton to have held the gun with the safety bar depressed and to have operated the 11½ pound trigger with the index finger. But she would have experienced no difficulty whatever in holding the gun four inches from her body, while she pulled the trigger with the thumb. Defendant was not questioned as to the position of Mrs. Morton's fingers or thumbs with relation to the trigger, and his illustrations to the jury evidently did not cover that detail. In view of defendant's insistence that the trigger was pulled by Mrs. Morton with the index finger, in spite of the expert testimony that it could have been pulled only with the thumb, it would have been somewhat difficult for the jury to have found that Mrs. Morton fired the shot.

[1] The fact that the gun was at least four inches from Mrs. Morton's body leads to conflicting surmises. The first one points toward suicide. All the evidence on the point indicates that Mrs. Morton was standing upright at the time she was shot. There were no powder burns upon her hands or sleeves and nothing to indicate that she had grasped or attempted to grasp the gun. It could be argued, with some force, that defendant would not have held the gun where his wife could easily have knocked it aside or grasped it, and that it was improbable that she would have stood facing him without making some effort to protect herself or escape. It is, of course, not impossible that defendant confronted his wife with the gun suddenly and fired before she had time to move, or that she stood still, with the gun pointed at her heart, in the belief that defendant would not fire it. In opposition to the above indication toward suicide, it might be argued that Mrs. Morton would have placed the gun against her body to steady it as she fired the shot. We have italicized defendant's testimony that his wife seemed temporarily paralyzed in the position in which she held the gun, for the reason that it seems to portray an actual occurrence. It appears to us unlikely that this detail of evidence would have been invented by defendant because of any tendency it might have to strengthen his testimony on the point. But if the effect of the shot was to temporarily "paralyze" Mrs. Morton, this would not tend to prove that she fired it. The evidence as the position in which the gun held at the time the shot was fired does not, as defendant contends, support only the theory of suicide. It is not inconsistent with that theory, but it does not exclude the possibility that the gun was fired by defendant. The weight of the conflicting probabilities was for the jury to determine.

The circumstantial evidence that remains for consideration goes to the question of motive. The evidence indicates that Mrs. Morton was grieving over the threatened breaking up of an illicit relationship with one Dallimore, a fellow employee, who was a married man. At the same time it is argued that she was jealous of defendant's former wife. Our attention is called to the testimony of Mrs. Fogelsong that Mrs. Morton was on the front porch weeping shortly before the shooting, and to the fact that when she entered the house she broke the glass in the door when she found it was locked, and stress is laid upon the disturbed condition of her mind which is indicated by these events. It is contended by the People that defendant was jealous of Dallimore, that he became enraged when Mrs. Morton placed all her clothes in the car, preparing to leave, and that he killled her when it appeared that he was about to lose her.

After Mrs. Morton's death, a locker which she maintained at her place of employment was entered and numerous letters were found which she had received from Dallimore, written from Camp Roberts, where he was stationed after his induction into the Army. Also in the locker were found several letters which Mrs. Morton had written to Dallimore, one of

which was sealed, stamped and addressed to him. This correspondence proved the existence of an illicit love affair and sexual relations. In a letter from Dallimore, dated July 30, 1945, Dallimore stated that he had been corresponding with his wife and that he had decided to return to her, although still protesting his love for Mrs. Morton. If this had been the last letter between the two, defendant's argument that Mrs. Morton was despondent would have carried greater weight. But later letters disclosed that Dallimore and Mrs. Morton had been together on a certain Saturday night and had plans for future meetings. The later letters were no less fervent than the former ones. They all gave assurance of a continuance of the relationship. The further argument is made that Mrs. Morton was despondent over the fear that defendant would return to his former wife, and that she was not satisfied with his assurances that he would not do so. Defendant's testimony was that Eliza Jane was 65 years old. The argument that Mrs. Morton feared that defendant would leave her to return to his first wife has support only in the testimony of defendant. A mutual friend, Mrs. Cumbo, stated that some two years before, Mrs. Morton had stated that she was jealous, but that she stated several months before her death that she was no longer jealous of Eliza Jane. There were statements in Mrs. Morton's letters to Dallimore that she was having trouble with her husband and was unhappy over being married to him. In an undated letter, which appears to have been written after their Saturday night meeting previously mentioned, she wrote: "Walter Daddy I want you so much as my own. I am afraid that sometime I will loose you. If that should ever happen then I don't have anything to live for, Darling you mean every thing in the world to me. I am so mixed up I don't know what to do I love you better than my own life and yet I am married to him and don't love him and you are also married, so Darling if you have any idea to what I should do let me know." In another letter, dated August 2, 1945, she wrote to Dallimore as follows: "Hello Walter Darling how is my Daddy fine I hope. Well this leaves me not feeling so good tonight, well honey Mot has just told every body we would not work Sunday, I am really glad in a way, for the way things stands to night between me and the old man, I would not be able to work any way. I am going to get me an apartment or a sleeping Room some place tomorrow or the next day. Daddy sometimes I dont know what in the Hell to do I am so mixed up I dont know heads from tails. I some times wonder if God intended for people to go thru Hell here on Earth I know one thing this is my final Roll, I cant stand any more. As I came to work to night he met me at the parking lot gate and told me when I come in to night there would be a note but he would not be home. Oh well why should I be telling you all this. So just forget what I have said Darling, for all that matters to me is you precious and nothing else. * * *" The evidence left little room for doubt that Mrs. Morton had completed her preparations to leave the home at the time the shooting took place. Defendant testified that she was only preparing to take her garments to the cleaners, but they were placed in evidence and were shown to have been freshly laundered. In view of the correspondence between Mrs. Morton and Dallimore, and Mrs. Morton's preparations to leave the home, defendant's contention that she was jealous of his first wife seems somewhat tenuous.

The People, as we say, found a motive for homicide in defendant's alleged jealousy of Dallimore, which, it is contended, had been the source of much trouble in the Morton home. Defendant on the stand denied knowledge of the Dallimore affair and of any jealousy over it, until he was confronted with notes that he had written to his wife. He testified that he had found a fragment of a letter which Mrs. Morton had written, addressed "Walter Darling," the remainder of the letter having been destroyed; that he confronted his wife with it and she had explained that she was only practicing writing, but that he did not believe it and thought there was more to it than that. Soon after this he wrote his wife a note, which was later found among her effects. He said, in part, "One time loved you better than my own life, but the

way you have treated me and the way you conducted yourself has completely changed things. The love you had for me if you ever had any, has been dead a long time—the love I had for you was hard to kill but you know you can kill a cat and it has 9 lives—I have faced many hard and tough propositions in my life but this has been the toughest of all—your secret trips, your phone calls and your airmail letters have done wonders—they have shown me a true picture of the woman I once loved. You want your sun suit and your darling Walter and now you have both. Hope you and he are both satisfied—I don't want to see the sun suit when I return—and I will not live with a woman that will wear one. Do as you please with it. John. If you decide to leave today leave my gun please." Other undated notes from defendant found in Mrs. Morton's effects read as follows: "As soon as I left to get a paper you left to meet your *Dear,* so here are your duds, goodbye. John. over. 12:30. I am *locking the door.* Don't try to break in. When I come back I will put your things on the porch." The foregoing was written upon an envelope, and with it was the following: "Don't be here when I return. Take your dam duds and go back where you spent the day. I don't mean perhaps. Either you start suit for divorce within the next two days or I will start one. A letter came for you today that make nice reading in court. It will help lift your reputation. Ha Ha. I guess this is another day you spent at Cumbo's. Like hell. Leave my pen and don't touch a dam thing of mine. I did think I would move out and give you this. In fact I rented an apartment in pedro this morning and paid one month rent. Came back to get my clothes, found you gone as usual, *out to meet your lover.* Now I have changed my mind. I am at home and going to stay. It is your move. Now do your damndest but do it quick." On another paper was a floor plan of a house of four rooms, on the reverse side of which was written, "Go on, take Steve or who you wish. I have a woman with plenty money and she loves to [undecipherable] Haw Haw. Get your things and get going. John." Defendant at first denied that in the argument which preceded the shooting there had been a quarrel over Dallimore, but later testified that Mrs. Morton was not satisfied with his assurances that he was not intending to return to his former wife and that he replied that if he did return to her it would be no worse than her affair with Dallimore. Defendant also testified at the coroner's inquest that in the argument his wife told him that the "Walt" was Walter Dallimore, "a former employee of the National Supply, and at present in the army.

"Q. Did she say whether or not she was in love with him? A. They had planned to go to Montana; so a part of another letter I found—she was writing a letter to one of her aunts and the letter she didn't mail and in the letter she was figuring on going to Montana.

"Q. Did you speak of that to her the day you quarreled with her, that she died? A. No.

"Q. The day that she died what did she say about how much she thought of Walt? A. She denied thinking as much of Walt as she did of me."

Defendant also testified at the coroner's inquest, with reference to former quarrels, as follows:

"Q. When you talked to her about going away with some other man and you said to her in substance that you didn't want her or the man to rub it in, did you tell her what would happen to her if she did rub it in? A. I said, 'I am getting along in years and I want to stay out of trouble. I will dodge you, if I know where you are, but don't try to rub it in, I don't know what might happen.'

"Q. Meaning what? A. Well, there might have been a fight or there might have been a killing if she would take some man and continually try to shove me off of the walk, as the old saying goes, rub it in. I don't think I could have stood it.

"Q. How many times did you tell her in substance what you have just testified to? A. I wouldn't know.

"Q. About how many times did you tell her that? A. I would say as many as twice.

"Q. When was the last? A. I don't remember, maybe the day before.

"Q. Maybe Sunday? A. Possibly; I don't remember. We argued so much and often I can't place the day and hours."

From defendant's version of the events which preceded the shooting, it would appear that there was no violent quarreling upon his part and that he expressed no anger or resentment at Mrs. Morton's placing her belongings in the car preparatory to leaving the home. The jury disbelieved this testimony and would have been justified in concluding that there had been a quarrel of serious proportions. This would appear to have been the case whether the death was suicidal or homicidal.

There was evidence that there had been much quarreling earlier in the year 1945. Police officers had been called to the Morton home on February 5, April 20, and April 21. Officer Stone testified that on February 5 defendant and his wife were found quarreling and that he heard defendant say, "I will kill you or any other son of a bitch if you don't stay away from him." On April 20, Mrs. Morton told Officers Stone and Sturdevant, in the presence of defendant, that defendant had threatened to beat her, that she wanted to move out of the house and asked their help while she removed her belongings; that defendant was under the influence of liquor, spoke profanely to his wife and told her that she could get out and stay out; that she took her clothes and the officers followed her while she drove to Redondo Beach. Officer Richardson testified that on April 21, 1945, he and another officer, in response to a radio call, went to Morton's home at about 6:25 p. m. and had a conversation with Mr. and Mrs. Morton; that Mrs. Morton stated that she wished to take her car, had sent a garage man for it to put a battery in it, and that defendant had run him away. She was crying at the time and stated that she was afraid of defendant; defendant was intoxicated; he stated that he would not harm his wife, that she could stay or go, but that he wouldn't let her have the car; he arose from his chair and told the officers that he had a gun and wasn't afraid to use it; that he had used the gun before and that if he had not wanted the police to come in his house he would have used the gun to keep them out. The officers told Mrs. Morton they could not help her get the car but she might leave with them if she wished. Mrs. Morton picked up some of her clothes but Mr. Morton said she could stay and he would not harm her, and she said that if she could not have her car she would take a chance and stay—that she did not think he would harm her. Defendant testified at the coroner's inquest that some six or seven months previously he had put his wife's clothes out of the house because she had "been on a big drunk and had not come in," and had told her that if she was going to act that way she could "go where she had more interests than she had at home and that she would be more than welcome to go." A Mrs. Collins, a fellow employee of decedent, testified to the latter's staying with her four nights in April, 1945, and that they found a note on Mrs. Morton's car reading: "Nora, meet me at the Workers' Cafe. John." and that they saw defendant at Mrs. Morton's car and he said, "Nora, what are you doing?" and that she said, "I am doing just what you told me to do; I got out," and that defendant then said, "Well, if you know what is good for you, you had better come home tonight to Gates Avenue," and that decedent did return to the home. The testimony of defendant given at the coroner's inquest, at the preliminary examination, and at the trial was in many instances evasive and replete with contradictions of his previous testimony and statements. The jury could have believed that his conflicting statements and testimony as to how the gun was held before or at the time the shot was fired materially affected his credibility, and while his testimony in other respects as to the details of the shooting was consistent, there was ample in his testimony as to related matters to indicate that he had slight regard for the truth.

[2, 3] The circumstantial evidence as a whole is inconclusive as to defendant's guilt. That, however, is beside the question as to whether there was substantial evidence that Mrs. Morton's death was homicidal. It is not for us to weigh the probabilities, but only to determine whether there was evidence which leads to the conclusion of guilt, without doing violence to reason and logic. We cannot say that

such evidence was wanting. It was, as we have said, not impossible that defendant should have advanced the gun to within four inches of his wife's body and to have pulled the trigger while she stood still, unresisting; a motive, and an incentive to violence, could have been detected by the jury in the evidence of defendant's jealousy of Dallimore and in the inference that he resented Mrs. Morton's leaving the home. Defendant's disposition toward violence was to be found in the evidence of his quarrelsome nature when drunk and the vague threats which he had uttered. This evidence of motive, disposition, and opportunity was sufficient, unless overcome, to justify a finding that he fired the fatal shot. The question whether that fact was proved to the exclusion of a reasonable doubt was for the jury to answer. For us to hold otherwise would be to weigh the evidence to an extent which is forbidden by law and by precedent, which limit the jurisdiction of our courts of review.

The court instructed the jury as follows: "In the crime of first degree murder referred to in these instructions, 'intent to kill' must be accompanied by *deliberation* and *premeditation*. The statute does not undertake to measure in units of time the length of the period during which the slayer must deliberate and premeditate or ponder over the killing after he or she has formed the intent to kill. The true test is not the duration of the time but the extent of the reflection. Thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly. It will be for you to say from all the evidence in this case whether or not the defendant first intended to kill Nora Hudson Morton, if you find from the evidence, beyond a reasonable doubt that he did kill her, and then, whether or not having said intent to kill her the intent was accompanied by deliberation and premeditation."

[4-7] Under the evidence of the People, the charge of first degree murder laid against defendant falls within that class described by section 189 of the Penal Code as "any other kind of willful, deliberate, and premeditated killing." An intent to kill must accompany the commission of the fatal act and it must be an intent formed with deliberation and premeditation. The instruction not only fails to declare that the intent to kill which distinguishes first degree murder from second degree murder is an intent formed after deliberation and premeditation, but in effect it declares that the act of killing may amount to first degree murder even if the intent to kill is formed without deliberation or premeditation. The clear meaning of the first sentence conveyed by the use of the word "accompanied" is that the deliberation and premeditation and the intent to kill may all occur at the same instant, and that deliberation and premeditation need not precede the formation of the intent. This was a complete misstatement of the law of first degree murder, in that it eliminated the single element of the offense which distinguishes it from second degree murder. The instruction is so patently confusing throughout as to require no further comment. It goes without saying that one whose life is in jeopardy under such a prosecution is entitled to have the applicable rules of law stated as clearly and simply as possible and with meticulous accuracy. An infallible guide in the drafting of such instructions will be found in the decisions of the Supreme Court in People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, and People v. Bender, 27 Cal.2d 164, 163 P.2d 8. They provide a pattern for instructions on murder which should be followed by trial courts without deviation or attempted innovation. The confusion engendered by the quoted instruction was not removed, and the error was not rendered harmless, by the giving of another instruction which gave the statutory definitions of the offenses of manslaughter and first and second degree murder. This error alone would justify a reversal of the judgment of guilt of the charge of first degree murder. It does not, however, furnish the only ground of invalidity of the judgment of guilt of that offense.

[8-11] We now have to consider the further questions whether the evidence was sufficient to sustain a conviction of first degree murder and, if it was insuffi-

cient, whether it establishes the guilt of defendant of the offense of second degree murder. It was not enough to justify a verdict of murder in the first degree that defendant *might* have formed an intention to kill his wife after giving the matter deliberate consideration. The evidence of the statements and conduct of an accused must be such as to furnish a reasonable basis for the belief that the intent to kill was formed after deliberation and premeditation. The fact may be proved by circumstantial evidence, but it is not established when the evidence proves only the killing and no other act and no statement logically tending to prove a deliberately formed intention to destroy life. Conjecture cannot be allowed to take the place of evidence. We are not unmindful of the evidence that defendant, many months prior to the shooting, uttered veiled threats of what he might do if his wife and a paramour should "try to shove me off of the walk" or "rub it in." But these remote statements, followed by many months of cohabitation, were by no means sufficient to prove that the act of shooting was deliberate or premeditated. Our views of the sufficiency of the evidence may be stated as follows: Considering the relations of the parties, their frequent quarrels, their separations and resumption of marital life, and especially the defendant's attitude on previous occasions when his wife had left him, only to return and to be welcomed home, and the undoubted fact that an extended quarrel took place immediately before the shooting, a conclusion that defendant's act was deliberate and premeditated, rather than impulsive, would be without support in the evidence. The judgment of guilt of first degree murder cannot be allowed to stand consistently with the holdings of the Supreme Court in People v. Holt and People v. Bender, supra, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385.

[12, 13] Defendant advances the further claim that the jury was insufficiently instructed as to the distinction between murder and manslaughter. The court gave the following instruction: "Manslaughter is principally distinguishable from murder in this that though the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice either express or implied which the very essence of murder is presumed to be wanting, and the act being imputed to the infirmity of human nature the correction ordained for it is proportionately lenient." As a passing observation upon the offenses of manslaughter and murder, the statement is instructive but it declares no rule of law. Defendant says it was the only instruction, except for one which gave the statutory definitions of manslaughter and first and second degree murder, and if that were the case, the complaint of insufficience would have been well founded. The court, however, gave an instruction as to the circumstances in which a felonious homicide would be reduced from the grade of murder to manslaughter, that is to say, if it occurred upon a sudden quarrel or in heat of passion. The latter term was fully defined and defendant has no criticism of the instruction—in fact, ignores the instruction altogether in his briefs. We are of the opinion that the instructions that were given were sufficient. The issue as between manslaughter and murder was fairly tried. The evidence which we have related furnished ample justification for the jury's determination that defendant was guilty of murder and not manslaughter. Since the jury found, upon sufficient evidence, that the offense was not manslaughter, and there was insufficient evidence to prove murder of the first degree, it necessarily follows that the offense proved was that of murder of the second degree.

The conclusions which we have stated require that the judgment appealed from be modified, and it is modified, by reducing it to murder of the second degree, and as so modified is affirmed. The order denying defendant's motion for a new trial is also affirmed. The cause is remanded to the superior court, with directions to pronounce judgment upon defendant sentencing him to be imprisoned in the State Prison for the term prescribed by law for murder of the second degree. People v. Holt, supra.

WOOD, J., and KINCAID, J. pro tem., concur.

79 Cal.App.2d 863

WEBB v. SAUNDERS et ux.

Civ. 3631.

District Court of Appeal, Fourth District, California.

May 26, 1947.

Hearing Denied July 24, 1947.

1. Trusts ⇐63¾

Neighbor of elderly woman, to whom the woman entrusted money to pay for her hospital bills and other expenses, was a trustee of that fund.

2. Gifts ⇐47(3)

Gifts or benefits from a principal to one occupying a fiduciary or confidential relation to him, though not absolutely void, are presumptively void, and persons standing in such a relation to others cannot entitle themselves to hold benefits which those others have conferred on them, unless they can show that donor had independent advice and that dealings were fair, and such transactions will be set aside on discovery of the least fraud, and burden is on one benefited to show that confidence was not abused, by proving that the donor acted with full knowledge.

3. Principal and agent ⇐48

Generally, equity regards and treats the relation of principal and agent in the same general manner and with nearly the same strictness as that of trustee and beneficiary. Civ.Code, § 2322.

4. Principal and agent ⇐48, 69(3)

The law requires perfect good faith on the part of agents, not only in form, but in substance, and not only from agents receiving compensation, but also from gratuitous agents, in which case the burden is on the grantee to show that deed was made freely and voluntarily, and with full knowledge of all facts and perfect understanding of the effect of the transfer.

5. Deeds ⇐68(1½)

In the absence of a finding of some confidential relationship or undue influence, mere fact that one is prone to do improvident things and incapable of exercising sound business judgment, standing alone, will not ordinarily give rise to a cause of action for cancelling a deed.

6. Deeds ⇐72(1)

"Undue influence" warranting cancellation of a deed, is that kind of influence or supremacy of one mind over another by which the other is prevented from acting according to his own wish or judgment, and whereby the will of the person is overborne and he is induced to do or forbear to do an act which he would not do, or would do, if left to act freely.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

7. Gifts ⇐4

If owner of realty intended to transfer the realty as a gift, no consideration was necessary.

8. Gifts ⇐36

A person of weak mind may rightfully dispose of her property by gift according to her own will.

9. Cancellation of Instruments ⇐53

Findings that at time of execution of deed grantor was in a weakened physical condition, that her mind was so weakened that, though she was capable of understanding details of any business transaction, she was incapable of exercising sound business judgment, and that while in such mental condition she executed deed without consideration, and that there was no fraud to procure deed, except such as might be inferred, were insufficient to sustain a judgment rescinding the deed.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action to rescind a deed by Annie W. Webb against C. B. Saunders and Myrtle Saunders, husband and wife. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment reversed with directions.

Stickney & Stickney, Edward Strop and W. H. Wylie all of San Diego, for appellants.

Sol Price and Frank Nottbusch, Jr., both of San Diego, for respondent.

GRIFFIN, Justice.

Action to rescind a deed. Plaintiff and respondent Annie W. Webb, a widow, approximately 85 years of age in 1943, lived next door to defendants and appellants C. B. and Myrtle Saunders, husband and wife. Mrs. Webb's closest relatives were second cousins living in Canada.

According to the depositions of defendants, they performed neighborly acts for plaintiff for quite some time and gained her confidence to the extent that she entrusted Mr. Saunders with approximately $2,500 of her money, which he kept in his personal bank account. He borrowed $2,000 from her to make a down payment on a house he purchased next door to plaintiff's home so they, at plaintiff's request, could be close to her.

In December, 1943, Mrs. Webb was obliged to go to her doctor and to the County Hospital for treatment for a gangrenous infection of the left little toe, which toe was later removed. Mr. Saunders drove her in his machine to these several places. He also painted her house for her and she paid him $200 for this service. They were subsequently informed by the doctor that Mrs. Webb's left leg must be amputated. This surgery was done on December 30, 1943. On December 27, 1943, Mrs. Webb, while in the hospital, executed a purported grant deed of her home to defendants, reserving a life estate therein. It was recorded the same day. The recitation was for "a valuable consideration" and no internal revenue stamps were attached.

Mr. Saunders testified that Mrs. Webb wanted to give them the place "because we had been so nice to her * * * wanted use to have the place *if anything happened to her there in the hospital if she passed on*" (Italics ours); that one time when Mr. Saunders took her to see her doctor Mrs. Webb stated to him that she intended to leave her property to some friend and that he then told her that if she was going to leave the property to some one why didn't she deed it to whoever she wanted to have the property, reserving a life estate; that he, defendant Mr. Saunders, secured the services of a Mr. Ryan to draw up the deed and he, defendant, presented it to her on December 27, 1943; that Mrs. Webb had been in the hospital about three weeks prior thereto and defendants had been visiting her every night; that a Mr. Johnson, manager of the hospital, notarized the deed and he asked Mrs. Webb if she knew what she was signing and if she wanted to give the defendants the house and that she answered in the affirmative. However, Johnson testified that although she asked to have the deed acknowledged, and that she knew what she was doing, on cross-examination he testified that he was of the opinion that "anyone who is sick, such as she was, they are not mentally able to know exactly what they are doing."

Mr. Saunders then testified that he knew that there was a probability of Mrs. Webb not being able to recover from the amputation of her left leg; that she directed him to contact an attorney to prepare a will, subsequent to the execution of the deed, which he did do and a will was executed in the presence of the attorney and her doctor; that on January 15, 1944, he paid her bills at the hospital at her request, with her money, and took her to her home; that for about two months thereafter his wife cared for her and received $100 for her services; that he built a fence around her house and was paid by Mrs. Webb approximately $300 for services and material furnished; that one day he was taking her to see the doctor and Mrs. Webb remarked that she was under the impression that she had given defendants her property in a will and also that she found out she had given them a deed to her place and that she wanted it back; that he told her he didn't want anything that belonged to her and that she could do as she wished about it; that after that Mrs. Webb got mad and they were not on too friendly terms; that at no time did he promise to take care of her the rest of her life, and that he later made an accounting for her about the money matters and returned $1,900 to her by check.

Mrs. Saunder's deposition shows that she found out, from her husband, about the deed, on December 27, 1943; that she told Mrs. Webb, on the day her leg was amputated, that she would take care of her but did not say for how long; that she took

care of her for two months and Mrs. Webb informed her that thereafter she had some one else to care for her.

Mrs. Webb testified that during the first month she was at the hospital she remembered "very, very little" of what transpired; that her mind was "kind of in a daze"; that she did not know what was going on around her; that the first time she knew about the signing of the deed was in 1945, after she had placed her home on the market for sale, and it was about this time, when Mr. Saunders was taking her to an oculist, that he told her: "Now you know that you have signed away your property".

The court rejected respondent's offer to show that on February 7, 1945, she listed the property for sale with a real estate agent, as free and clear. It was in connection with this attempted sale that she said she first found out she had deeded her property to defendants.

The hospital record of Mrs. Webb was received in evidence. Her doctor testified that the physical condition of Mrs. Webb on December 27, 1943, was poor and she was in a condition of extremis; that she was given a general anaesthetic on December 23, 1943, when he removed her toe and also some narcotic; that in addition, she was suffering from other ailments such as arteriosclerotic condition of the nerve centers, and, having had to be given so many narcotics, there were times when she was dazed; that he observed her mental condition and there were times when she appeared dazed, but that he would not say that she was of unsound mind; that persons in such condition are at times rather vague, not precise, and have lucid intervals, and then are befogged at times; that her mental processes were disjunctive; that Mrs. Webb had mentioned on more than one occasion that she did not remember having signed the deed; that a variation of over 12 years as to her age, which variation was given by her at different times, indicated to him a deterioration of her mental condition to a certain degree. However, the doctor did testify that he believed her competent to execute a will and to transact any business that she so desired.

This action was filed in June, 1945, alleging plaintiff was infirm, physically and mentally; that she was approximately 75 years of age and had been suffering from a diseased condition of one leg, necessitating its removal; that on December 26, 1943, and for several days prior thereto there had been administered to her large quantities of opiates; that by reason of such physical and mental condition, on December 27, 1943, she was incapacitated from doing any business or entering into any contract whatsoever; that knowing these facts, defendants caused plaintiff to execute the deed; that defendants falsely represented said deed was a will; that plaintiff believed the representations to be true and signed the deed. The second cause of action contained a similar allegation and alleged that at the time of executing the deed plaintiff did not intend to convey to defendants any title to the property.

After trial, the court found that plaintiff was in fact about 85 years of age; that, as to the deed, she had no independent legal advice; that she had been suffering for some months prior to and on December 27, 1943, with a diseased condition of one leg; that gangrene had infected it; that she was in a weakened physical condition; that the probability of her living was extremely doubtful and it was known to her; that her mind, while clear, was yet in such a weakened condition that, though not incapable of understanding the details of a business transaction, she was incapable of exercising sound business judgment and was prone to do improvident things, and that while she was in such mental condition she executed to defendants the deed involved and that it was an improvident conveyance. It then found as untrue that she was, at the time, under the influence of any opiates or sedatives; that it was *untrue* that defendants, *knowing of plaintiff's incapacity and infirmity,* and for *the purpose of defrauding her,* procured *plaintiff to execute the deed*; that plaintiff herself suggested the execution of the deed; that Mr. Saunders became active in causing it to be drawn up and executed and that he knew exactly what the mental condition of plaintiff was at the time; that it was untrue that defendants falsely

claimed to plaintiff that the instrument was a will or that plaintiff believed it was; that it is true that no consideration was given for the deed. As to the second cause of action it was found that plaintiff *did intend to convey to defendants some title to the property.*

In the court's oral decision, a copy of which is in the record, the force of its findings is explained. It points out that the allegations in the pleadings are in many respects different from the findings and the evidence supporting them; "that undue influence may be of more sorts than one"; that since there was no allegation of confidential relationship, plaintiff's offer to amend the pleadings charging such to conform to the proof was untimely, as it came after the parties had rested their case, and further, that there was no equitable basis for such a motion, since the court had admitted evidence bearing upon that question *upon another theory.* The motion to amend the pleadings could have been granted. It was a discretionary matter.

The trial judge then stated that in his opinion plaintiff's general physical condition was approximately as set out in the complaint, but that the effect of the opiates "must have worn off before the time the deed was executed"; that he believed she was in a "very weakened condition, physically" and that "her mind * * * was in the circumstances, a weak mind"; that there was no fraud "except as it may be said to result from the fact that there was no consideration for the conveyance". Speaking of these findings, he then comments "it might be thought that they would require a judgment for defendants, but there are certain authorities that give me pause in any conclusion that that is the result", citing Shaffer v. Security Trust & Savings Bank, 4 Cal.App.2d 707, 712, 41 P.2d 948; 4 Cal.Jur. p. 782, sec. 18; Moore v. Moore, 56 Cal. 89, 94; Richards v. Donner, 72 Cal. 207, 13 P. 584; and Allore v. Jewell, 94 U.S. 506, 24 L.Ed. 260.

After citing these authorities, he then concludes that the concurrence of the two elements, weakness of mind and inadequacy of consideration, were sufficient grounds for cancelling the deed; that undue influence may be presumed from the two elements. Other elements tending to support the conclusion were that she had no independent legal advice in reference to the deed; that the conveyance was not a provident exercise of judgment; and that there was no agreement to care for her as a part of any consideration. He concluded that there were sufficient facts pleaded and found to be true which would, in effect, amount, in substance, to a pleading and finding of undue influence.

[1] The evidence seems clear that Mr. Saunders was entrusted with several hundreds of dollars of plaintiff's money for several indicated purposes. He placed the money in his own bank account and in his own name. He drew checks on it in payment of plaintiff's bills. He used it in financing his own home. He was trustee of that fund during all of the transactions in reference to the deeding of the property to him and his wife as joint tenants. The evidence further indicates that as a part of the inducement to transfer the real property defendants stated they would care for plaintiff if she survived the operation. Mr. Saunders's deposition also shows that it was Mrs. Webb's desire that they have her home only if anything happened to her there in the hospital, i. e., if she passed on, and that he remarked that "if that was the way she wanted it why that would be all right with me, I suppose." He further testified that she told him that she was "worried" about going to the county hospital and that the "County would take her place, her home, which, as a matter of fact * * * was one reason she gave me all this money to take * * * care of her, so she could say she didn't have any money in the bank. * * *"

[2-4] At the outset, we are convinced that the evidence produced fairly indicates that the ultimate conclusion reached by the trial court, i. e., that the deed should be canceled and set aside, should be sustained. It further indicates that an intimate and confidential relationship between the parties existed and that defendants should be bound by the rules prescribed on that subject. Gifts or benefits from a principal to one occupying a fiduciary or confidential relation to him, while not absolutely void, are presumptively void, and persons standing in such a rela-

tion to others cannot entitle themselves to hold benefits which those others have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them and that the dealings were fair. Such transactions will be set aside upon the discovery of the least fraud and the burden is upon the party benefited to show that the confidence was not abused, by proving that the other party acted, not upon any reliance or confidence placed in the former, but with full knowledge of the facts, and entire understanding of the effect of the transaction. (4 Cal.Jur. p. 778, sec. 16.) It is also a general rule that equity regards and treats the relation of principal and agent in the same general manner and with nearly the same strictness as that of trustee and beneficiary. (Civ.Code sec. 2322; 1 Cal.Jur. p. 788, sec. 77.) The law requires perfect good faith on the part of agents, not only in form, but in substance, and not only from agents receiving compensation, but also from gratuitous agents (1 Cal.Jur. p. 790, sec. 78), in which case the burden is upon the grantee to show that the deed was made freely and voluntarily, and with full knowledge of all the facts and with perfect understanding of the effect of the transfer. Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Calmon v. Sarraille, 142 Cal. 638, 76 P. 486.

The trial court has not directly found on this question. Plaintiff's pleadings do not allege such a relationship. A proper finding based on these facts, under proper allegations, might legitimately support the judgment. An analysis of the findings indicate that a finding touching on this subject was intended, but the actual findings as signed are not consistent with this theory of the case.

[5] Summarizing the findings, they merely find that plaintiff was "in a very weakened physical condition"; that her mind, though clear, was in such a weakened condition that though capable of understanding the details of any business transaction, she was incapable of exercising sound business judgment and was prone to do improvident things; that while in such mental condition she executed the deed; and that there was no consideration for its execution. As opposed to those findings, the court specifically found no fraud or false representations of defendants in procuring its execution, except such as may be inferred from the facts found true, and that the execution of the deed was done at plaintiff's suggestion. Then a direct finding is made that at that time *"plaintiff did intend to convey to defendants * * * some* title or estate * * * to the property", and that defendants did not "procure plaintiff to execute the deed". In the absence of a finding of some confidential relationship or undue influence, the mere fact that one is "prone to do improvident things" as that term is defined, and "incapable of exercising sound business judgment", standing alone, would not ordinarily give rise to a cause of action for cancelling a deed. If this were true, many of us could set aside transactions or investments we have made which later happenings proved us to be improvident and to show lack of capability of exercising sound judgment. Some additional facts are required to satisfy the rule. The additional facts relied upon show but a weakened *physical condition* and a clear but *weakened mind.* It was weakened only to the extent that she was incapable of exercising sound business judgment and was prone to do improvident things. There might have been some plausible argument to support the judgment on the facts found (giving them their most liberal construction) if it had not been for the specific finding that she "intended to convey * * * to defendants some title or interest * * * to the property", and that defendants did not "procure plaintiff to execute the deed", which to us seems to negative any implied finding of undue influence.

[6] Undue influence has been defined to be that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment, and whereby the will of the person is overborne and he is induced to do or forbear to do an act which he would not do, or would do, if left to act freely. Estate of Olson, 19 Cal.App. 379, 126 P. 171; Civ.Code Sec. 1575; 6 Cal.Jur. p. 70, sec. 40.

[7] Here, it is specifically found that notwithstanding any such limited weakened mind condition, plaintiff "did intend to * * * convey to * * * defendants * * * some * * * title or estate * * * in * * * the * * * property", and further found that it was not true that "plaintiff by reason of her physical and mental infirmity * * * mistakenly assumed that said instrument was a will and did not dispose, transfer or alienate any interest in said real property until her death." If she intended to transfer the property as a gift, no consideration was neccessary.

In Shaffer v. Security Trust & Savings Bank, supra, relied upon by respondent, the trial court found, upon competent evidence, that the grantor was mentally weak and mentally infirm and that, though not insane, was by reason of such old age, weakness of mind and mental infirmities, unable, unassisted, to properly manage and take care of her property and *unable to understand the nature of her acts in signing the agreement.* "Mere mental weakness, whether natural or produced by old age, sickness or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not sufficient ground to defeat the enforcement of an executory contract or to set aside an executed agreement or conveyance. * * * To establish mental incapacity sufficient to justify cancellation on that ground alone, it is essential to prove, not necessarily total lack of understanding, but that the person was unable to exercise a rational care of his property by reason of mental delusion." 4 Cal.Jur. p. 782, sec. 18.

The court did uphold a judgment setting aside a deed in Estate of Brast, 69 Cal.App. 2d 704, 160 P.2d 193, 198, for "great mental weakness" of mind under facts much stronger than here presented, but it was also found in that case that there was a confidential relationship existing between the parties and that the deed was produced by the suggestion and activity of the appellant.

In Moore v. Moore, supra, also cited by respondent, the allegations were that plaintiff did not know the contents of the deeds signed, their purpose or effect; that she was induced to execute them by undue influence and without consideration while she was in a mental state of shock, and there existed a great weakness of mind, and a "great mental and physical prostration". From the facts pleaded, it was concluded that it might be inferred that defendants not only took, but that they designed to take, an unfair advantage of her weakness of mind. We have no such finding in the instant case.

In Richards v. Donner, supra [72 Cal. 207, 13 P. 585], there was a finding of "great mental weakness" on the part of plaintiff while executing a gift deed to defendant, "without understanding the nature, effect, or consequences of his act", and it was further found that imposition was produced by defendant through which plaintiff was induced to execute the deed. It was there held that from such facts found, a conclusion of law of undue influence must be drawn. No such conclusion can be drawn from the facts here found, particularly since the court specifically found that plaintiff actually "intended" to transfer some interest in the property to defendants. Allore v. Jewell, supra, is also cited in that case.

[8, 9] A person of weak mind may rightfully dispose of her property according to her own will. The finding that plaintiff "intended" this very thing, even without legal advice, voluntarily and without any domination, fraud or undue influence on the part of defendants, and that no advantage of the grantor was taken by them, tends to negative such findings, when liberally construed, as would tend to support the judgment. Under these inconsistent findings, therefore, the judgment should be reversed with directions to permit plaintiff to amend her complaint by alleging the confidential relationship, if she be so advised.

Judgment reversed with such directions.

BARNARD, P. J., and MARKS, J., concur.

79 Cal.App.2d 858

PEOPLE ex rel. KENNY, Attorney General, v. CHRIST'S CHURCH OF THE GOLDEN RULE et al.

Civ. 15440.

District Court of Appeal, Second District, Division 1, California.

May 26, 1947.

1. Religious societies ⇐32

A complaint and affidavits, affirmatively alleging many past irregular activities and misappropriations by church corporation's trustee, showed urgent necessity or emergency warranting ex parte appointment of receiver pending accounting of corporation's assets, though such pleadings also contained phrases merely indicating suspicions, fears, and inferences that trustee would convert or remove and secrete such assets and flee state therewith. Code Civ. Proc. § 566.

2. Appeal and error ⇐955

Since power to appoint receiver ex parte pending accounting of corporation's assets lies in superior court, question on appeal from such ex parte order is not one of jurisdiction, but of error, and hence is limited to inquiry whether court abused its discretion. Code Civ.Proc. § 566.

3. Appeal and error ⇐945

An appellate court is never justified in substituting its discretion for that of court sitting nisi prius.

4. Constitutional law ⇐312

The superior court's ex parte appointment of receiver of church corporation until hearing of order to show cause, of which appointment was part, on notice to defendants, did not offend due process because appointment was made without notice of hearing, especially where appointment was confirmed at such hearing on showing adequate to justify receivership. Code Civ. Proc. § 566.

5. Religious societies ⇐32

In action for accounting of church corporation's assets and appointment of receiver pending accounting, ex parte order appointing receiver until hearing of order to show cause was authorized. Code Civ. Proc. § 566.

6. Appeal and error ⇐101(1)

An ex parte order, appointing receiver of church corporation until hearing of order to show cause why appointment should not be confirmed, became functus officio on confirmation thereof, and hence was not appealable, but later, permanent confirmation order became controlling and was only appealable order. Code Civ.Proc. § 566.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the People, on the relation of Robert W. Kenny, Attorney General, against Christ's Church of the Golden Rule, a corporation, Arthur L. Bell, and others, for an accounting of the corporation's assets, removal of defendant Bell as trustee of the Church, appointment of a receiver pending the accounting, and injunction against interference with the receiver. From an ex parte order removing defendant trustee and appointing a receiver, defendants appeal.

Appeal dismissed.

Russell E. Parsons and A. L. Wirin, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., Warren Olney III, Sp. Asst. to Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from an ex parte order removing Arthur L. Bell, President and Trustee of Christ's Church of the Golden Rule, and appointing one R. E. Allen as receiver of such church. The order in question, made on October 10, 1945, further commanded that the defendants show cause on October 19, 1945, "why an order should not be made confirming the ex-parte appointment" of the receiver. At the hearing of the order to show cause, appellants being then represented by counsel, Judge Henry M. Willis confirmed the previous ex parte order appointing a receiver, made by Judge Joseph W. Vickers. The original

appeal was from both of the orders hereinbefore mentioned, but for some undisclosed reason a stipulation was later executed in which appellants abandoned the appeal from the final order made by Judge Willis, such stipulation expressly providing that "nothing herein contained, however, shall operate against or prejudice the appeal" from the ex parte order made by Judge Vickers.

The complaint in the present action, filed by the Attorney General on behalf of the People, prayed for an accounting concerning the corporation's assets, the removal of Arthur L. Bell as trustee, the appointment of a receiver pending the accounting, and an injunction against interference with the receiver. Summarizing the more important allegations, the complaint alleged that Christ's Church of the Golden Rule was a non-profit California corporation formed for public, religious and charitable purposes, owning assets in excess of $3,000,000, and having no valid franchise to hold property other than as a public, charitable trust. The complaint then alleged that the corporation was under the complete domination of Arthur L. Bell, and set forth a series of alleged misappropriations and misapplications of funds, unauthorized expenditures, and a failure to account to the corporation. It was alleged that Bell had caused the sale of certain corporate real estate and had received the proceeds; that certain other property had been set apart for Bell and his wife, for which the corporation received no consideration; that a false financial statement had been made. Other specific irregularities and misappropriations of church assets were alleged.

As presenting an immediate emergency necessitating the appointment of a receiver and the other relief sought, the complaint alleged that Arthur L. Bell had advertised for sale at public auction, certain real estate held by the church, said auctions to be held on October 9 and 10, 1945; that plaintiff "is informed and believes" that such sales had not been authorized or approved by the corporation, and that unless prevented, Bell would convert the proceeds "to his own use and intends not to account for the same * * * and thereby the assets and property * * * will be lost and dissipated to the irreparable damage to said corporation and to the People of the State of California." The advertised purchase price of these properties was alleged to be $1,507,000. Affidavits by Charles H. Manaugh, an accountant and investigator of the State Department of Justice, and by Warren Olney III, Special Assistant to the Attorney General, concerning the alleged emergency, were also presented. The latter affidavit affirmed that Bell had stated that the corporation possessed cash assets in excess of $100,000 deposited under various individual or fictitious names, the largest part of which had been hidden by Bell. The interest of the state in the corporate affairs of the church was alleged to be that by reason of the acts set forth in the complaint, there had been a failure "to comply with the trusts which it had assumed and (a departure) * * * from the public, religious and charitable purposes for which it was formed".

It is the appellants' contention that the ex parte order made by Judge Vickers on October 10, 1945, appointing a receiver and removing Bell as trustee, should be declared null and void because, "(1) There was no showing of facts sufficient to confer jurisdiction upon the Superior Court to enter the ex parte order. (2) The appointment of the ex parte receiver without notice or hearing contravenes federal and state due process. (3) In an action by the state against a corporation for its dissolution, the *only* order which the Superior Court can make is an order to show cause."

[1] Apropos the first contention above mentioned, appellants' brief calls attention to various allegations contained in the complaint and affidavits, which are said to be "phrases merely indicating suspicions, fears and inferences," furnishing no factual support for the ex-parte order. Examples thereof are such expressions in the complaint as "said Bell intends to * * * convert the same to his own use"; and the "fear" expressed in the affidavits, that Bell would remove and secrete the assets of the church, and would flee the State of California, taking with him such assets. Doubtless, the conclusions mentioned might be insufficient, standing alone, but such

question is not here presented for the reason that the complaint and affidavits are replete with factual affirmations concerning alleged irregular activities and misappropriations of Arthur L. Bell, president and trustee. In view of these factual allegations in reference to past activities, the expressions of fear that some similar misapplication of trust funds might occur in the immediate future following the proposed sale of corporate real estate can hardly support appellants' argument that there was no showing of "urgent necessity" or emergency warranting the ex parte appointment.

[2, 3] In Misita v. Distillers Corp., Ltd., 54 Cal.App.2d 244, 247, 128 P.2d 888, 890, it was held that generally "the granting of such orders (ex parte appointment of receivers) rests in the sound discretion of the trial court, in the exercise of which it must be governed necessarily by the situation as it is presented and appears to the court at the time of making the order." Appellant points out that in the Misita case the court stated that "This power will not be exercised in a doubtful case," and argues that in the instant litigation there were "mere apprehensions, surmises or probabilities" presenting, at most, a "doubtful case" not calling for an ex parte order. But, as further said in the Misita case, 54 Cal.App. 2d at page 250, 128 P.2d at page 892, and particularly applicable to the present contention, "Since the power to appoint 'ex parte' lies in the superior court, the question on appeal is not one of jurisdiction, but of error, and, as such, is limited to the inquiry whether the trial court abused its discretion. * * * An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius." As hereinbefore indicated, there was some showing of an emergency supporting the ex parte order, and no abuse of discretion is apparent.

[4] There is no merit to appellants' contion that "appointment of the ex parte receiver without notice of hearing offends federal and state due process." As hereinbefore mentioned, the ex parte appointment in question was merely a temporary provision only effective until the order to show cause, of which it was a part, was heard upon notice to appellants. And as respondent's brief concludes, "even if Judge Vickers was in error, no miscarriage of justice has occurred because the appointment of the receiver was confirmed by Judge Willis on October 29, 1946 after hearing and upon a showing which must be conceded to have been adequate to justify receivership." Section 566 of the Code of Civil Procedure by its terms contemplates the ex parte appointment of a receiver. In Misita v. Distillers Corp., Ltd., 54 Cal.App.2d 244, 250, 128 P.2d 888, 892, previously referred to, occurs the following: "As held in Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301, 302, the appointment of a receiver 'may be made "ex parte" and without notice if the "imperative necessity" or emergency is shown in the petition or supporting affidavits.'"

[5] Appellants' third point, that "In an action by the State against a corporation for its dissolution, the only order which the Superior Court can make is an order to show cause", is answered by the fact that the present action does not seek dissolution but is one for an accounting and incidental relief by way of receivership, etc.

[6] Not only is there a complete want of merit in appellants' contentions, but a further reason exists for the denial of appellate relief in this case. As respondent's brief points out, "The ex parte order of October 10, 1945, appointing a receiver was functus officio before the taking of this appeal and is not appealable." The order in question, continues respondent's brief, was, "by its terms effective only until the day of hearing (of the order to show cause). It ceased to function as a temporary order at the moment of its confirmation, and the later and permanent order became controlling, and of course, the only appealable order." In the case of Moore v. Oberg, 61 Cal.App.2d 216, 152 P.2d 443, involving a situation not fundamentally different from that of the instant appeal, it was held that a temporary order appointing a receiver, made as a part of an order to show cause, was not appealable after the permanent appointment had been made at the hearing of the order to show cause.

The Moore case, in turn, followed Baumann v. Bedford, 18 Cal.2d 366, 115 P.2d 437, wherein the syllabus reads: "An order making permanent a prior ex parte order appointing a receiver is controlling and parties dissatisfied therewith should appeal from it and not from the temporary order."

In the instant case there was an abandonment of the appeal from the permanent order, hence the validity of such order is not here in question. As to the ex parte order complained of, under the authority of the above mentioned cases, this appeal is dismissed.

YORK, P. J., and WHITE, J., concur.



BAGDASARIAN v. GRAGNON et al.*
Civ. 3559.

District Court of Appeal, Fourth District, California.
May 26, 1947.
Rehearing Denied June 25, 1947.
Hearing Granted July 24, 1947.

1. Fraud ⇐58(1)

In action to foreclose crop and chattel mortgage securing note for part payment of farm wherein mortgagor counterclaimed for damages for fraud inducing purchase, evidence that representations made to purchasers as to crop productions in 1943 and 1944 were false, that vendor had considerable experience in estimating crops, that he was thoroughly familiar with farm's productivity, and that he made the misrepresentations to his agent who conveyed that information to purchasers established actionable fraud.

2. Fraud ⇐20, 50

Generally, recovery for fraud cannot be had by one who has actually investigated truth of representations and instead of relying on representations made, relies on his own judgment or knowledge or advice of third persons, but to preclude recovery it must be shown that he had such knowledge or information, either actually or constructively.

3. Fraud ⇐64(5)

A party is not precluded from recovery for fraud as a matter of law because he obtained information from others in regard to subject matter of representations, since such information may not have influenced him and he might have relied upon original misrepresentations.

4. Fraud ⇐20

One who conducts an investigation may still be entitled to rely upon representations as to conditions to which his investigation does not extend.

5. Fraud ⇐20

Discovery of fraud and deceit after consummation of transaction and after party defrauded has been prejudiced, cannot defeat his right to recover.

6. Estoppel ⇐52

"Waiver" is the intentional relinquishment of a known right with knowledge of facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

7. Estoppel ⇐116

The burden of proving waiver and estoppel is upon the party raising the defense.

8. Fraud ⇐35

Purchaser who alleged fraud inducing purchase but who did not claim rescission of sale, was bound to make payments on purchase-money notes, and such payment did not constitute waiver of the fraud.

9. Appeal and error ⇐1008(1)

In action to foreclose crop and chattel mortgage securing note for part payment of farm, wherein mortgagor counterclaimed for damages for fraud inducing purchase whether mortgagor was barred by waiver, estoppel and laches from asserting damages was a factual question for trial court.

10. Appeal and error ⇐1011(1)

In action to foreclose crop and chattel mortgage securing note for part payment of farm, wherein morgagor counterclaimed for

* Subsequent opinion 192 P.2d 935.

damages for fraud inducing purchase, trial court was final judge of facts as to value, in view of clear conflict in the evidence.

11. Appeal and error ⇐971(2)
Evidence ⇐546

Qualification of an expert to testify is in trial court's sound discretion and its ruling thereon will not be disturbed on appeal in absence of clear abuse.

12. Evidence ⇐536

Where expert witness has disclosed sufficient knowledge of subject to entitle his opinion to go to the jury, the question of the degree of his knowledge bears more on the weight of the evidence than on its admissibility.

13. Fraud ⇐59(3)

Under statute providing that one defrauded in purchase of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of that which he received, damages are based on actual value. Civ. Code, § 3343.

14. Equity ⇐39(1)

Where equity has acquired jurisdiction for one purpose it will retain jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented.

15. Set-off and counterclaim ⇐55

In action to foreclose crop and chattel mortgage securing note for part payment of farm wherein mortgagor counterclaimed for damages for fraud inducing purchase, where damages were awarded based upon competent evidence, determination that mortgage should be satisfied out of the recovery for fraud was not improper.

16. Judgment ⇐230

In action to foreclose crop and chattel mortgage securing note for part payment of farm wherein mortgagor counterclaimed for damages for fraud, where damages were awarded based upon competent evidence, court had jurisdiction to order that balance of proceeds of judgment, after satisfaction of the chattel mortgage be applied toward payment of note securing trust deed, in view of fact that deed became directly involved by virtue of cross-complaint, though foreclosure of trust deed was not directly involved in the complaint and though effect of credit was an immediate payment and satisfaction of judgment on the cross-complaint.

Appeal from Superior Court, Fresno County; Clark Clement, Judge.

Action by D. H. Bagdasarian against P. G Gragnon and others to foreclose a crop and chattel mortgage given as security for note representing part payment of purchase price of real property, wherein defendants filed a cross-complaint to recover damages for fraud inducing the sale and purchase. Judgment for defendants, and plaintiff appeals.

Affirmed.

L. Kenneth Say, Conley, Conley & Conley, and Phillip Conley, all of Fresno, for appellant.

Frank C. Lerrigo and Galen McKnight, both of Fresno, for respondents.

GRIFFIN, Justice.

Action to foreclose crop and chattel mortgage. In June, 1944, plaintiff sold defendants, for $68,000, 160 acres of farming land in Fresno County improved with vineyards, orchards, necessary tools and implements, a dwelling house and barn, together with growing crops thereon. Defendants paid $10,000 in cash and executed a trust deed on the real property to secure the payment of a note for $34,000 plus interest, payable $5,000 per annum beginning December 1, 1945. The balance of the purchase price was evidenced by a note for $24,000 payable on or before December 1, 1944, secured by a crop and chattel mortgage covering the farm implements and the 1944–1945 crops (excepting the alfalfa).

At the time this action was filed on January 1, 1945, plaintiff claimed that defendants were delinquent in their payments on the chattel mortgage and that there had been paid thereon as principal and interest the sum of $14,960.15.

Defendants admitted generally the execution of the crop and chattel mortgage, notes and trust deed, and by way of cross-complaint alleged that the note upon which

this action was based was given as part payment upon the purchase price of the property; that the sale and purchase was induced by fraud on the part of plaintiff and that they were damaged in the sum of $19,987.50 on account of the sale of the real property and in the sum of $12,113.92 on account of the sale of the crops.

The trial court found in favor of defendants on the allegation of fraud and refused to foreclose the crop and chattel mortgage. It ordered damages in favor of defendants and cross-complainants in the sum of $27,916.23 and that the sum due upon the promissory note for $24,000 secured by the crop and chattel mortgage be offset against the amount of damages and that the balance of damages ($16,233.51) be credited upon and set off against the first payments of principal and interest to become due on the $34,000 promissory note and trust deed; that the crop and chattel mortgage and the note given to secure the same be declared paid and satisfied. Plaintiff and cross-defendant appealed from the judgment excepting paragraph 3 thereof, containing the provision allowing $1,700 attorneys' fees.

In April, 1944, Bagdasarian, a farmer, was approached by one Dickey, a real estate broker, about the sale of his ranch. Plaintiff signed a listing with the agent at $68,000, and also gave a statement of the crops produced upon the property in the preceding year. Dickey reduced the statement to typewriting and a copy of that statement was used in the escrow when the sale was consummated. Dickey tried to sell the property and on May 10, 1944, approached a friend of his, P. G. Gragnon (hereinafter referred to as Gragnon), a cotton merchant, on the subject. Dickey told Gragnon that the property was a first class buy and that according to the production figures furnished him by plaintiff, it appeared to him that the ranch was worth the money. Gragnon told Dickey that he did not know anything about a vineyard. Dickey gave Gragnon a duplicate copy of the production record (Exhibit B). Harry Bagdasarian, son of plaintiff, helped with the sale and he gave Gragnon figures on anticipated tonnage and value of crops for the year 1944 (Exhibit E). Later, plaintiff discussed these figures and the 1943 crop production record with Gragnon and Dickey. Dickey attempted to obtain a loan for Gragnon without success. Finally, Bagdasarian said he would make the loan himself because he was "not afraid of the crop * * * it would make what they represented". On June 5, 1944, the escrow was set up and $10,000 was paid down. On June 6th, Gragnon took possession. He testified and the court found that he believed and relied upon the representations made by the two Bagdasarians and their agent Dickey; that those representations induced him to make the purchase although he did in fact make some inspection and also made some inquiry as to the value of the property. The records of the packing companies which purchased the 1943 crops grown on the property were received in evidence. A few of the discrepancies between the figures contained in the statements furnished by plaintiff and those contained in the packer's statement may be thus illustrated: Plaintiff represented that 600 tons of grapes were produced during the year 1943 when in fact, according to the production record, only 252 tons were grown on the property. Similar variances resulted as to other crops grown during that year. The vineyard produced 167 tons of grapes in 1944 at a value of $10,362, rather than the 540 tons with a revenue of $45,000, estimated by plaintiff.

There is evidence that defendants failed to farm and care for the property in a good and farmerlike manner and that the crop failure was due to this fact. However, there is evidence to the contrary and the court found in favor of defendants on this issue.

The net proceeds from the farm were turned over to plaintiff as payment on the note. It lacked $9,039.85 of meeting the obligation then due on December 1, 1944. There was evidence produced as to the reasonable or market value of the property at the time of the sale to defendants.

On November 28, 1944, plaintiff made written demand for the payment of the note in full. On December 8, 1944, his attorney also demanded payment and threatened suit. On January 5, 1945, this action was instituted. Defendants contend that they then consulted an attorney and learned

that they had a legal right of redress against plaintiff and it was then when an inspection was made and they then learned the true nature and extent of the fraud. After trial, the court found that the sale was induced by fraud; that the actual and reasonable market value of the real property was $28,220.92, as against $44,000 paid for it; that the actual and reasonable market value of the growing crops was $10,362.85, as against $22,500 paid for them. Judgment was entered as heretofore mentioned.

Plaintiff now contends, on appeal, as he did during the trial and on a motion for new trial: (1) that actionable fraud was not established; (2) that defendants did not rely upon any alleged misrepresentations made by plaintiff; (3) that defendants knew, or should have known, the exact facts with regard to the property; that they inspected the farm and growing crops prior to sale and received independent advice in relation thereto; (4) that no damages have been proved and that the reasonable market value of the property at the time of the sale was $68,000; (5) that under the principles of waiver, estoppel and laches, the defendants cannot now assert fraud or claim damages; (6) that the findings are defective and erroneous; (7) that the pleadings and proof of cross-complainants were deficient in that the cross-complainants did not offer to do equity; that the court erroneously ordered that the offsets be made against the first monies due and to become thereon, and has not treated the cross-defendant equitably; and (8) that the trial court committed prejudicial error in rulings on the admissibility of evidence, particularly in relation to the attempted proof of values of the property, and that the cumulative effect of the repeated errors is as follows: "In Medico Legal Jurisprudence" it is said that "small doses of arsenic, relatively harmless in themselves, may, by their cumulative effect, prove fatal;—although some of the errors in rulings on the evidence, if taken alone, might not require a reversal of the judgment, the cumulative effect is fatal to respondents' case."

[1] We will endeavor to answer plaintiff's contentions numbers 1, 2, 3 and 5 under our first conclusion. Plaintiff contends that P. G. Gragnon attended the University of Mississippi for three years, had been in the cotton business for 30 years and operated ranches at Yuma with his brother, growing flax, cotton and alfalfa, and that he had more than a general knowledge of farming values, and that since he went to the plaintiff's ranch two or three times before the sale he could not claim that he was misled by the representations made as to its production record or value; that since plaintiff denied making the representations set forth on the compilation prepared by Dickey, Dickey must have been confused as to what plaintiff actually told him and therefore defendants were obligated to rely upon their own investigation and judgment rather than any claimed representations made by plaintiff or his agent. Many cases are cited in support of this argument, as well as the general rule set forth in 12 Cal.Jur. 756, sec. 33 et seq.

The evidence is clear that the 1943 crops produced were far short of the representations made on the agent's typewritten exhibit. Plaintiff concedes that fact but denies he made such representations to his agent. The representations made to defendants as to crop productions both in 1943 and 1944 were, no doubt, false. Plaintiff had 42 years of experience as a vineyard grower, and had considerable experience in estimating crops. He was thoroughly familiar with the farm's productivity, and was thoroughly familiar with the record of production. He produced and sold the 1943 crop and had produced the 1944 grape crop which, at the time of sale, was in being and on the vines. There is substantial evidence that plaintiff did make these misrepresentations to his agent; that his agent conveyed that information to defendants; that plaintiff, his son, and the agent talked over these figures with Gragnon and that they were submitted as a part of the escrow. The trial court, apparently, believed this evidence. These facts alone may have been misrepresentations of a material fact on which defendants were entitled to rely. Bickel v. Munger, 20 Cal. App. 633, 637, 129 P. 958; Harris v. Miller, 196 Cal. 8, 13, 235 P. 981; Stumpf v. Lawrence, 4 Cal.App.2d 373, 377, 40 P.2d 920.

It is then argued that since defendants did not claim any fraud on the part of plaintiff until after the filing of the cross-complaint, and since they had become thoroughly familiar with the property and its production record, had sought advice from plaintiff in connection with the farming of the ranch, and had sought a deferment of the payment of interest on the note and had made payments on it, they were estopped from claiming, and waived, any fraud.

[2-5] It is a general rule that a recovery, on the grounds of fraud, may not be authorized to one who has actually investigated the truth of the representations, and instead of relying upon the representations made, relies on his own judgment for knowledge or on the advice of third persons. However, it must be shown that such knowledge or information is possessed, either actually or constructively, by the party claiming to have been defrauded. It does not follow as a matter of law that a party is precluded from recovery because he obtained information from others in regard to the subject matter of the representations, since such information might not have been of a character to influence him and he might have relied upon the original misrepresentations. Where one conducts an investigation he may still be entitled to rely upon certain representations as to conditions to which the investigation does not extend. Discovery of the fraud and deceit after the consummation of the transaction and after the party defrauded has been prejudiced, cannot defeat the right to recover. Del Vecchio v. Savelli, 10 Cal. App. 79, 82, 101 P. 32; Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L. R. 1291; Benner v. Hooper, 112 Cal.App. 53, 58, 296 P. 660; Shearer v. Cooper, 21 Cal.2d 695, 702, 134 P.2d 764; Anderson v. Berger, 101 Cal.App. 728, 730, 282 P. 416; 12 Cal.Jur. 761, sec. 35.

[6-8] Waiver has been defined as the intentional relinquishment of a known right with knowledge of the facts. Alden v. Mayfield, 164 Cal. 6, 11, 127 P. 45; In re De Neef, 42 Cal.App.2d 691, 694, 109 P.2d 741. The burden of proving waiver and estoppel is upon the party raising the defense. Aronson v. Frankfort Accident & Plate Glass Ins. Co., 9 Cal.App. 743, 99 P. 537. Gragnon did not claim a rescission of the sale. He therefore was legally bound to make payments on the notes. Such actions cannot be held, as a matter of law, to constitute a waiver of the fraud. Hines v. Brode, 168 Cal. 507, 143 P. 729. There is evidence that Gragnon was never aware of his legal rights until he went to his attorney and that he never knew all of the facts concerning production records for 1944 until the latter part of November, and that he never knew any of the facts concerning the production records for 1943 until those records were obtained for him by his attorney after this action had been commenced. Whatever assistance was furnished by Bagdasarian may have been furnished for his own self-interest as the holder of the crop mortgage.

[9] To us it appears, from an examination of the entire record, that the evidence produced on this matter was in conflict and was accordingly a factual question for the trial court to determine. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Bechtold v. Bishop & Co., 16 Cal.2d 285, 291, 105 P.2d 984.

[10-12] The fourth and sixth specifications of error, i. e., that no damages had been proved and findings thereon were erroneous, involves, mainly, the testimony of expert witnesses and the use by them of the term "actual value" of the property at the time of the sale rather than the term "reasonable market value".

At the suggestion of agent Dickey or defendant Gragnon, the $68,000 purchase price was split up for income tax purposes so as to show a valuation of $44,000 for the real property and $24,000 for the personal property. This segregation was approved by plaintiff and Gragnon by marginal initials of both parties on the escrow agreement. The trial court segregated the damages as to the real property and the personal property transactions. Many pages of transcript are taken up with the description of the property and with evidence pertaining to those things which go to make up value. Gragnon, as owner, testified that in his opinion the "actual value" of the real property was $24,000. As agent of the

Growers' Service Corporation qualified as an expert on values. He fixed the "actual value" at $24,000. A farmer in the same district estimated its value at $20,000. Others, equally qualified, fixed the "actual value" at between $24,000 and $28,000, as of June, 1944. Plaintiff produced expert witnesses who had the property listed at $68,000, a price fixed by plaintiff. They testified that in their opinion "the reasonable market value" of the entire property was, as of the date of sale, at least $68,000.

The trial court found that the "actual and reasonable market value of said real property" in June, 1944, was $28,220.92. The evidence presented a clear conflict, the facts of which the trial court was the final judge. Chichester v. Seymour, supra. Witnesses supplied sufficient qualifications to testify on the subject of values. The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a clear abuse of that discretion, the ruling of that court will not be disturbed on appeal. Where the witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility. 10 Cal.Jur. sec. 220, p. 963; Eubanks v. Milton G. Cooper & Son, Inc., 68 Cal.App.2d 366, 156 P.2d 775.

[13] Section 3343 of the Civil Code provides: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the *actual value* of that with which the defrauded person parted and the *actual value* of that which he received, * * *". (Italics ours.)

Under the clear language of the statute, damages in a case of this kind are based upon "actual value".

In Herzog v. Capital Co., 27 Cal.2d 349, 164 P.2d 8, 10, the appellant took exactly the same position as plaintiff takes in the case at bar, except that in that case the witnesses testified to "reasonable market value" and appellant claimed that there was no proof of "actual value". The court affirmed the judgment holding that while "reasonable market value" and "actual value" were not necessarily the same thing, a finding of either might be based upon evidence of the other. See, also, Kendrick v. Schwartz, 69 Cal.App.2d 171, 158 P.2d 405; Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 149 P.2d 177.

[14, 15] Specifications numbers 7 and 8 deal with the question whether the trial court equitably disposed of the case in accordance with the above findings by applying the amount of the judgment for damages as a credit toward the payment of the two notes. They further deal with certain other claimed errors in relation to admissibility of evidence. The action from its inception was an equitable one, and where equity has acquired jurisdiction for one purpose it will retain it to the final adjustment of all differences between the parties arising from the cause of action presented, it being the duty of a court of equity where all the parties to a controversy are before it to adjust the rights of all and leave nothing for further litigation. Vice v. Thacker, —— Cal.App.2d ——, 172 P.2d 930. Damages were awarded and were based upon competent evidence. We perceive no grave injustice in holding that the trial court was justified in declaring that the crop and chattel mortgage should be satisfied out of the amount of the recovery.

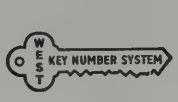
We withhold judgment as to the advisability of allowing $1,700 attorneys' fees in the foreclosure action under the circumstances related. However, since defendants have not appealed from this judgment, and plaintiff has specifically excepted this portion of the judgment in his notice of appeal, we refrain from passing upon that question.

[16] The remaining portion of the judgment for damages was ordered applied as a credit on the first monies due and to become due on the note securing the trust deed. The foreclosure of that trust deed was not directly involved in plaintiff's complaint. It became directly involved, however, in the defendants' cross-complaint and the court had jurisdiction to order the balance of the proceeds of the judgment applied toward its payment. This order may have been prompted by the request of plaintiff (Clerk's transcript pp. 57-L to 57-Q) in submitting proposed findings, sug-

gesting this procedure, but seeking the application of such credit to the last payments rather than the first payments due. The credit had the effect of an immediate payment and satisfaction of the judgment on the cross-complaint. This procedure cannot be held to be inequitable or unreasonable. Suffice it to say, we have thoroughly examined the remaining complaints advanced by plaintiff, particularly as to the claimed erroneous admission of evidence and the rulings of the court thereon. We do not find any errors, cumulative or otherwise, sufficient to constitute prejudicial error.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



79 Cal.App.2d 800

EDWARDS et al. v. McCORMICK et al.

Civ. 15490.

District Court of Appeal, Second District, Division 1, California.

May 21, 1947.

Hearing Denied July 17, 1947.

1. Automobiles ⇐245(6, 72)

In action for death of pedestrian who was struck by automobile while crossing street, negligence of defendant and contributory negligence of pedestrian were questions of fact for jury. Vehicle Code, § 560.

2. Appeal and error ⇐1001(1)

Verdict for defendant, in action for death of pedestrian who was struck by automobile and killed while crossing street, was sustained by substantial evidence and was binding on appeal. Vehicle Code, § 560.

3. Automobiles ⇐245(72)

In action for death of pedestrian who was struck by automobile and killed while crossing street, where under all the evidence both negligence and contributory negligence were questions of fact for jury, neither a presumption of due care on the part of the pedestrian nor any right to assume that automobile driver would yield the right of way could alter the situation or do more than merely raise a conflict in the evidence. Vehicle Code, § 560.

4. Automobiles ⇐206

A pedestrian may not blindly rely on right of way or insist on it in the face of obvious danger. Vehicle Code, § 560.

5. Automobiles ⇐243(17)

In action for death of pedestrian killed by automobile while crossing street, where plaintiff's attorney had inquired whether witnesses had smelled any liquor on pedestrian's breath, admitting defendant's evidence that pedestrian had visited a restaurant where beer was served and two bars was not error, especially where proof showed merely that pedestrian had drunk one glass of beer. Vehicle Code, § 560.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Ethel D. Edwards and others against Guerdon E. McCormick and others for damages resulting from an automobile accident. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Henry G. Bodkin and Bodkin, Breslin and Luddy, all of Los Angeles, for appellants.

Parker, Stanbury & Reese, Harry D. Parker, Raymond G. Stanbury, Richard E. Reese, and White McGee, Jr., all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by plaintiff from the judgment following a verdict for defendant in an action for damages resulting from an accident.

The facts briefly are as follows: Defendant was driving east on Olympic Boulevard in Los Angeles about midnight; Olympic Boulevard is a four-lane highway with a double white line in the center thereof and a single white line dividing the two lanes of traffic in each direction east and west. Defendant was driving east on

Olympic in the southern lane; there was little traffic; Stephen Louis Edwards crossed Olympic on the east side of Amalia Street from the northeast corner of Olympic and Amalia to the southeast corner; while so doing he was struck by defendant's car and killed. Clyde S. Leaker, who happened to be following about one hundred feet behind, testified that defendant's car was traveling about thirty miles an hour. Leaker's description of the accident is in part as follows:

"Q. As you were in Atlantic Boulevard did you observe any one at the northeast corner of Amalia and Olympic? A. Yes, I did. There was a pedestrian there, walking south.

"Q. Walking south? A. Yes.

"Q. Did you see him enter the street? A. I saw him—first saw him just about the time he stepped off of the curb into the street.

"Q. Did you observe the manner in which he walked? A. Well, it was quite a brisk pace—yes. He was walking erect and fairly brisk. Not fast, but walking right along. * * *

"Q. Now, how far, if at all, was this man, the man who was killed, how far was he across that highway when you noticed any change in his speed? A. He was within about 3 feet of the southerly white line. About 3 feet north of the southerly white line, approximately.

"Q. Approximately 3 feet—A. North.

"Q. Of the white line? A. Yes.

"Q. In other words, he had walked that distance in the same brisk walk he had been going before, is that the idea? A. Yes. * * *

"Q. By Mr. Bodkin: At that time did the McCormick automobile slow down at all? A. No.

"Q. He didn't slow down? A. No. The red taillights did not come on at all until after the accident.

"The Court: What was that answer? (Answer read.)

"The Witness: By that I mean the brake lights—stop lights.

"By Mr. Bodkin: Then what did the man do about going across? A. The pedestrian began to run at that point, took about possibly one running step before he got in the path of the car, and he was more or less screened from my view by the car at that time. Shall I continue? The next I saw him his feet went up over the top of the car from the right hand side of the car."

Defendant testified:

"I didn't see the man until the impact" and further:

"Q. You are positive you had not seen Mr. Edwards walking that distance from the center line down to a distance of about three or four feet south of the white line? A. No, sir.

"Q. And as you approached that part of the highway you drove right along here in your automobile, crossing Amalia Street, you were looking straight ahead, were you not? A. Yes, sir.

"Q. And your lights extended at least to the center of the highway, didn't they? A. I couldn't say on that, sir, how far they extended.

"Q. Do you know what prevented you from seeing this man right in front of your car? A. I do not, sir.

"Q. In other words, you just didn't see him, is that correct? A. I did not see him."

Appellant contends in substance that deceased was free from contributory negligence as a matter of law and that, "the court erred in refusing to instruct the jury as requested by plaintiffs that defendant was guilty of negligence as a matter of law."

Appellant argues that the judgment cannot be sustained because, "there is no evidence of contributory negligence on the part of deceased, if the defendant is shown to have been guilty of negligence which was aproximate cause of the death, for under such circumstances plaintiffs are entitled to the presumption that the deceased obeyed the law." It is further argued in substance that defendant's failure to yield the right of way was negligence per se and that this act on the part of defendant was the "sole cause of the death of deceased."

It is pointed out in reply that, "Respondent was traveling at a very moderate rate

of speed—twenty-five to thirty miles per hour. He was on a wide, paved street that was carrying little traffic. Under all the evidence, he stopped within twenty-four to forty-five feet after seeing the deceased and without leaving skid marks. He was observing the street and intersection ahead of him as he approached the point of impact. There was nothing about his conduct that could reasonably be said to have been negligent, unless it be his failure to see the pedestrian before he did. In this connection it should be noted that the deceased was wearing dark clothes, and further that there was testimony that the sky was somewhat overcast or cloudy. The light on the northeast corner, from which the deceased started out, was hooded."

The recent case of Satterlee v. Orange Glen School District of S. D. Co., Cal.Sup., 177 P.2d 279, appears to be in point. In that case, which involved an automobile collision and an alleged violation of the Vehicle Code, the court, quoting from Scalf v. Eicher, 11 Cal.App.2d 44, 54, 53 P.2d 368, said: "Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where '* * * the court is impelled to say that from the facts reasonable men can draw but one inference * * * .'" [177 P.2d 284] It was therefore held proper for the trial court to refuse a requested instruction that plaintiff's violation of the Vehicle Code provisions relating to right of way constituted negligence, where such instruction did not tender the issue whether the circumstances were such as to excuse violation. There was a similar holding in Combs v. Los Angeles Railway Corp., Cal. Sup., 177 P.2d 293.

[1, 2] In the instant case, as commented upon in respondents' brief, "It was for the jury to decide whether respondent's failure to see the deceased was a negligent failure. His failure to yield the right of way arose from his failure to see the pedestrian before he did; the two are inextricably intertwined. Hence it would have been an invasion of the province of the jury for the court to have laid down an inflexible rule that if respondent did not yield the right of way he was negligent as a matter of law." Under the evidence disclosed by the record, negligence and contributory negligence were questions of fact and not of law. The jury by its verdict resolved such questions against the appellants' contentions and there is substantial evidence in support of the verdict and judgment. Under such circumstances there can be no interference by an appellate tribunal.

[3, 4] The appellants insist that "The verdict and judgment are against the law, in that deceased had a right to assume defendant would obey the law (and yield the right of way), and in that deceased being confronted by a sudden peril he was not guilty of contributory negligence in attempting to pass in front of defendant's automobile." It is also argued that "plaintiffs are entitled to the benefit of the presumption that the deceased obeyed the law in that he exercised ordinary care for his own safety and therefore the verdict was against the evidence if the defendant was guilty of negligence." These contentions, however, proceed on the assumption that the defendant was, and the deceased was not, guilty of negligence in the situation presented. And, as already indicated, such matters involve questions of fact, not of law. Neither a presumption of due care on the part of the deceased, nor any right to assume that respondent driver would yield the right of way, can alter this situation—or, in fact, do more than merely raise a conflict in the evidence. As pointed out in respondents' brief, "It is clear that a pedestrian has no privilege of relying on right of way blindly or in the face of obvious danger." Fischer v. Keen, 43 Cal. App.2d 244, 110 P.2d 693; Reed v. Stroh, 54 Cal.App.2d 183, 128 P.2d 829.

[5] Reversible error is predicated upon the admission of evidence to the effect that, previous to the accident, "the deceased had visited a restaurant where beer was served and two bars." Appellants' argument is that this evidence should have been excluded on the ground that it was merely circumstantial and was introduced "with the sole intent of prejudicing plaintiffs in the eyes of the jury." The record indicates, however, that plaintiffs' attorney, on the direct examination of various witnesses,

brought up the issue of possible intoxication by inquiring whether the witnesses had smelled "any liquor on his breath." The matter of intoxication does not appear to have been an improper subject of inquiry, and in any event, as mentioned in the briefs of both parties, "respondent was only able to prove that Mr. Edwards had the customary one glass of beer." Under these circumstances, no reversible error is apparent.

The instructions given, when viewed as an entirety, do not appear to have been prejudicially erroneous. Among other things it is to be noted that Section 560 of the Vehicle Code, providing that the driver of a vehicle shall yield the right of way to a pedestrian, etc., was read to the jury verbatim. To have declared that the driver in this case was, as a matter of law, guilty of negligence, would, under the evidence, have been an unwarranted invasion of the province of the jury.

No error appearing in the record, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



79 Cal.App.2d 392

PAPPAS et al. v. DELIS et al.

Civ. 3553.

District Court of Appeal, Fourth District, California.

April 29, 1947.

Rehearing Denied May 27, 1947.

Hearing Denied June 26, 1947.

1. Pleading ⇐376

Where defendant, instead of denying allegation in plaintiff's complaint, affirmatively alleged the same fact in his answer, the fact was admitted and no evidence was necessary.

2. War ⇐4

Sellers were not precluded from recovering balance due from buyer under contract for sale for $16,000 of 40 acre crop of growing onions to be harvested by buyers, on ground that purchase price of crop was contrary to Office of Price Administration regulations, and contract therefore void on its face, since quantity of onions produced may have been such that contract price was far below maximum prices. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.

3. War ⇐4

In action by sellers against buyer to recover balance due under contract for sale of 40 acre crop of growing onions, buyer had burden of proving his defense that the contract was in violation of Office of Price Administration regulations and therefore void. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by George P. Pappas, Evangelia Pappas and Gus Kavalos, doing business under the fictitious name of Pappas & Co., against Nick Delis and others to recover the balance of the purchase price of a 40 acre crop of growing onions sold by plaintiffs to the named defendant. From a judgment for the plaintiffs, the named defendant appeals.

Affirmed.

William E. Ferriter, James C. Purcell and William Petros, all of San Francisco, for appellant.

Aynesworth & Hayhurst and John J. Gallagher, all of Fresno, for respondent.

BARNARD, Presiding Justice.

Under a written contract dated September 1, 1945, the respondents sold a 40-acre crop of growing onions to the appellant. The purchase price was $16,000, of which only $1,000 was paid. In accordance with the understanding of the parties the appellant harvested the crop at his own expense sometime during the month of October. This action was brought to recover the balance of the purchase price. Rely-

ing on the defense that the purchase price of this crop was contrary to OPA regulations, the appellant introduced no evidence other than to bring out, upon cross-examination of the respondents' witnesses, that at the time of the sale the parties did not know how many onions there would be in this field and that the OPA rules and regulations were not discussed by them. The court found in all respects in favor of the respondents, giving judgment for the full amount prayed for, and this appeal followed.

The appellant's sole contention is that this transaction violated the provisions of the Emergency Price Control Act of 1942, Public Law 421, 77th Congress, 2nd Session, 56 Stat. 23, as amended, 50 U.S.C.A. Appendix, § 901 et seq., and the provisions of Revised Maximum Price Regulation 271 issued by the Office of Price Administration pursuant to the authority given thereby, and that it follows that the contract entered into between these parties was illegal and void.

The question presented depends upon the applicability, meaning and construction of Revised Maximum Price Regulation 271, relating to the sale of potatoes and onions. In a similar case the United States District Court, Southern District, Northern Division George J. Barnett v. Atlantic Commission Company, Inc., 233 Civil,[1] held that these OPA regulations were not intended to be applicable to a sale of growing crops in the field. In that case, the court pointed out that these regulations evidenced no intention to cover a growing crop as such, where the harvesting was to be done by the purchaser, where additional labor was called for, and where the factor of labor constituted an unknown quantity but one without which a price ought not to be fixed; and further pointed out that if the OPA intended these regulations to cover such a situation they could and should have directly so provided.

A careful reading of the regulations here in question (RMPR 271) strongly confirms the holding in the case just cited that they were not intended to cover the sale of growing crops in the field where the expense of harvesting is to be paid by the buyer and where many other factors may be involved, including further expense of cultivation and various matters which may interfere with and affect the production of a crop.

The provisions of RMPR 271 may be briefly reviewed in so far as material here. Article I, Sec. 1, covering applicability, provides that "This regulation establishes maximum prices for all sales of white flesh potatoes and dry onions." The expression used, "dry onions", would seem to be intended to mean onions after they are harvested and have become a commodity, and not while they are growing or still in the ground. Section 7 of Article I contains a provision forbidding the sale of onions at higher than maximum prices established by this regulation, and will be later referred to. Section 8 contains certain definitions. No. (3) defines a "country shipper" as meaning any person, including a grower, who makes sales from a farm or other country shipping point to any other person. No. (10) defines "country shipping point" as meaning the farm or other place near the producing area from which onions are sold or delivered or prepared for sale, and further provides that "prepared" includes, among other things, "harvesting". The only reasonable construction of these provisions is that while a country shipper includes a grower, and while a country shipping point includes a farm, the person making the sales who is covered by the regulations is the person who harvests the crop. These provisions rather clearly show they were intended to cover harvested potatoes and onions and not growing crops. Article II is entitled "Maximum Prices For Table Stock Potatoes and Onions". This also carries with it the idea of harvested potatoes and onions rather than growing crops. This idea is confirmed by the provisions contained in Article II. Section 9(a) thereof provides "If you are a country shipper your maximum prices f.o.b. country shipping point are established in Article V, section 24 and section 25". Article V, section 24, relating to onions, has certain maximum prices for certain months and certain areas, all relating to dry onions, being f.o.b prices in sacks or in bags. It is

[1] No opinion for publication.

significant that a differential in price is here provided where certain things are furnished by the buyer, but none covering the expense of harvestng and completing cultivation when done by the buyer. Article II, Sec. 9(h) (1) further provides that every country shipper making a sale to any person shall either furnish an invoice or shall attach a label to each sack of onions on which shall be stated the state in which the onions were grown and the year and month of the sale. This is inconsistent with the sale of a growing crop in the field. Article II, section 9, further gives several "examples." Example 2 is that a country shipper in Modoc County, California, who wishes to sell unharvested potatoes to be harvested in September, 1943, should turn to Article V, section 24, Table 3, to find the maximum price allowed and then states: "You may not sell unharvested potatoes at a per-acre price because you must know the yield before you can figure the price per cwt." This last provision is the one mainly relied upon by the appellant, who contends that it is also applicable to onions and that it is a part of the regulation itself, having the effect of law. Assuming that this last provision would also apply to onions it may not be taken out of its context. It is perfectly clear from the context that this provides that the grower, who is to become a country shipper within the meaning of the regulation, may not sell unharvested potatoes which he intends himself to harvest, at a price above the maximum set. This is clearly intended to prevent a violation of the act by selling the potatoes before they are harvested and then harvesting and delivering them himself. However, there is nothing in this provision which changes the meaning and effect of the entire regulations contained in RMPR 271, which are clearly confined to dry onions as a commodity after they are harvested and not to growing crops in the field. This view is confirmed by another set of regulations of the Office of Price Administration contained in MPR 426, which is the general regulation covering the sale of fresh fruit and vegetables. This regulation contains several provisions to the effect that no person may purchase acreage of certain listed commodities at a price which would result in a price higher than the maximum price allowed unless that person operates a packing and shipping plant for that commodity. Not only would it appear that a growing crop of onions was intentionally omitted from these provisions, but if it was intended to be included there is nothing here to show that the appellant, whose business was that of a produce dealer, did not regularly operate a packing and shipping plant for onions.

[1] In reply to the proposition that RMPR 271 was not intended to apply to growing crops the appellant contends first that example 2 given under Article II, Section 9, as above set forth, shows that it was so intended. This contention has already been sufficiently covered. The appellant then contends that there is no evidence here to support the finding that the sale here made was one of a growing crop. Not only does it appear that the parties intended that the appellant should harvest this crop, but it appears that he did harvest it more than a month after the sale took place. The only reasonable interpretation of the written contract is that the appellant, as buyer, assumed all hazards incidental to the continued growing of this crop and assumed any possible danger from pests or any other matters which might have affected the size or condition of the crop which would eventually be harvested. Moreover, the complaint alleged that on September 1, 1945, these parties "entered into an agreement in writing, wherein and whereby plaintiff sold to defendants, and defendants purchased of and from plaintiffs, a 40-acre field of growing onions—". Instead of denying this allegation the appellant, in his answer thereto, affirmatively alleged that on this date these parties "did enter into an agreement, wherein and whereby plaintiff sold to the defendant Nick Delis, and the defendant purchased of and from the said plaintiffs, a 40-acre field of growing onions." This fact being admitted no evidence was necessary.

[2] If it could be assumed that the provisions of RMPR 271 could be applicable to the sale of growing crops it does not here appear that the transaction here in question was illegal on its face and, therefore, void.

The appellant contends that the entire contract was illegal and void from its inception, as a matter of law, and without the necessity of introducing any evidence because section 7 of Article I contains a prohibition against sales above the maximum prices fixed in this regulation. Section 7 provides that "On and after May 25, 1943, regardless of any contract or other obligation, no person shall sell or deliver and no person, in the course of trade or business, shall buy or receive potatoes and onions at prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing." The provision that regardless of any contract no person shall sell or deliver and no person shall buy and receive onions at prices higher than the maximum prices established would seem to be intended to declare that regardless of contract any prices agreed upon which were above the maximum prices allowed would be illegal, rather than to declare that the contract itself was illegal and void. The purposes of the act contemplated the making and carrying out of sales of such commodities, and the prohibition referred to seems to have been directed at any excess over the maximum prices allowed while still recognizing the contract, and not to the end of creating chaos by preventing the raising and selling of products through penalizing an ignorant farmer in dealing with a produce dealer, by depriving him of all returns from his crops, in the event of an accidental or incidental violation of the strict provisions of numerous ambiguous and intricate regulations. Moreover, sections 20 and 21 of Article III of RMPR 271 provide for modification of the prices fixed on proper application therefor. It cannot be said that a particular contract is illegal and void upon its face when it does not appear whether or not a proper modification has been applied for and granted. Further, it does not appear that the appellant did not regularly operate a packing house for this commodity, which may have called for the application of another exception to these regulations.

Not only does it not appear upon the face of this transaction that it was illegal and void, but there is no evidence in the record from which the court could have found that the contract was illegal or that it was in violation of these regulations. The appellant harvested and removed these onions and is the only one who knew or could have produced evidence as to the quantity of onions which was eventually produced and taken by the appellant by virtue of this sale. He failed to produce any evidence as to this fact, and all presumptions are in favor of the judgment and not against it. For anything that here appears the quantity of onions produced and taken by the appellant may have been such that the contract price agreed upon was at a rate far below the maximum prices provided for in RMPR 271, assuming that the provisions of that regulation were applicable and material here.

[3] The plain situation is that the appellant has failed to meet the prima facie case made by the respondents and has failed to sustain the burden of proof resting upon him. Basler v. Sharp & Fellows Co., 73 Cal.App.2d 480, 166 P.2d 403; Balfour v. Heuer, 77 Cal.App.2d 227, 175 P.2d 55; Thacker v. American Foundry, 78 Cal.App.2d 76, 177 P.2d 322; Gelb v. Benjamin, 78 Cal.App.2d 881, 178 P.2d 476.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



BACON et al. v. BACON et al. *

Civ. 3569.

District Court of Appeal, Fourth District, California.

May 23, 1947.

Rehearing Denied June 13, 1947.

Hearing Granted July 17, 1947.

1. Attorney and client ⇨106

The relation of attorney and client is of the most confidential character and demands full disclosure and absolute fair dealings on the part of the attorney.

* Subsequent opinion 194 P.2d 697.

2. Trusts ⇐107

Usually the burden of proof rests on the person asserting fraud, but where one bases a claim on a contract obtained from a person to whom he stands in a relation of trust and confidence, he must prove that he exhibited abundant good faith which removes all doubt respecting the fairness of the contract.

3. Attorney and client ⇐26
Trusts ⇐305

In action by beneficiaries of trust against trustee and his attorney to require defendants to account for $5,000 which was paid to trustee by third persons for "expenses" preparatory to execution of oil lease by trustee to third persons, burden of trustee and his attorney of proving that he administered the $5,000 fund economically and reasonably, as was his duty, was on the trustee.

4. Attorney and client ⇐26
Trusts ⇐305

In action by beneficiaries of trust against trustee and his attorney to require defendants to account for $5,000 which was paid to trustee by third person for "expenses" preparatory to execution of oil lease by trustee to third persons, evidence was insufficient to sustain burden on trustee and his attorney to establish that they economically and reasonably administered $5,000.

5. Appeal and error ⇐762

The rule that the District Court of Appeal may overlook a proposition raised for the first time in an appellant's reply brief is not mandatory.

6. Appeal and error ⇐762

Where question of presumptive fraud was vital to a fair determination of the rights of the parties, District Court of Appeal considered the question, though it was raised for the first time in the appellants' reply brief.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Joseph C. Bacon and Robert H. Bacon against Thomas P. Bacon and Joseph Wahrhaftig for an accounting, to cancel a certain assignment to Joseph Wahrhaftig, and to compel reconveyance of properties to plaintiffs. From a judgment for the defendants, the plaintiffs appeal.

Judgment reversed.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for appellants.

Matt Wahrhaftig and McKee, Tasheira and Wahrhaftig, all of Oakland, and Kendall, Howell & Deadrich, of Bakersfield, for respondents.

MARKS, Justice.

This is an action for an accounting, to cancel a certain assignment to Joseph Wahrhaftig, an attorney at law who represented the Bacons in litigation, and to compel the reconveyance of properties to plaintiffs. Defendants had judgment and this appeal followed.

For brevity we will refer to Joseph C. Bacon as Joseph, to Robert H. Bacon as Robert, to Thomas P. Bacon as Thomas, to Joseph Wahrhaftig as the attorney, and the assignment or agreement between Thomas P. Bacon and Joseph Wahrhaftig as the assignment.

Joseph, Robert and Thomas were the sons of Frank C. Bacon, deceased, whose estate was probated in Los Angeles County. Under the decree of distribution they, with others, received various undivided fractional interests in certain of the properties of the estate. They each received interests in Sections 21, 27 and 35, Township 28 South, Range 20 East, M.D.B. & M. in Kern County, containing about 1920 acres of land. This was prospective oil bearing land and furnishes the chief cause of this litigation. The various percentages of ownership in this property are stated as follows: Joseph, 13.96; Robert, 28.04; Thomas, 23.12; Ida Bacon, 2.91; Pearl Bacon, 3.485; Faith Bacon, 3.485; Dorothy Morris, 4.166; J. Burris Mitchel and B. Milo Mitchel, 4.166; Ashby Downs Orphanage of Bristol, England, 4.166; McAuley Cremorne Mission, 4.166, Bible Rescue Mission, 4.166, and Salvation Army, 4.166.

Joseph had fractional interests in properties in three other counties in California which do not require particular notice at

this time although these interests and their disposition should receive consideration in any future accounting.

On November 28, 1938, Joseph executed a general power of attorney appointing Thomas his attorney in fact, but limited to his "entire right, title and interest in and to the real and personal property * * *" distributed to him in the probate proceeding of the estate of his father. On December 17, 1938, he conveyed the same property to Thomas.

On March 16, 1942, Thomas and Joseph executed an agreement by which it was established that Thomas held the property conveyed to him by Joseph and a small interest owned by Dorothy Morris in trust for them. On the payment to him of $1,000 Thomas agreed to reconvey to Joseph and Dorothy Morris the interests in the properties conveyed to him by Joseph when a certain quiet title and partition action involving the Kern County property was settled and terminated. This agreement authorized Thomas to lease the Kern County property for oil for the benefit of all co-owners and provided that Joseph and Dorothy Morris should benefit and be entitled to receive back their respective proportionate shares "free and clear of any claim of" Thomas and receive their respective proportionate shares of all net bonuses, rents, royalties or other values as their respective interests bear to the whole estate. This instrument concludes as follows: "It is further agreed by the parties hereto that this agreement settles all of their differences and disputes of every kind and character and this agreement supersedes all other agreements between the parties and is binding upon the parties and their Administrators, Executors, heirs and assigns and personal representatives."

Plaintiffs argue that the quoted paragraph revoked the general power of attorney given Thomas by Joseph. From the view we take of the case we regard this question as unimportant at this time because the duties and obligations of an agent and a trustee do not differ materially as they are involved here.

On December 1, 1943, Robert conveyed his interest in the Kern County property to Thomas. From other documents there would seem to have been another prior conveyance of this interest.

On December 17, 1942, Robert and Thomas executed a contract reciting the conveyance of Robert's interest to Thomas in consideration of Thomas paying a judgment against Robert in the sum of $1,782, and advancing the necessary legal expenses and costs to clear the title or effecting the partition, sale or lease of the Kern County property. Thomas agreed to reconvey the property on repayment by Robert of the money expended by Thomas in paying the judgment "and the pro rata costs and legal expenses contracted or expended in connection with said property."

Another agreement between the same parties bears date of the 1st day of December, 1943, in which Thomas agreed to hold the interest of Robert in the Kern County property in trust for him. Thomas agreed to reconvey the property to Robert, upon demand, upon the termination of the action already mentioned; that in so reconveying, the property would be free from any claim or demand of Thomas "except the actual costs and legal fees involved in said partition and quiet title proceeding." The document empowered Thomas to lease the Kern County property for oil "and enter into agreements for the operation of said property under such lease for the benefit of all co-owners of said property."

Thomas negotiated the sale of a two per cent of Robert's landowners royalty to T. E. Adams for $10,000 out of which he paid the amount of the judgment already mentioned. We presume the balance was paid to Robert as there is no complaint made concerning that transaction.

Thomas reconveyed the remaining interest to Robert but subject to the contract and assignment to the attorney which will be considered later.

The title to the Kern County property was clouded in several ways. Thomas finally succeeded in obtaining title as trustee to various interests so that with his own he held legal title to 91.66 per cent of the ownership. He employed the attorney to bring an action to quiet title and partition the Kern County property. The attorney associated with him a firm of Bakersfield attorneys as local counsel. It was stipulated

at the trial that the files in that action might be considered and referred to by counsel and the trial judge in the instant case. They were not introduced in evidence so they are not before us but we may assume that the action was brought to a successful conclusion.

R. E. Bering and T. E. Adams were partners in the business of acquiring and developing oil properties. They became interested in the Kern County property involved here and unsuccessfully spent time and money in attempting to clear the title so they could obtain an oil lease on it. They were so desirous of obtaining such a lease that they finally concluded negotiations with Thomas for one. He was represented throughout these proceedings by the attorney who was familiar with the various ownerships and knew that Thomas was acting as trustee in representing various owners of fractional interests.

The first document in point of time we have before us concerning these negotiations is a contract between Thomas and Bering and Adams dated February 20, 1942. It recited that Thomas was then the legal owner of 66.43 per cent of the total ownership of the property; that the parties were desirous of entering into an oil lease on the property. It was agreed (1) that Bering should pay Thomas "the sum of $5000.00, and by execution of this agreement Bacon acknowledges receipt of said sum"; (2) that Thomas should execute an oil and gas lease on the property to Bering on what ever interest in the property he had or should thereafter acquire; (3) that Thomas should forthwith at his own cost and expense institute and prosecute an action to partition or quiet title to the property. The other provisions of the contract are unimportant here.

While the purpose of the $5,000 payment was not stated in the contract Bering testified that it was paid solely for the purpose of paying the expenses of partitioning or quieting title to the Kern County property; that if all the money was not used for that purpose neither he nor Adams would be entitled to any repayment if satisfactory title was obtained for the purposes of their lease. This testimony as to the purpose of the payment was exactly corroborated by Thomas and the attorney. The three witnesses testified that no bonus or anything of value was paid for the lease subsequently executed under the date of December 2, 1943.

An oil well was drilled on the property to a depth of something over 11,000 feet where an oil sand was found. Owing to mechanical difficulties the well was not placed on production but it is suggested that the drillers would continue their operations and probably could bring in a producing well.

The attorney brought the action to partition and to quiet title to the Kern County property. While Thomas was the plaintiff in that case the attorney was fully aware of the fact that he was trustee for plaintiffs and other persons so the attorney occupied the position of representing the interests of not only Thomas but the various beneficiaries under the trust. He admitted as much while a witness during the trial. Therefore he owed the beneficiaries the same duty and obligation that he owed Thomas.

Thomas expended $5,184.89 as expenses and attorneys fees in the Superior Court action. Of this amount the attorney received $500 listed as "Pro rata of expense of trip East to see New York and Chicago charities," and $3,500 attorneys fees. Plaintiffs attack the second item as an unreasonable fee not supported by the evidence.

The oil lease provided for a 1/6 royalty; that 1/24 of all royalties and rents be paid to J. Burris Mitchel and B. Milo Mitchel and that 23/24 thereof be paid to the attorney "for the credit of the other Lessors executing this lease in proportion to their interests * * *."

Under date of January 25th, 1944, Thomas and the attorney entered into what is termed an "operating agreement." After numerous recitations, this agreement provided:

"Now, therefore, first party (Thomas) hereby authorizes second party (the attorney) to deduct from all royalties he receives, 5% of such gross amount, if paid in cash, or 5% of the gross amount resulting from the sale of oil and/or gas if paid in kind as full compensation for his services

in supervising the operation under the terms of said lease for the collection and distribution of royalties in cash or in kind.

"Second party agrees to devote the necessary time and effort to the best of his ability, supervise the operation under the terms of said lease and to collect and distribute the royalties therefrom for the benefit of first party and the trust interest held by first party in cash or in kind for said compensation of 5%." Plaintiffs attack this assignment as unauthorized and unwarranted.

It is clear that Thomas was trustee for plaintiffs here. We do not need to decide the question of whether or not he was also attorney in fact for one or both of them as in either instance he occupied a position of trust with similar duties and obligations resting upon him. The attorney was not only counsel for Thomas but, knowing of the trust relationship, he also represented the beneficiaries under the trust.

[1] "Confidential relations are presumed to exist between * * * principal and agent * * * attorney and client * * * trustee and cestui que trust, * * *" 12 Cal.Juris. 713, Par. 7, and cases cited. The relation of attorney and client is of the most confidential character and demands full disclosure and absolute fair dealings on the part of the attorney. Foster v. Young, 172 Cal. 317, 156 P. 476; Cox v. Delmas, 99 Cal. 104, 33 P. 836.

[2] In Cox v. Schnerr, 172 Cal. 371, 156 P. 509, 512, it is said:

"The burden of proof usually rests upon the person asserting fraud; but, when one bases a claim upon a contract obtained from a person to whom he stands in a relation of trust and confidence, it becomes his task to prove that he exhibited that uberrima fides which removes all doubt respecting the fairness of the contract. * * *

"In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the result of his action."

In Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, at page 149, 80 P.2d 723, at page 734, is the following: "Therefore an agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith, and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof is, upon its face, deemed by law to be fraudulent. * * * In Rubidoex v. Parks (48 Cal. 215), the court (we quote the syllabus) lays down the rule as follows: 'The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; *but in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly.*' (Italics ours.)"

There is no evidence in the record that the fee charged by the attorney in the partition and quiet title action was fair, equitable or just, or was reasonable compensation for his services. There is no finding to that effect. Therefore defendants failed to meet the burden of proof placed upon them by the existence of the confidential relationship.

Counsel for defendants seek to justify the fee on quite a different ground. They argue, and the trial court agreed with them, that the $5,000 was a donation by Bering and Adams made for the sole and specific purpose of clearing title to the oil property; that it was all expended for that purpose; that it is no concern of plaintiffs how the money was expended as they had no interest in it except to benefit by having title to their property cleared.

[3, 4] The simple answer to this argument is found in the findings and judgment. Thomas claimed to have expended more than $5,000 in paying the expenses of the litigation including the $3,500 attorney fee. The trial court so found and rendered

judgment against each plaintiff for his proportionate share of the overplus. Thus plaintiffs are directly interested in the expenditures made and particularly in the attorney's fee, being the largest item, for if the attorney's fee be excessive, and it had been substantially reduced, no such judgment could have been rendered against them.

Further, the $5,000 was not paid to Thomas simply because his name was Thomas P. Bacon, but rather because he was an owner of a fractional interest in the land and also because he held the legal title as trustee to other fractional interests including plaintiffs'. Thus the duty to economically and reasonably administer the fund rested upon him. The burden of proving that he so administered it rested upon him and he failed to meet this burden of proof. Had the expense of clearing the title been less than $5,000, the claim that the balance would belong to Thomas individually would have come with bad grace as it would have permitted him individually to profit from the trust relationship. According to the testimony of Bering neither he nor Adams had any claim on any balance remaining after title was cleared.

There is neither finding nor evidence that the nature of the agreement between Thomas and the attorney was communicated to plaintiffs or either of them or that five per cent of the royalties was a reasonable, fair or just compensation for the services rendered and to be rendered by the attorney.

The evidence in the record shows that the service rendered up to the time of trial were meager. They consisted of thirteen telephone calls to Bakersfield and Los Angeles (defendants claim others but did not particularize them), one trip to Los Angeles, one trip to Bakersfield, and a trip to the Bacon Hills District all to learn of the progress of the drilling operations. The attorney testified that the substance of the information thus obtained by him was communicated to Robert and Thomas.

There is nothing to indicate that the attorney had any special knowledge of the operation of drilling an oil well or that his investigations were prompted by anything other than curiosity and the hope of a person who expected to share in the royalties. There is nothing to indicate that these investigations had any value to the landowners. Thus defendants failed to carry the burden of proof imposed upon them by their confidential relationship with plaintiffs in respect to the fairness of this royalty contract.

[5, 6] Defendants point out that the question of the confidential relationship and presumptive fraud was first raised in the reply brief of plaintiffs and urge that we may overlook it. We are familiar with this rule and realize that it furnishes an easy way to avoid deciding an important and controlling phase of the appeal. We also are aware that the rule is not mandatory and is not always followed. The question of presumptive fraud is so obvious and so vital to a fair determination of the rights of the parties that we prefer to consider it in an equity case of this kind.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



80 Cal.App.2d 78

In re HENSGEN'S ESTATE.
HENSGEN v. NEAL et al.
Civ. 15768.

District Court of Appeal, Second District, Division 1, California.
May 29, 1947.

1. Divorce ⇐327

Where husband and wife were both residents of California and neither was ever in Mexico, but procured divorce by mail, the Mexican court was without jurisdiction and its decree was not entitled to recognition by California courts.

2. Executors and administrators ⇐20(7) Marriage ⇐40(10)

Where undisputed evidence disclosed that, while husband and wife were both residents of California, wife secured a Mexican mail order divorce which was in-

valid for want of jurisdiction in Mexican court of parties or subject matter, and thereafter husband remarried, presumption of validity of second marriage was overthrown and was insufficient to sustain second wife's claim of right to administer husband's estate as against claim of first wife. Probate Code, § 422(1).

3. Divorce ⇐172

A party may be estopped to assert invalidity of a divorce decree secured by or acquiesced in by him, at least when he seeks by such assertion to secure property rights as distinguished from a determination of marital status, even though decree is void for want of jurisdiction.

4. Estoppel ⇐52

Where question in controversy relates to property rights or pecuniary interest of parties, as distinguished from their marital status, doctrine of estoppel is applicable under proper circumstances.

5. Divorce ⇐326

Where issue was which of two women was decedent's widow and thereby entitled to administer his estate, no question of heirship being involved, doctrine of estoppel was not applicable against first wife notwithstanding that, after she secured a void Mexican divorce and after husband remarried, she also remarried.

6. Divorce ⇐327
Executors and administrators ⇐20(7)
Marriage ⇐50(1)

Evidence sustained finding that first wife's Mexican mail order divorce from husband was a nullity, that second wife's marriage to husband was void, and that first wife, rather than second wife, was husband's widow and entitled to administer his estate through a nominee. Probate Code, § 422(1).

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Nicholas Carl Hensgen, deceased. On the petition of Rose Hensgen for letters of administration of decedent's estate, contested by Thelma L. Hensgen Neal and Esther Hensgen. From an order appointing Esther Hensgen nominee of Thelma L. Hensgen Neal, administratrix, petitioner appeals.

Order affirmed.

Newton E. Anderson and Eldon V. McPharlin, both of Los Angeles, for appellant.

A. W. Brunton, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County, appointing Esther Hensgen, nominee of Thelma L. Hensgen Neal (hereinafter called Thelma Hensgen), administratrix of the estate of Nicholas Carl Hensgen, deceased. Rose Hensgen and Thelma Hensgen each claim the right to administer as widow of decedent; and the decision herein turns upon the effect of a decree of divorce granted Thelma Hensgen in Mexico, followed by the remarriage of decedent to petitioner and appellant, Rose Hensgen, and the subsequent marriage of Thelma Hensgen.

Nicholas Carl Hensgen and Thelma Hensgen were married in 1928 and separated at Los Angeles, California, in 1940. As the issue of said marriage two children were born. On December 12, 1940, the husband and wife went to Tijuana, Baja California, Mexico, where they conferred with an attorney and arranged for the wife to secure a "mail-order" divorce. They returned to Los Angeles the same day. On December 17, 1940, in the Civil Court of First Instance, Bravos District, Chiahuahua, Mexico, the wife was granted a final decree of divorce and later that month received a copy of the decree. On December 24, 1940, at Reno, Nevada, the decedent married Rose Hensgen, appellant herein. On April 11, 1941, Thelma Hensgen married a man named Smith in Clark County, Nevada. Nicholas Hensgen died December 24, 1945. About February 1, 1946, Thelma divorced Mr. Smith in Nevada and thereafter married a Mr. Neal.

It is urged by appellant that Thelma Hensgen, having joined as plaintiff in securing the Mexican decree and having taken advantage thereof by remarrying, is estopped to assert the invalidity of the decree for the purpose of claiming an interest in the property of the decedent. It follows,

argues appellant, that in the absence of proof of the invalidity of the Mexican divorce, there remains only the presumption of the validity of appellant's marriage to the decedent, and that therefore she is entitled to letters of administration.

Respondents take the view that since there was no valid divorce, there could be no valid remarriage, and hence no rights could accrue to Rose as widow; and further, that appellant entered into her purported marriage with decedent after learning of the "mail-order" divorce but before Thelma had attempted to remarry, and that as between them, therefore, appellant did not rely upon Thelma's attempted remarriage, and hence, as between them, the elements of estoppel did not arise. In other words, respondents contend that a subsequent remarriage of the first wife cannot give validity to a marriage which is void because the previous divorce of one of the parties thereto was void.

[1] It is conceded that neither of the parties to the Mexican divorce were ever in the State of Chihuahua, Mexico, but procured the divorce by mail through an attorney in Tijuana. Therefore the court in Mexico did not have jurisdiction of the parties or of the subject matter. The decree was invalid and entitled to no recognition by the courts of California. Harlan v. Harlan, 70 Cal.App.2d 657, 660, 661, 161 P.2d 490. We are convinced that the question of estoppel is not determinative of this appeal. The ultimate question involved in this contest for letters of administration was whether appellant as an applicant for such letters was the wife of the decedent at the time of his death. Prob.Code sec. 422, subd. 1.

[2] Upon undisputed evidence, the court found and determined that the Mexican "mail-order" decree of divorce obtained by respondent Thelma Hensgen was invalid because of lack of jurisdiction in the Mexican court over the parties or the subject matter, and that therefore the Mexican "mail-order" divorce decree was entitled to no recognition whatsoever in the courts of California. Appellant's contention that her marriage to decedent is presumed to be valid affords her no comfort upon this appeal, since the presumption of validity of marriage referred to in cases cited by appellant was completely overthrown by the evidence adduced in the instant case.

[3-5] Appellant, however, contends that respondent Thelma Hensgen is estopped from attacking the validity of the former's marriage to decedent. We are not unmindful of the cases holding that a party may be estopped to assert the invalidity of a divorce decree secured by or acquiesced in by him (at least when he seeks by such assertion to secure property rights, as distinguished from a determination of the marital status), even though such decree be void for want of jurisdiction. Harlan v. Harlan, supra; Estate of Davis, 38 Cal.App.2d 579, 585, 101 P.2d 761, 102 P.2d 545; Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193, 194, 93 Am.St.Rep. 631; Brown v. Brown, 266 N.Y. 532, 195 N.E. 186; Chapman v. Chapman, 224 Mass. 427, 113 N.E. 359, L.R.A.1916F, 528; Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423; note 122 A.L.R. 1321; 153 A.L.R. 941 (note); 17 Am.Jur. 575. Neither are we unmindful of the rule that where the question in controversy relates to the property rights or pecuniary interest of the parties as distinguished from their marital status, the doctrine of estoppel is applicable under circumstances properly calling for its application. But the instant proceeding is not of the character first above mentioned. This is not a proceeding to determine heirship. It involves the appointment of an administratrix. The filing of a contest squarely presented to the court the question of determining the marital status of the parties claiming the right of appointment as administratrix, viz., who was the legal wife of decedent at the time of his death? Any estoppel imposed upon respondent Thelma Hensgen would not make valid appellant's marriage to the decedent, and it was the validity of that marriage that was before the court for determination. If appellant was legally married to decedent at the time of his death she was entitled to the letters prayed for. Otherwise, she was not. Furthermore, it might here be pointed out that respondent Thelma Hensgen is not seeking through this proceeding to gain any pecuniary benefit, as is evidenced by the fact that she has nominated respondent

Esther Hensgen for appointment as administratrix, and Esther Hensgen had pending in the probate court her petition for appointment as guardian of the estates of the minor children of the decedent and respondent Thelma Hensgen.

In the instant case the trial court found as a fact upon uncontradicted evidence:

"That the said Nicholas Carl Hensgen, on or about the 12th day of December, 1940, took his said wife, Thelma L. Hensgen, to Tiajuana, Mexico, at which time the said deceased purported to make arrangements for a decree of divorce from the said Thelma L. Hensgen; that at the time said deceased and said Thelma L. Hensgen went to Tiajuana, Mexico, both were residents of the County of Los Angeles, State of California, and both were citizens of the State of California and of the United States of America; that thereafter, to-wit, on the 17th day of December, 1940, the said purported decree of divorce was issued in the State of Chihuahua, Republic of Mexico, purporting to be a decree of divorce dissolving the marriage relationship between the said deceased, Nicholas Carl Hensgen, and his said wife, Thelma L. Hensgen; that neither the said Nicholas Carl Hensgen or the said Thelma L. Hensgen were ever in the State of Chihuahua, Republic of Mexico, and neither the said deceased nor his said wife were present at the time of the granting of said purported decree of divorce;

"That the said Thelma L. Hensgen went to the City of Tiajuana, State of Lower California, Republic of Mexico, on the 12th day of December, 1940, because of threats of the said deceased, Nicholas Carl Hensgen, that if she did not go with him that he would take her children away from her and deprive her of support money for said children; that thereafter, to-wit, on the 24th day of December, 1940, the said deceased, Nicholas Carl Hensgen and the petitioner, Rose Hensgen, formerly Rose Silverman, purported to enter into a marriage in the State of Nevada; * * *."

From the foregoing findings of fact and as conclusions of law, the court found that appellant, Rose Hensgen, "is not now, and never was, the lawful wife of the decedent, and is not now and never was his widow"; that at the time of the death of decedent, respondent Thelma L. Hensgen "was the wife of said deceased, and subsequent to his death became the widow of deceased."

[6] The evidence abundantly supports the findings of the court that the Mexican "mail-order" divorce was a nullity. Such being the case, it follows that the court's finding that respondent Thelma L. Hensgen was the surviving spouse of the decedent and as such entitled to nominate respondent Esther Hensgen to act as administratrix, is equally supported by the evidence.

The evidence supports the findings and the findings support the order made, which should therefore be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.



80 Cal.App.2d 1

ALKUS et al. v. JOHNSON-PACIFIC CO.

Civ. 13339.

District Court of Appeal, First District, Division 1, California.

May 27, 1947.

1. Trial ⇐404(2)

In action by lessors for declaratory relief to determine whether lessee which acquired premises subject in part to government lease and which agreed to pay for all utilities used about the premises was liable for cost of utilities furnished the government, a finding that lessee was not liable under the lease for cost of utilities furnished the government and that whatever expense was incurred by lessors for payment of utilities was the obligation of lessors was a finding of ultimate fact and not a conclusion of law.

2. Appeal and error ⇐907(3)

Where appeal was taken on the judgment roll alone, the District Court of Ap-

peal would presume, under rule of appeal, that judgment roll included all matters material to a determination of the points on appeal, and hence where relevant findings merely found that lessee acquired premises subject in part to government lease, that lessee agreed to pay for all of the utilities used about the premises, and that government was entitled to receive utilities as part of its rental consideration, a further finding of nonliability on lessee's part for cost of utilities furnished government was without support in the record. Rules on Appeal, rule 52; Civ.Code, §§ 1649, 1654.

3. Appeal and error ⇐907(3)

The rule that if a record on appeal does not contain all the papers, records and oral proceedings but is certified by the judge or the clerk or stipulated to by the parties, it shall be presumed in absence of proceedings for augumentation that it includes all matters material to a determination of the points on appeal is applicable to judgment roll appeals. Rules on Appeal, rule 52; Code Civ.Proc. § 961.

4. Appeal and error ⇐597(1)

The rule permitting the reviewing court to impose penalties upon offending attorneys or parties for including in the typewritten or printed record on appeal any matter not reasonably material to determination of the appeal was taken directly from the Federal Rules of Civil Procedure and requires appellants to avail themselves of methods established by the rules for cutting record to matters relevant to points raised on appeal. Rules on Appeal, rule 26(a); Federal Rules of Civil Procedure, rule 75(e), 28 U.S.C.A. following § 723c.

5. Appeal and error ⇐900

Presumptions which the courts have established regulating the matter in which record on appeal should be considered are not matters of substantive law but are merely rules of convenience and constitute adjective or procedural law.

6. Action ⇐66

"Adjective law" is the aggregate of rules of procedure or practice and, as opposed to substantive law, means the rules according to which substantive law is administered.

See Words and Phrases, Permanent Edition, for all other definitions of "Adjective Law".

7. Courts ⇐82

The presumptions which the courts have established regulating the manner in which record on appeal should be considered are purely procedural, were made by the courts, and can be changed by the courts.

8. Courts ⇐85(2)

The rules on appeal cannot themselves, unaided by construction, accomplish their objectives, and the courts must make them effective by liberal and sympathetic interpretation. Rules on Appeal, rules 4(a), 5(f), 6(a), 7(a), 26(a), 52.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Irving N. Alkus and others against the Johnson-Pacific Company for declaratory relief. Judgment for defendant and plaintiffs appeal.

Reversed.

McKee, Tasheira & Wahrhaftig, Ridley Stone, and J. D. Cooper, all of Oakland, for appellants.

Appelbaum & Mitchell, of Oakland, for respondent.

BRAY, Justice.

Appeal by plaintiffs on the judgment roll alone in an action for declaratory relief from a judgment decreeing that "defendant is not liable [to plaintiffs] under the terms or provisions of the lease between the parties hereto for the cost of utilities furnished to the United States Government."

The case arises out of the following facts: Capital Company, a corporation, owned real property in Oakland upon which was a building, a portion of which it had leased to the United States Government, on a year to year basis, the lease to extend in no event further than six months after the date when the President should

declare the termination of the national war emergency. Appellants purchased the property from the Capital Company and received an assignment of the lessor's interest in the lease with the government. After purchasing the property appellants entered into a supplemental agreement with the government, increasing the area leased and the rental to be paid. Under the lease as modified, the government was paying appellants a rental of $435 per month. One of the provisions of this lease required the lessor to furnish to the government "Elevator service, including right of ingress and egress to the freight elevator and stairway, *and adequate water and electricity twelve (12) hours per day.*" (Emphasis added.)

Thereafter, appellants leased the entire property to respondent, for a term of five years at a total rental of $90,000, payable in graduated monthly installments. This lease was made expressly subject to the government lease. Paragraph 31 of the lease to respondent provided: "This lease is made subject to the present occupancy of the top floor of the demised premises and a portion of the first floor, by the United States Army, together with the right of ingress and egress, on a month to month tenancy, at a present rental of $435.00 per month, which rental shall go to and may be collected by the Lessee; or, which rental if paid by the Army to the Lessor, shall be credited and applied upon the rental provided hereunder." Paragraph 15 provided: "Lessee agrees to pay for all the water, fuel, gas, oil, heat, electricity, power, materials and services which may be furnished to or used in or about said premises during the term of this lease and to keep the same free and clear of any lien or incumbrance of any kind whatsoever created by Lessee's acts or omissions."

On November 15, 1944, respondent took possession under the lease, the Army remaining, however, in possession of the portion leased to the government. At and prior to its execution of the lease, respondent did not have knowledge of the terms of the lease to the United States other than the information given in paragraph 31 above quoted, or of the provision in the government's lease requiring the lessor to supply, among other things, water and electricity.

After respondent took possession, the government continued to pay appellants the $435 monthly rental, which rental appellants applied on the rentals payable by respondent. Also, appellants paid the utility bills for the services rendered to the government. Respondent, when requested by appellants so to do, refused to reimburse appellants for the amounts so paid. A controversy arose from appellants' claim that respondent, under its lease, was required to pay the cost of the utilities furnished to the government and respondent's refusal to acknowledge that claim. This suit was then brought by appellants for declaratory relief to determine whether respondent is obligated to pay for such utilities. The court found the facts above set forth, and that under the terms of its lease respondent is not liable for the cost of the utilities furnished the government.

Appellants contend that the findings do not support the judgment, because (1) the finding of non-liability is not a true finding of fact, but a conclusion of law, and the other findings do not support a conclusion of non-liability; (2) if the finding of non-liability is a finding of fact and not a conclusion of law, it is merely a summing up of the other facts found, and as such is contradicted by the other findings and not supported by them; and (3) in no event do the findings support the judgment. Another way of putting it, is that except for the finding of non-liability, appellants claim that there is nothing in the findings which justifies an interpretation of the lease other than appears on its face, namely, the liability of respondent to pay for the utilities supplied the government.

[1] The court, with some few minor exceptions, found the allegations of each paragraph of plaintiffs' complaint were true and correct. It is not necessary to set the findings forth here. Only the portions pertinent to the contentions here will be mentioned. The main controversy on the appeal centers upon the following finding: "IV. * * * and the Court finds that the defendant is not liable under the terms or provisions of the lease between the parties hereto for the cost of utilities furnished to

the United States Government pursuant to paragraph 6 of the said lease referred to in paragraph VI of the complaint, and that whatever expense was incurred by the plaintiffs herein for the payment of said electricity, water or other utilities was the obligation of said plaintiffs and defendant herein is not obligated to reimburse plaintiffs herein for the same." Without this finding there is no support for the judgment, unless the lease can be interpreted as a matter of law contrary to appellants' contention, as there is nothing in the rest of the findings to vary the terms of the lease as they appear on its face.

It is this finding which appellants contend is not a finding of fact but a conclusion of law. As support for their contention appellants cite Wiedenmueller v. Stearns Ranchos Co., 128 Cal. 623, at page 625, 61 P. 374, at page 375, which holds to the contrary, as the court there held that a finding that "plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom * * *" was a finding of fact and not a conclusion of law. It quotes the rule set forth in Levins v. Rovegno, 71 Cal. 273, 275, 278, 12 P. 161: "The line of demarkation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. * * * If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law." Anglo-California Trust Co. v. Collins, 192 Cal. 315, 219 P. 982, 983, held that where there was no express finding in the findings of fact on the question of damages a finding in the conclusion of law "that the plaintiff is not entitled to recover any damages" was a conclusion of law and not a finding of fact. Therefore the findings did not support the judgment. Actually, the decision was based more on the fact that "In any view of the case, the judgment under the findings is inadequate to compensate the plaintiff" than on the question of whether or not this particular finding was a finding of fact or a conclusion of law.

Robinson v. Raquet, 1 Cal.App.2d 533, 36 P.2d 821, 824, held that a statement in the findings of fact that "it is not true that plaintiff has been damaged" etc., was a conclusion of law and not a finding of fact. While there are other cases in California which hold, as the Robinson case, that such matters are conclusions of law rather than findings of ultimate facts, the majority of the cases hold to the contrary. The more prevalent rule is to hold these matters as findings of fact, and not to upset judgments on mere technical determinations as to fine distinctions between ultimate facts and conclusions. Even as far back as Daly v. Sorocco, 80 Cal. 367, 22 P. 211, 212, "that the plaintiff was not the owner" was held to be a finding of fact. Other statements held to be findings of fact are as follows: "that plaintiff did not rescind said sales * * *." Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 873, 40 Am.St.Rep. 57. "That Elizabeth Zink has 'no right, title interest, claim or *lien* of, in or to or against, any of the land or premises * * *.'" Dan v. Zink, 112 Cal. 91, 93, 44 P. 331, 332. Spring Street Realty Co. v. Trask, 126 Cal.App. 765, 15 P.2d 195, was a suit brought for declaratory relief in the interpretation of a lease. "The trial court made its findings in favor of the plaintiff in the language of the lease. The defendant now asserts that those findings are conclusions. We think not. They were the ultimate facts." 126 Cal.App. at page 769, 15 P.2d at page 196. A finding that plaintiffs cancelled a sales contract because of its violation by defendants, and that it was not true that plaintiffs have failed and refused to pay defendants any commissions due "in the manner provided in the said contract" was held to be a finding of fact. Palmer v. Fix, 104 Cal.App. 562, 567, 286 P. 498, 499. In this case the court refers to Butler v. Agnew, 9 Cal.App. 327, 330, 99 P. 395, to the effect "that in case of a doubt as to which class the findings belong, the doubt should be resolved in favor of the judgment." 104 Cal.App. at page 568, 286 P. at page 500. A determination that the property in question is community property rather than separate property (Estate of Woods, 23 Cal.App.2d 187, 72 P.2d 258); a finding that a guaranty was

not supported by any consideration (Rusk v. Johnston, 18 Cal.App.2d 408, 63 P.2d 1167); a finding that there has been no material change in circumstances, and that it is for the best interests of the child that it be returned to the care and custody of its father (Jordan v. Jordan, 58 Cal.App.2d 371, 135 P.2d 416), were held to be findings of fact. See other cases listed in 24 Cal.Jur. 927, and 53 Am.Jur. 786. And, of course, allegations of negligence and contributory negligence have long been held to be allegations of ultimate facts and not conclusions of law.

The ultimate fact which the court below was called upon to determine was whether or not respondent was obligated under the terms of the lease to pay for the public utilities furnished the Army. It was the only disputed issue before the court.

[2] Appellants' second contention is the exceedingly narrow one that, assuming paragraph IV to be a finding of fact, it shows on its face that it is merely a summation of the preceding findings and as the preceding findings merely find the written terms of the contract there is no basis for finding IV, which is contrary to the terms of the contract. On this point appellants rely upon three cases: (1) Geer v. Sibley, 83 Cal. 1, 23 P. 220. In that case the court made a finding expressly stating that it was based on the preceding findings. "From the foregoing facts" the court made the finding objected to, and which the higher court held was not supported by the "foregoing facts." (2) In People v. Reed, 81 Cal. 70, 76, 22 P. 474, 475, 15 Am.St.Rep. 22, the contested finding states that "by the acts, facts, and matters above found" the premises were dedicated as public streets. The higher court held that the acts, facts and matters upon which that finding was based did not support it. The third case, Noble v. Beach, 21 Cal.2d 91, 130 P.2d 426, does not give the exact wording of the finding in question, but does hold that the probative facts found would not justify this finding as an ultimate fact. These cases all depend upon the particular language of the findings.

Appellants contend that the language used by the court, "under the terms or provisions of the lease," shows that the court was summing up the preceding findings. This does not necessarily follow. The form of the finding here is quite similar to the form of the finding in Transportation Guar. Co. v. Jellins, 29 Cal.2d 242, 174 P.2d 625, 626. There the court found that "in and by said contract 136, plaintiff agreed" to keep a certain truck insured. Whether or not the contract required plaintiff to keep that truck insured was the main issue in the case. The Supreme Court upheld the finding.

An examination of finding IV reveals no basis for holding that it is a summation of the preceding findings, unless Rule 52, Rules on Appeal, applies to this appeal. So it becomes necessary to consider this rule, for that reason, and also in connection with appellants' third point, namely, that in no event do the findings support the judgment. This is a most serious question. The interpretation of the lease in this case depends upon which rule we follow. If the rule as set forth in innumerable cases and last cited in Transportation Guar. Co. v. Jellins, supra, 29 Cal.2d 242, 174 P.2d 625, 627, namely, "on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received", applies here, then, as it is possible that the word "rental" under certain circumstances might mean "net rental," this court must presume that there was parol evidence introduced in the lower court which showed that the word "rental" as used in paragraph 31 of the lease was intended to mean "net rental" after deduction of cost of the utilities. On the other hand, if Rule 52 applies, then we must presume that the judgment roll contains everything that was before the court on the subject, and the meaning of the lease must be determined solely from an examination of its terms.

For the reasons hereinafter set forth, we are applying Rule 52 to this appeal. Therefore this court must presume that the judgment roll "includes all matters material to a determination of the points on appeal." These findings, without the aid of the old presumptions, merely find, so far as the question here is concerned, that the parties entered into the lease, the important clauses of which provide, "This lease is made subject to the present occupancy * * * by the United States Army * * * at a present rental of $435.00 per month, * * *."

"Lessee agrees to pay for all the water, fuel, gas, oil, heat, electricity, power, materials and services *which may be furnished to or used in or about said premises,* * * *" and that the lease with the Army provides, "The lessor shall furnish to the Government, *as part of the rental consideration,* * * * Elevator service * * * *and adequate water and electricity* * * *" (Emphasis added.) A mere reading of these clauses can bring but one conclusion, namely, that respondent, as a part of the rental consideration, agreed to provide the utilities for the building, including the Army's portion, and that appellants were to receive from the Army the sum of $435 per month — no more, no less.

The utilities provision is not restricted to utilities used by the respondent. It expressly applies to all utilities used in the building or premises. There is nothing ambiguous about the terms in the lease; they are in plain, simple English. The fact that respondent did not know of the exact terms of the lease to the government, is immaterial. It leased the *entire* premises and not just the portion it was to occupy physically. The words of the contract can be given no other reasonable interpretation than that they mean just what they say.

If the court interpreted the lease upon its terms alone, plus the fact that the respondent did not know of the terms of the government lease (and we must assume that the court did just that), then the court erred. The finding of non-liability has no support in the record and is irreconcilable with the findings which set up the terms of the two leases. The respondent is liable under the terms of its lease for the utilities supplied. The word "rental" as used in the lease here, particularly in connection with the paragraph providing that respondent will pay for the utilities "used in or about said premises" is clear and unambiguous. But if there is an ambiguity in the lease caused by paragraphs 15 and 31, as contended by respondent, it is not such an ambiguity as can be interpreted by an examination of the lease alone. It would require parol evidence to determine it, and here there is none. Again, if there is any uncertainty on the face of the lease as to whether the rental paid by the government is net or gross, the terms of the lease itself would necessarily imply that it was a gross rental, and any interpretation of it to mean net rental could only be by parol evidence. On the record alone, without evidence, sections 1649 and 1654 of the Civil Code cannot be applied. It would be straining the word a long way to hold that where a lease says that respondent is to receive or get credit for a "rental" of $435 payable by the government, the word means "net rental."

Respondent refers to the portion of paragraph 15 of the lease which reads, "and to keep the same free and clear of any lien or incumbrance of any kind whatsoever *created by Lessee's acts or omissions*" (emphasis added by respondent), and contends that it justifies an interpretation that the utilities respondent is to pay for are only those used by respondent itself. It is rather difficult to follow such reasoning. By no stretch of interpretation can that clause be reasonably construed that way.

Does Rule 52 Appeals to Judgment Roll Appeals?

[3, 4] This rule provides: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal."

In order to determine its applicability to judgment roll appeals it is necessary to consider somewhat its history and purpose. For many years prior to the adoption of the new rules, most judges and lawyers, to say nothing of the laymen, had come to the conclusion that appeals in California were unwieldy, overburdensome, took too long and were unreasonably expensive. It was felt that something should be done to shorten the records, speed up the time, and reduce the expense of appeals; in short, to streamline our whole appeal system. It was with that end in view that in 1941 the Legislature granted to the Judicial Council the power to prescribe new rules for the practice and procedure on appeal, and re-

quired it to report to the 1943 Legislature the rules prescribed by it.

Section 961 of the Code of Civil Procedure provides: "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. The Judicial Council shall report the rules prescribed by it to the Legislature on or before March 31, 1943. The rules reported as aforesaid shall take effect on July 1, 1943, *and thereafter all laws in conflict therewith shall be of no further force or effect.*" Section 1247k of the Penal Code is to the same effect as to appeals in criminal cases. (Emphasis added.)

The Judicial Council assisted by four other groups (see 17 So.Cal. Law Rev. 80 for detail of the assisting groups) proceeded at once to work out a set of rules as directed. It was a Herculean task in the short time assigned to it, and yet the rules as finally devised evidence an exceptionally fine piece of work. There were several drafts of rules made before final acceptance. In the next to the last draft certain methods of shortening the record had been adopted. (They are the methods now in effect and are referred to hereafter.) Upon the study of this draft, it became apparent that if lawyers were to be expected to use any of these short methods of appeal something would have to be done about the presumptions then in effect with reference to the record on appeal. There were two of these presumptions: (1) The one hereinbefore referred to, that where the entire proceedings in the lower court were not presented in the record on appeal and the findings of fact were *within the issues* presented by the pleadings, the appellate court would conclusively presume that there was evidence received below to fully support the findings. (2) That where the whole record was not brought up and the findings were *without the issues* made by the pleadings, the appellate court would conclusively presume that either by stipulation of the parties or otherwise, the matters contained in such findings had been made an issue in the lower court. In many instances these presumptions were actually contrary to the true fact.

It was obvious that if these presumptions were to continue in effect, there would be very few, if any, short record appeals. Any lawyer taking an appeal on such a record would be instantly met with the presumption that, as he had not brought up the entire record, the findings were supported by the omitted matter. To meet this situation Rule 52 was adopted.

But, again, the question arose, suppose the appellant appeals on the judgment roll alone and claims that there is no evidence to support the findings and the respondent contends that there is such evidence: how can the respondent get that evidence before the reviewing court? Rule 5(f) was devised for that purpose. It reads: "Where the appellant has designated only the papers and records constituting the judgment roll and has not given notice to prepare a reporter's transcript, the judgment roll shall constitute the record on appeal, and the respondent may not require any addition thereto; provided, however, that on motion of the respondent the reviewing court may allow augmentation of the record whenever it is necessary to prevent a miscarriage of justice."

The draftsman's notes have this to say concerning Rule 52 (Annotated Judicial Council Rules, p. 60): "New. Cross-references: Rules 4 and 5, partial transcript; Rule 6, agreed statement; Rule 7, settled statement; Rule 8, certification; Rule 26 (a), excessive record; Rule 12, augmentation; Rules 33, 35(f), 36, records in criminal appeals. This rule is entirely new, and is contrary to the holdings of some decisions, but if the short records are to be used, some such rebuttable presumption is essential to protect the party appealing on less than the complete record."

One of the primary objectives of the new rules, and of almost all reforms and proposed reforms in appellate procedure, is the shortening of appellate records. The stacking up of massive transcripts containing thousands of pages of testimony and exhibits, much of it totally irrelevant to the points raised on appeal, had long been the target of criticism by courts and lawyers alike, and many efforts were made to re-

duce the labors of court and counsel by eliminating irrelevant matters from the appellate record. Among these methods are the *partial reporter's transcript* (Rule 4(a), the *agreed statement* or *settled statement* covering only a portion of the proceedings Rules 6(a), 7(a), and the *clerk's transcript* or judgment roll record (Rule 5(f).

Thus the use of one or more of these methods of shortening the record is invited and encouraged by the new rules; but they go much further than that. Rule 26(a) declares that "where any party shall have required in the typewritten or printed record on appeal the *inclusion of any matter not reasonably material to the determination of the appeal* * * * the reviewing court may impose upon *offending attorneys or parties such penalties,* including the withholding or imposing of costs, as the circumstances of the case and the *discouragement of like conduct in the future may require.*"

The latter portion of the foregoing provision was taken directly from the new federal rules. Federal Rules of Civil Procedure, Rule 75(e), 28 U.S.C.A. following section 723c. Conceding that such a rule should be invoked rarely and with great caution (see draftsman's comment, 17 So. Cal. Law Rev. 102), nevertheless it stands in the rules as a warning to counsel that the courts are tired of huge transcripts full of immaterial evidence, and that it is the duty of appellants to avail themselves of the methods established by the rules for cutting the record down to matters relevant to the points raised on appeal.

Witkin in his article on New California Rules on Appeal in 17 So.Cal. Law Rev. has this to say (p. 124): "The cases plainly disclose the hazards under our former law of appealing on less than a complete record, particularly where only the judgment roll is brought up. Not only do the courts apply the normal presumption that any uncertainties are resolved in favor of the judgment and omitted matter is deemed adverse, but often the presumption is indulged that if something could have happened, which would support the judgment, it did happen. It was therefore absolutely necessary to protect the short record by giving it its face value; and there is both logical and practical justification for doing so, since it comes up by agreement or acquiescence of both parties, and augmentation is always possible."

Having in mind that under Rule 26(a) a party who brings up matter not reasonably material to the determination of the appeal is subject to penalty, and that if the old rules are to apply he will be met by the presumption that the portions of the proceedings he left below supports his opponent's position, the appellant will be "between the devil and the deep blue sea." With such a result the entire plan for shortening records on appeal is made useless by the reviewing courts' own rules.

Rule 5(f), expressly providing for the *appeal on the judgment roll,* describes it as one in which "the appellant has designated only the papers and records constituting the judgment roll," and declares that in such case "the judgment roll shall constitute the record on appeal." Rule 52 applies its presumption where "a record on appeal does not contain all of the papers, records and oral proceedings." Thus the judgment roll is a *"record on appeal"* under both Rules 5(f) and 52, and if it contains "only the papers and records constituting the judgment roll," it "does not contain all of the papers, records and oral proceedings," and therefore is within the terms of Rule 52. In other words, it makes no difference whether the record contains 50% of the proceedings, or 1% of the proceedings, or the 10% or 20% constituting the papers and records, and not the 90% or 80% containing the testimony—in all those cases there is something less than a complete record, i.e., the record does not contain "all of the papers, records and oral proceedings."

In addition to its express language, exactly the same purpose of Rule 52 is involved in its application to an appeal on the judgment roll. An appellant presents a question of law, contending that, on the face of the pleadings and findings, the judgment is wrong as a matter of law. Of course, while it is always possible that evidence was introduced *outside* the issues made by the pleadings, without objection, or to support a finding that otherwise has no support, as in the case at bar, such ap-

pellant contends that no such evidence was introduced. He therefore avoids the useless expense to himself, and the burden on the appellate court, of bringing up a complete transcript. If the respondent knows or the court has reason to believe that such evidence was introduced, Rule 12 allows either to augment the record by having it transcribed; and Rule 5(f) (the judgment roll appeal rule) makes this doubly clear by expressly protecting the right of the respondent: "* * * on motion of the respondent the reviewing court may allow augmentation of the record whenever it is necessary to prevent a miscarriage of justice."

The annotations to the Rules pamphlet, page 43, on the provision for judgment roll appeals, read as follows: "New. Cross-references: C.C.P. 670, Prob. C. 1242, C.C.P. 1134, 1139, what constitutes judgment roll; Rule 12(a), augmentation of record; *Rule 52, presumption where record not complete.* This rule recognizes the existing practice of an appeal on the judgment roll alone. Ordinarily the respondent cannot demand a reporter's transcript, but if he desires to bring up evidence to justify additional findings on appeal, or to show that error in ruling on pleadings was cured at the trial, or for some other proper purpose, he may move to augment the record (see Rule 12(a))."

Commenting on the reasons which led to the formulation of Rule 5(f), the draftsman observes (17 So.Cal. Law Rev. 111): "The appellant may limit his grounds of appeal to matters appearing on the face of the judgment roll, and if he does so the evidence usually would contribute nothing relevant. There are, however, certain special situations in which the evidence would be material, e.g., to justify additional findings on appeal, thereby eliminating inconsistency between findings and judgment, or to show that an erroneous ruling in connection with the pleadings was cured at the trial. Under our former law, except where the appellate fact-finding power was invoked, there was no need for the respondent to bring up any evidence, for the presumptions against the appellant on a judgment roll appeal were a sufficient protection. But Rule 52 does away with the arbitrary presumptions and it is now essential that the respondent be permitted to show what actually occurred."

It has been suggested that judgment roll appeals were not intended to be included under Rule 52 for the reason that no absolute right is given respondent to augment the record where he feels additional matter should be brought up. Rule 5(f) does not give him the right to augment on a judgment roll appeal, but provides that on motion the court "may" permit augmentation. It is true that in one type of short appeal, to-wit, agreed statement, respondent has an absolute right to require the inclusion of any matter in the statement. However, in the case of a settled statement, this right is subject to the approval of the court in settling the statement. In appeals on a partial transcript his right to augment is only permissive, for under Rule 12 in order to augment respondent must apply to the reviewing court, which "on such terms as it deems proper, *may* order" the augmentation requested. (Emphasis added.) In any event, the fact that the reviewing court under Rule 5(f) requires an application to be made to it before a reporter's transcript can be prepared, is consistent with the declared purpose of the rule that, when the points involved can be raised on the judgment roll alone, the court retains such control as is necessary to see that the respondent does not convert it into an unnecessary full record appeal. It cannot be assumed that the court, where its attention is called by respondent to the fact that there are matters in the court below which should be considered on the appeal, would deny respondent the right to augment. Such a denial would be a clear abuse of discretion.

Norman S. Sterry, Chairman, State Bar Committee on Rules on Appeal, states (vol. 18, State Bar Journal (1943) p. 142):

"Rule 5(f) provides, where the appellant has designated only the judgment roll and has not asked for a reporter's transcript, that the judgment roll shall constitute the record on appeal, provided, however, that on motion of the respondent the reviewing court may allow an augmentation of the record.

"The reason for this rule: Where an appeal is taken from a judgment roll alone, the oral proceedings are ordinarily not germane. On such an appeal an appellant can attack only defects which are inherent in the judgment and cannot ordinarily be cured by evidence. However, under Rule 52 it will be presumed that a record that is stipulated or is certified as correct presents all the matters sufficient for a determination of the points raised by the appellant, and there may be cases where the appellant could designate a judgment roll and also by designation have included affidavits or exhibits that would apparently contradict recitals of the judgment or the findings of fact, if any. Hence, the necessity for giving the respondent the right to ask the reviewing court for an augmentation of the record, wherever the errors appearing on the face of the judgment roll are such that they could be, and respondent believes were, cured by the course or conduct of the trial. It was not thought wise, however, on a judgment roll appeal to give the respondent the absolute right to have the oral proceedings brought up and that he was entirely safeguarded by giving him a right to apply to the reviewing court."

The application of Rule 52 in judgment roll appeals is a necessary concomitant of the modernizing and streamlining of short record appeals, including those on the judgment roll. This rule fully protects a respondent in that, if it is necessary to justify a finding that evidence be brought up, and there is such evidence, respondent can do so. On the other hand, appellant in making a short record appeal, cannot justly be penalized by a presumption which may actually be contrary to the true situation.

The case at bar is a good example. At the oral argument the question arose as to whether or not there was evidence taken in the court below upon the question of whether the rental payable by the Army and set forth in respondent's lease was "net rental" or "gross rental." This court thereupon made an order that if the respondent within five days would write the court a letter stating that it desired the testimony written and brought up, this court would order the same at the expense of the appellants with the understanding, however, that in the event the transcript when brought up failed to disclose any evidence upon this particular subject the court would order respondent to reimburse appellants for the cost of such transcript. The court did this under Rule 26(a): "In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper." This court felt that in applying Rule 52 to a judgment roll appeal there is one contingency in which it might work a hardship. If an appellant desired to avoid the initial expense of the reporter's transcript, he could appeal on the judgment roll alone, even though he knew there were matters introduced at the trial which would support the findings, and thereby throw the initial expense (not, of course, the ultimate cost) of converting the appeal into a full record appeal on the respondent. While, of course, there is no such situation here, this court felt that as Rule 52 was being applied for the first time to a judgment roll appeal, it was only fair that appellants who had appealed on the judgment roll alone should pay for the transcript in the event that there was evidence that would support the findings, and also that such an application of Rule 52 would tend to prevent in the future any judgment roll appeals that were not in good faith. Within the allotted five days, respondent wrote this court to the effect that it did not care to bring up any additional matters and would stand on the judgment roll alone. Thus, it would appear that if we were to apply the old presumption which in this case would be that there was testimony to the effect that the parties intended "rentals" to mean "net" and not "gross" rentals (the ordinary acceptance and meaning of the word), we would be presuming something which by the admission of respondent is actually contrary to the fact. Thus, we have a striking illustration of the unfairness of the old method and the fairness of the new.

If we apply Rule 5(f) to the situation in this case it necessarily follows that Rule 52 must apply in judgment roll appeals. Here, if the old presumptions apply, respondent under no conditions would desire to augment the record. The presumptions

are stronger than any evidence he could bring up, provided evidence had been received. But Rule 5(f) says, "provided, however, that on motion of the respondent the reviewing court may allow augmentation of the record whenever it is necessary to prevent a miscarriage of justice." Now, if the old presumption still exists, what situation could there be in this type of appeal where augmentation of the record would be necessary to prevent a miscarriage of justice? Rather is it true in this case that there would be a miscarriage of justice, if the old presumption were applied. The court would presume that there was evidence below, which actually did not exist.

[5-7] Respondent contends that Rule 52 was never intended to apply to judgment roll appeals, and secondly, that if it was so intended, the Judicial Council had no power to set aside presumptions which have been in effect in California for over ninety years and which they claim are rules of substantive law. But these presumptions are not matters of substantive law, they are merely rules of convenience which the courts have established regulating the manner in which the record on appeal should be considered. They are adjective or procedural law. Black's Law Dictionary defines adjective law as "The aggregate of rules of procedure or practice. As opposed to that body of law which the courts are established to administer, (called 'substantive law,') it means the rules according to which the substantive law is administered." These presumptions are purely procedural, were made by the courts, and can be changed by the courts.

[8] The Rules on Appeal cannot themselves, unaided by construction, accomplish their declared objectives. The courts must make them effective by a liberal and sympathetic interpretation. On this point, the statement of Chief Justice Gibson in 15 State Bar Journal, 332, is apropos: "My principal thought on the subject is this: Conferring the power to make rules of procedure upon the Judicial Council or upon the Supreme Court would, *without more,* be an impressive but completely futile gesture. A mere *transfer* of the power from the Legislature to the Judicial Council would be a vain attempt at reform, predestined to certain failure. Adequate *machinery* to make the power effective is the vital and basic element of any successful reform. Without this, we would be simply substituting a group of persons already overburdened with judicial problems in place of a group of persons equally busy with legislative problems. Not only would nothing be gained, but the whole program would be jeopardized, if the momentum for reform which now exists is dissipated by the adoption of a system no better than the old."

Witkin has this to say, referring to Rule 52 (17 So.Cal.Law Rev. 123):

"This is *new.* There is practically no precedent for it, and its scope and effect are yet to be determined. But a question immediately arises as to its validity. May such a rule be promulgated by the Judicial Council under a grant of authority over matters of procedure? It has been suggested that the subject involved is the appellate court's review power, which cannot be decreased by a procedural rule; and that Article VI, Section 4½ of the Constitution makes it the duty of the court to examine the *entire record* before reversing a judgment. There was some feeling, therefore, that the rule was either invalid or inappropriate and should be omitted.

"This position became untenable when the provisions of Part II providing for short records (judgment roll, partial transcript, agreed statement and settled statement) were approved. The cases plainly disclose the hazards under our former law of appealing on less than a complete record, particularly where only the judgment roll is brought up. Not only do the courts apply the normal presumption that any uncertainties are resolved in favor of the judgment and omitted matter is deemed adverse, but often the presumption is indulged that if something could have happened, which would support the judgment, it did happen. It was therefore absolutely necessary to protect the short record by giving it its face value; and there is both logical and practical justification for doing so, since it comes up by agreement or acquiescence of both parties, and augmentation is always possible.

"Viewing the presumption in this light, Rule 52 does not encroach upon the appellate court's power of review, but merely supplements the various rules dealing with the different types of short records. It says nothing about the manner in which the court is to consider the evidence, or the weight it may give it, nor does it even hint that the court must decide the case on less than the entire record. By stating the presumption that the relevant matters have come up, the rule simply does away with presumptions as to omitted matters, and requires that the court rely upon the *actual record.* If the court is not satisfied with a short record, or desires further light on any point, it may invoke the augmentation rule on its own motion, ordering up as much additional record as it desires, and may then proceed to decide the case on the actual, augmented record.

"There remains the question whether the rule conflicts with the constitutional doctrine of reversible error. Here it would seem sufficient to say that the phrase 'entire cause including the evidence,' in Article VI, Section 4½, need not be given the arbitrary meaning of everything that took place in the lower court. The reviewing court never can know what happened below except through the record, which consists of what is brought up by the parties in accordance with the procedure prescribed by statute or rule. Even under our former statutes and rules some matters were frequently omitted, so that the record did not include all the proceedings. It would seem, then, that the constitution can be interpreted in accordance with its admitted objective, namely, to prohibit reversals for error where the record shows no miscarriage of justice; but the function of the reviewing court is performed when it examines the entire record before the court, to determine whether the error, in the light of the evidence brought up, is prejudicial. The court may and should rely on the parties to prepare a record which contains all that is relevant and material to the issue as to which error is urged."

When the reason changes, the rule changes. As heretofore shown, the old presumptions are incompatible with the new rule and the reasons for it. It is practically impossible to have short record appeals without changing the presumptions applicable to them.

This is really not changing the presumption at all. It is establishing a new method of handling the record on appeal by which the parties are told that if they desire to shorten the record and speed up the appeal, it will be considered that all matters necessary to the determination of the appeal have been brought up. If that is not in fact true, then the parties may clear up the situation by augmenting the record as hereinbefore pointed out.

It is true that since the new rules were adopted in 1943 and at the time appellants filed their brief herein, there had been no case in which Rule 52 had been applied, and there were seven cases in which the old presumption was applied without mention of that rule. They are Hoyt Heater Co. v. Hoyt, 68 Cal.App.2d 523, 157 P.2d 657; Estate of Crawford, 69 Cal.App.2d 607, 160 P.2d 64; Kompf v. Morrison, 73 Cal. App.2d 284, 285; Lucich v. Lucich, 75 Cal. App.2d 890, 172 P.2d 73; Burns v. Brown, 76 Cal.App.2d 639, 173 P.2d 716; Hughes v. City of Torrance, 77 Cal.App.2d 272, 175 P.2d 290; Transportation Guar. Co. v. Jellins, supra, 29 Cal.2d 242, 174 P.2d 625. (Since the filing of the briefs this court applied Rule 52 in the case of People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102. It was not a judgment roll appeal.) However, an examination of the record in each of the above mentioned seven cases shows that the question of the application of Rule 52 was not raised in the briefs. Of course, a point not discussed is not authority in any future case.

Cuthbert Burrel Co. v. Shirley, 64 Cal. App.2d 52, 53, 148 P.2d 85, 86, was an appeal on the clerk's transcript alone, hence a judgment roll appeal. There the court assumed that Rule 52 applies to judgment roll appeals, for it is said: "The notice of appeal was filed April 16, 1943, and the record on appeal was filed June 17, 1943, so rules four to twelve, and rule 52 of the Rules on Appeal, do not apply to this case."

Respondent contends that the attention of the Bar should have been called to the effect of Rule 52. Aside from the great amount of publicity which accompanied the

adoption of the rules, Mr. Sterry in his article before mentioned (18 State Bar Journal p. 136) said: "In my judgment, the most vital changes in the new rules are to be found in Part II, dealing with the record. Every attorney taking an appeal should study carefully Part II of the rules. In doing so, *he must constantly keep in mind Rule* 52, which is found under Part VI. This rule is misplaced and should be under Part II." (Emphasis added.)

The judgment appealed from is reversed.

PETERS, P. J., and WARD, J., concur.



80 Cal.App.2d 59

BOSTON INS. CO. v. WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 13262.

District Court of Appeal, First District, Division 2, California.

May 28, 1947.

Rehearing Denied June 27, 1947.

Hearing Denied July 24, 1947

1. Banks and banking ⇐154(9)

Whether bank had notice or was put on inquiry that its depositor's funds were being diverted by the manager of depositor's marine insurance department for his own uses and purposes was a question of fact in depositor's action against bank.

2. Banks and banking ⇐138

Statute providing that whenever any depositor shall have authorized any person as agent to draw checks on bank against such account, bank, in absence of written notice to contrary, shall be justified in presuming that any check drawn by such agent in form or manner authorized by depositor, including checks drawn to agent's personal order, was drawn for a purpose authorized by depositor and within scope of agent's authority, is not ambiguous. St.1925, p. 513, § 16a.

3. Banks and banking ⇐138

The fact that checks provided on their face for a specification of the purpose for which they were drawn, and that none of the checks contained anything in such space, was not sufficient to put bank on notice that checks were drawn for an improper purpose by depositor's agent. St.1925, p. 513, § 16a.

4. Banks and banking ⇐138

Where manager of marine insurance department of insurance company drew drafts through state bank, and state bank sent drafts to its San Francisco correspondent, bank where company had its deposit, for collection, and, on receipt of the drafts, San Francisco bank customarily sent its messenger to company's office, and later that day or following day messenger would be given a check of company on San Francisco bank, payable to the bank, for amount of draft, and those checks were signed by company's authorized agents, neither San Francisco bank nor state bank was liable for company's funds misappropriated by means of the checks. St.1925, p. 513, § 16a.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by the Boston Insurance Company (a corporation) against the Wells Fargo Bank & Union Trust Co. (a corporation) Kern County Bank (a corporation) and others to recover the amount paid out on a series of checks drawn against plaintiff's account in the Wells Fargo Bank & Union Company, whereby plaintiff's funds were misappropriated. From an adverse judgment the plaintiff appeals.

Judgment affirmed.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for appellant.

Heller, Ehyman, White & McAuliffe, of San Francisco, for respondent Wells Fargo Bank & Union Trust Co.

Harvey, Johnston & Baker, of Bakersfield, for respondent Kern County Bank.

GOODELL, Justice.

This action was brought by the appellant against the respondent banks to recover $4,057.50 paid on a series of checks drawn against appellant's account in the Wells Fargo bank, whereby appellant's funds were

misappropriated. Respondents recovered judgment for their costs.

M. R. Wallace was the Pacific Coast manager of the marine department of appellant, and had been since 1933. Its cashier and accountant was L. W. Bruntlett. Appellant in 1938 lodged with Wells Fargo bank a copy of a resolution authorizing its checks to be signed by M. R. Wallace and countersigned by L. W. Bruntlett or J. F. Fayen.

Wallace was interested in an oil venture in Kern County. It was a partnership composed of himself, his wife Freda G. Wallace, and one Charles Morris, and operated under the name Freda G. Oil Company.

The 13 transactions in question were spread over the period from April 4, to August 9, 1940 and in each of them the modus operandi was as follows: Morris, on the ground in Kern County, in need of money wherewith to operate, would draw a draft signed either in his name or Freda G. Oil Co. by himself, through the State Bank of Taft (now Kern County Bank) for the amount needed. The Taft bank would send the draft to its San Francisco correspondent, the Wells Fargo bank, for collection, which bank incidentally happened to be the depositary of Boston. On receipt of the draft Wells Fargo would send it by messenger to the office of Boston Insurance Company and leave it with Bruntlett who would receipt for it. Later that day, or the next, the messenger would return and Bruntlett would give him the check of Boston drawn on Wells Fargo bank and payable to Wells Fargo bank, for the amount of the draft, whereupon the latter bank would credit the drawer bank at Taft for the amount of the draft and notify it that the draft had been paid, debiting, at the same time, the account of Boston in Wells Fargo.

Twelve drafts were drawn in the following fashion:

"M. R. Wallace
To Boston Ins. Co.
340 Pine St.
San Francisco, Cal."

The other was drawn:

"M. R. Wallace
To 340 Pine
Boston Ins. Co.
San Francisco, Cal."

All 13 checks were signed by Wallace. Twelve of them were countersigned by Bruntlett and the other by Fayen.

The 13 drafts and the corresponding checks were for varying amounts ranging from as low as $35 to as high as $1,000, aggregating the $4,057.50 in suit.

Admittedly Boston Insurance Company had no interest in the Freda G. Oil Company, and Wallace had never been given permission to use appellant's funds in that venture. However, neither bank knew this.

The appellant's first contention is that "One who participates in a breach of trust is liable to the beneficiary for the damages resulting from the breach." Respondents do not challenge this general statement of principle, but they deny that there was such participation as to fasten liability on them.

The appellant contends that because the drafts were drawn on Wallace personally and were paid by checks of Boston Insurance Company, the Wells Fargo bank was put on notice as matter of law that its depositor's funds were being diverted by Wallace for his own uses and purposes and that, accordingly, it took part in the diversion. In other words, it is claimed that the face and form of the drafts plus the face and form of the checks gave the Wells Fargo bank constructive notice of the misappropriation, which it should have followed up.

[1] Whether the bank had notice or was put on inquiry is a question of fact, not one of law. Northwestern Portland Cement Co. v. Atlantic Portland Cement Co., 174 Cal. 308, 312, 163 P. 47; West v. Great Western Power Co., 36 Cal.App. 2d 403, 97 P.2d 1014; People v. One 1933 Buick Sedan, 43 Cal.App.2d 482, 111 P.2d 378; 20 Cal.Jur. p. 240. In National Bank v. Whitney, 181 Cal. 202, 210, 183 P. 789, 793, 8 A.L.R. 298 it is said, "The question as to whether the suspicions of the defendant were or should have been aroused was a question of fact for the jury."

The court found not only that the Wells Fargo bank had no such notice, but it went further and found that appellant caused the checks to be delivered to the bank with

the intent of engendering the belief that the drafts were for appellant's own obligations, were authorized by it, and that by appellant's conduct the bank was led to believe that the drafts were drawn upon appellant itself. In this connection it must be remembered that the drafts were delivered by the bank's messenger not to Wallace but to Bruntlett, the insurance company's cashier, and it was Bruntlett and not Wallace who delivered the appellant's checks when the messenger returned for them. The form in which 12 of the 13 drafts were drawn, with "Boston Ins. Co." appearing on the same line with, and following, the word "To" was, to say the least, equivocal and, whether or not it was designed to mislead the bank into concluding that Boston instead of Wallace was the drawee, it certainly had a tendency to do so. To say the least, appellant's name was coupled with Wallace's in the drawee part of the drafts. Moreover the record shows that "every day in the week" the Wells Fargo bank handled a draft on the appellant although not "directly chargeable against their account". In addition to these circumstances, Bruntlett, and in one case Fayen, neither of whom was interested in Freda G. Oil Co. and both of whom were connected with appellant, countersigned the checks.

Appellant claims that the case of Lynch v. Wells Fargo Bank & Union Trust Co., 114 Cal.App. 565, 300 P. 74, is directly in point. That was not a case such as this is, where an agent, authorized to sign his principal's checks, diverted their proceeds to his own use. There the checks, signed by authorized persons, were used for precisely the purpose which the principal intended, namely, to pay off the principal's overdraft. The trouble was that the fund on which the checks were drawn was a trust fund, known by the bank to be such. The reason why the bank was held liable was that, with such knowledge, it "cashed and received the proceeds at its risk" (as appears from the opinion at page 574 of 114 Cal.App., at page 78 of 300 P.). See, also, 9 C.J.S., Banks and Banking, § 353, page 713, where the Lynch case is cited as a representative California case under this rule.

Appellant relies also on Southern Trust & Commerce Bank v. San Diego Savings Bank, 60 Cal.App. 215, 212 P. 385, 386, where the cashier of the defendant bank was at the same time guardian of an estate. He received a check for $8,271.12, and other checks, payable to himself as guardian, deposited them in his personal account in the same bank and drew against the latter account for his own uses. There were 10 separate transactions sued on. In nine of them the bank was held not liable, because the checks were drawn to payees other than the bank. In one transaction the bank was held liable because the guardian drew the check on trust funds, known by the defendant bank to be such, in payment of his personal overdraft, the bank thereby becoming an active participant in the diversion, as in the Lynch case, and being held liable for the selfsame reason. The court, quoting L.R.A. 1915C, note p. 519, stated: "The reason for the bank's liability is that it knowingly makes itself a party to a fraud, and must make good the loss that results from the misappropriation." With respect to the other nine transactions, where the checks were paid to others, the court said, at page 221 of 60 Cal.App., at page 387 of 212: "The manner in which the guardian should keep his trust funds, or how he should dispose of them, were not matters in which the bank had any duty to investigate, or any interest to protect." In cases where the bank receives money out of an earmarked trust fund in its own bank it *knows* the money is being applied to the trustee's personal use, and takes part in so applying it.

Keeney v. Bank of Italy, 33 Cal.App. 515, 165 P. 735, also relied on by appellant, was simply a case where the bank appropriated, by virtue of its banker's lien, $1,968.66 from an account clearly earmarked as a trustee account, in satisfaction of an indebtedness personally owing to it by the person who happened to be the trustee. In the Keeney case the court states the California rule on this subject. The concluding phrase points out the broad distinction which the appellant's cases so well illustrate. At page 518 of 33 Cal.App., at page 736 of 165 P. the court says: "It is

not contended by respondent, nor could it well be in the light of the later decisions, that if the defendant had paid out to third parties the funds here in question upon checks regularly drawn upon the account, it could be held accountable for them, for under such a state of facts no duty is cast upon the bank to inquire into the purpose for which the funds are being used (United States Fidelity & Guaranty Co. v. First Nat. Bank of Monrovia, 18 Cal.App. 437, 123 P. 352; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S.W. 604, 65 L.R.A. 820, 104 Am.St.Rep. 885; Silisbee State Bank v. French Market [Grocery] Co., 103 Tex. 629, 132 S.W. 465, 34 L.R.A.,N.S., 1207); but the cases draw a clear distinction between such payments and an appropriation by the depositary of the fund in payment of its own claim against the trustee or agent."

In United States Fidelity & Guaranty Co. v. First National Bank of Monrovia, 18 Cal.App. 437, 123 P. 352, 354, cited in the foregoing quotation, a case quite similar to the Southern Trust case, the court in rejecting the contention that the bank was obligated to investigate the purpose for which a guardian drew against his account, said: "Appellant's contention, if accepted as applicable to the facts presented, would render banks *ex-officio* trustees in general for all *cestuis que trusts.*"

All the authorities thus far discussed are cases where the bank accounts were clearly earmarked as trust funds, and we have seen what the rule is in California on that subject. The instant case, however, involves an ordinary commercial account of a corporation where its officers or agents (fiduciaries in the broad sense) are authorized to sign its checks. If the rule respecting a definitely earmarked trustee account is as we have found it to be, it would seem that the rule should be no stricter, but perhaps less strict, respecting an account such as we have in this case. This question was considered in the case of Empire Trust Co. v. Cahan, 274 U.S. 473, 47 S.Ct. 661, 662, 71 L.Ed. 1158, 57 A.L.R. 921. There it was held by the lower courts that because of the form of the checks the bank was chargeable with notice *as matter of law* that the agent was not acting in his principal's interest. In reversing the judgment the court said: "We do not perceive on what ground the petitioner could be held bound to assume that checks thus lawfully drawn were required to be held or used for one purpose rather than another. In the case of checks drawn by a corporation not likely to disburse except for corporate purposes there might be stronger reasons for requiring a bank to be on its guard if an officer having power to draw them deposited checks for considerable sums to his private account; but it recently has been held otherwise by the Judicial Committee of the Privy Council. Corporation Agencies, Limited v. Home Bank of Canada [1927] A.C. 318. * * *" The court then draws an analogy between that case—where the agent, holding a power of attorney, diverted his principal's funds in an ordinary bank account—and one involving an earmarked trust fund, as follows: "The petitioner [bank] in permitting the son to draw out the money was permitting only what it, like the respondent's banks, would have been bound to allow *even if the deposit had been earmarked as a trust.* The form in which the withdrawals took place does not appear. They might have been, like the deposits, in checks to the son's own order. All that is known is that the respondent did not get the benefit of them." (Emphasis added.)

It is not necessary to decide whether a commercial account is subject to the same rules as apply to an earmarked trust fund for here we have a statute which removes all doubt as to the obligation resting on the bank. Section 16a of the Bank Act (Stats. 1925, p. 513) reads as follows: "Whenever any person, firm or corporation being the owner of any deposit account subject to check in any bank * * * shall have authorized any person as agent or officer of said person, firm or corporation to draw checks on such bank against said account, the bank, in the absence of written notice to the contrary, shall be justified in presuming that any check drawn by said agent or officer in the form or manner authorized by such principal, including checks drawn to personal

order of agent or officer, was drawn for a purpose authorized by the principal and within the scope of the authority conferred upon the agent or officer."

The appellant argues that this "provision seems not to have been discussed in any reported decision and did not replace or amend any similar provision which might shed light on its history and purpose. Its interpretation is therefore a matter of some difficulty, especially since the language of the section is not free from ambiguity." Appellant argues further that the transaction in the Lynch case arose after section 16a was adopted and that the "opinion does not discuss Section 16a, but presumably it was considered by the Court." The court had no occasion to consider it. Section 16a deals only with the drawing of checks, and there is nothing in that section which could have had any bearing on the Lynch case transaction. In that case it appears clearly from the depositor's letter to the bank of February 20, 1925, that the depositor was "holding in trust certain funds in the sum of $25,000.-00" which it was then depositing in a "Special Account" "not subject to be drawn against in our usual course of business." That earmarked fund *was* drawn against to reduce the depositor's overdraft, hence the bank was held liable as a participant under the rule discussed earlier. The Lynch case involved no question (as does this case) of the signers of the check going outside their authority, for there the checks were applied exactly as the depositor intended, namely, in payment of its overdraft.

[2] We find no difficulty in the interpretation of section 16a nor any ambiguity therein.

Under the provision of section 16a that the bank shall be justified in presuming that *checks drawn to personal order of agent or officer are authorized,* Wallace (assuming he had an authorized countersignature) could have drawn any or all of these checks payable to himself, cashed them in currency, and met the drafts therewith. Regardless of whatever suspicion might have lurked in the mind of the teller as to the destination of the proceeds, no duty of inquiry would have been cast on the bank.

The 13 checks in question were drawn at different times to pay 13 drafts for $35; $220; $650; $215; $325; $450; $200; $50; $1,000; $350; $400; $122.50 and $40 respectively. They were admittedly signed by authorized agents of appellant. The drafts were presented from time to time by a bank messenger and when, the same day or the next, he returned and was given a check which matched to a cent the amount called for by the draft there could be no question that the bank was being told what the check was for. As each check was delivered to the bank it was accompanied by the presumption, created by section 16a, that such check, designed to pay the draft then in the bank's hands, "was drawn for a purpose authorized by the principal and within the scope of the authority conferred upon the agent or officer".

Section 16a deals with the drawing of checks, and with nothing else. It does not touch the *endorsement* of checks, and for that reason cases such as Palo Alto Mut. Building & Loan Ass'n v. First Nat. Bank, 33 Cal.App. 214, 164 P. 1124 and Buena Vista Oil Co. v. Park Bank of Los Angeles, 39 Cal.App. 710, 180 P. 12 have no bearing on the case. The section provides that the presumption prevails "in the absence of written notice to the contrary", and appellant argues that the drafts drawn on Wallace, personally, supplied such written notice. We are unable to agree with appellant in this contention. The drafts of course were in writing but they were not sufficient to destroy or weaken the presumption which went with each check. To hold that they were sufficient, would render the statute meaningless.

Appellant's second point is that as the checks were payable to the Wells Fargo bank itself, the bank could do nothing but hold them for instructions from appellant as to their application. This is somewhat theoretical in view of the circumstances under which the checks were issued, having been drawn for exactly the dollars and cents called for by the drafts then in the hands of the bank.

[3] Finally it is argued that as the checks provided on their face for a specifi-

cation of the purpose for which they were drawn, and as none of them contained anything in this space, the absence of such notations put the bank on notice. The general rule, however, as stated in 9 C.J.S., Banks and Banking, § 332, page 677 is that "Generally the bank is not required to take notice of any notation or memorandum on the check appearing on the margin thereof made for the convenience or benefit of the maker, with respect to honoring such check or so as to restrict the bank's right to charge the maker's account with the amount thereof." See, also, Childs v. Empire Trust Co., 2 Cir., 54 F. 2d 981, 983, citing State Nat. Bank v. Dodge, 124 U.S. 333, 8 S.Ct. 521, 31 L.Ed. 458; First Nat. Bank v. School District, 173 Minn. 383, 217 N.W. 366, 367, 56 A.L.R. 1369; Valley Nat. Bank v. American Employers Ins. Co., 60 Ariz. 407, 138 P.2d 294.

[4] We are satisfied, as already indicated, that the trial court properly held that the Wells Fargo bank was subject to no liability in this case. It follows that the Kern County Bank is likewise free from liability.

A large number of authorities from outside jurisdictions are relied on by appellant. In view of the fact that in such other jurisdictions there is no statute similar to section 16a, there is no need to discuss these outside cases. In Empire Trust Co. v. Cahan, supra, the court said: "The person reposing confidence in the son was not the petitioner but the respondent, National Safe Deposit, Savings & Trust Co. v. Hibbs, 229 U.S. 391, 397, 33 S.Ct. 818, 57 L.Ed. 1241, 1247". So in this case, "under familiar principles of law 'where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss.' National Bank of San Mateo v. Whitney, supra, 181 Cal. at page 205, 183 P. at page 781 [789, 8 A.L.R. 298]." Condor Corp. v. Cunningham, 71 Cal.App. 2d 25, 33, 162 P.2d 21, 25.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

LUTHRINGER v. MOORE et al.*

Civ. 7290.

District Court of Appeal, Third District, California.

May 29, 1947.

Rehearing Denied June 28, 1947.

Hearing Granted July 22, 1947.

1. Appeal and error ⇐989

The appellate court's power regarding sufficiency of evidence to sustain recovery of damages for injuries was limited to inquiry whether there was substantial evidence, contradicted or uncontradicted, which in and of itself would support trial court's conclusion.

2. Poisons ⇐6

In action to recover for injuries from breathing hydro-cyanic acid gas which had escaped from adjoining premises into drugstore where plaintiff was employed, evidence to show that plaintiff had breathed the gas and to show that gas could have escaped into drugstore was sufficient to sustain recovery from fumigating company on cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity.

3. Appeal and error ⇐1003

Where there was sufficient evidence, which taken alone would support jury's conclusion that plaintiff had suffered injuries of a more or less permanent, chronic, and disabling nature, District Court of Appeal would not weigh such evidence to determine direction of the preponderance.

4. Damages ⇐208(1)
New trial ⇐162(1)

Amount of damages is for the jury, and secondly for the trial court on a motion for new trial, and trial court may properly reduce amount if in his sound discretion it appears to be excessive.

5. Appeal and error ⇐1004(1)

An appellate court will not interfere with amount of damages for injuries unless the amount allowed is so outrageously excessive as to suggest, at first blush, passion or prejudice.

6. Damages ⇐132(4)

$10,000 for injuries from breathing hydro-cyanic acid gas which medical experts testified had produced chronic in-

* Subsequent opinion 190 P.2d 1.

flammatory condition of respiratory tract was not excessive.

7. Evidence ⇐351

Business records are admitted as an exception to the hearsay rule to eliminate the necessity of calling each witness to a transaction. Code Civ.Proc. §§ 1953e to 1953h.

8. Appeal and error ⇐1056(1)

In action to recover for injuries, exclusion of hospital reports, notes, etc., signed by doctors was not prejudicial where doctors who signed reports were sworn as witnesses at trial and reports were not offered for purpose of impeaching contradictory testimony but as affirmative proof of the matters recited, since the doctors were competent to testify as to matters comprising the reports. Code Civ.Proc. §§ 1953e to 1953h.

9. Torts ⇐1

The concept of liability for tort without fault is one of social and economic expediency and has its origin in the fundamental aim of shifting a loss from one upon whom it has fallen to another whose acts have been the proximate cause of a foreseeable risk.

10. Torts ⇐1

The application of rule imposing liability for tort without fault must be confined within reasonable limits in the light of which requirement injury must have been proximate result of activity in its ultra-hazardous nature and risk must have been foreseeable.

11. Torts ⇐1

An activity carried on in one place reasonably may be considered as ultra-hazardous while the same acts done elsewhere may not be such, for purpose of applying rule of liability for tort without fault.

12. Torts ⇐1

The true basis for liability for tort without fault is not that of negligence, but more nearly approximates the elements of a willful tort in that a person is presumed to intend the natural and probable consequences of his acts.

13. Negligence ⇐4

"Negligence" is conduct which is unreasonable with respect to the utility derived from the particular way in which it is done.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

14. Torts ⇐1

Liability without fault is imposed for damage from miscarriage of an ultra-hazardous activity though the activity is justified because of the great amount of utility either to the individual, or to the public generally from permitting such acts.

15. Action ⇐1

Lack of case precedent for recovery of damages for injuries from use of hydro-cyanic gas for fumigation, on the theory of absolute liability, would not prevent application of the rule of liability without fault for injury resulting from an ultra-hazardous activity.

16. Poisons ⇐6

The use of hydro-cyanic acid gas for fumigation is not an activity of common usage within exception of rule imposing liability for tort without fault in case of injuries arising from an ultra-hazardous activity.

17. Torts ⇐28

Whether an activity comes within rule imposing liability for tort without fault in case of injuries arising from an ultra-hazardous activity is for the trial judge, and, where the activity comes within the rule, it is proper to instruct jury that they may find for plaintiff though there is no showing of negligence by defendant.

18. Poisons ⇐6

In action to recover damages for injuries from breathing hydro-cyanic acid gas which was being used to fumigate adjoining premises, wherein court instructed jury that as a matter of law the use of such gas under the circumstances constituted an ultra-hazardous activity, but that use of such gas would create a liability independent of negligence only when it appeared that gas was proximate cause of injuries, evidence supported implied finding that use of gas under the circumstances of the case was proximate cause of injuries.

19. Poisons ⇐6

In action to recover for injuries caused by breathing hydro-cyanic acid gas which

had escaped from adjoining premises which were being fumigated with such gas, cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity was properly submitted to the jury by instruction stating that as a matter of law the use of hydro-cyanic acid gas under the circumstances constituted an ultra-hazardous activity.

20. Trial ⇐251(1)

Instructions on issues outside the case are properly refused.

21. Appeal and error ⇐1066

The giving of instructions proposed by defendants on issues outside the case would be reversible error in event of judgment for defendants.

22. Trial ⇐260(1)

Where given instructions as a whole properly inform jury of the law applicable, refusal of instructions which are merely cumulative or repetitious and are covered by other instructions given is not reversible error.

23. Trial ⇐250, 260(1)

Instructions which were either inconsistent with the evidence and the pleadings or the theory of the case as applied by the trial court, or were covered by other instructions given, were properly refused.

24. Appeal and error ⇐1062(3)
Trial ⇐145

In action to recover for injuries caused by breathing hydro-cyanic acid gas which was being used in fumigating adjoining premises, where case was submitted on cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity, and the jury by returning a verdict against fumigating contractor but in favor of building owner and lessee necessarily must have found that owner and lessee did not know of the nature of work which contractor intended to perform, withdrawal of cause of action alleging negligence was not reversible error.

25. Poisons ⇐6

In action to recover for injuries caused by breathing hydro-cyanic acid gas which was used by independent contractor to fumigate adjoining premises, where case was submitted to jury on cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity, evidence showing lack of knowledge by building owner and lessee of means which contractor intended to use in ridding building of pests sustained verdict in favor of owner and lessee.

26. Master and servant ⇐320

An employer is not liable for the negligent acts of an independent contractor where the work to be done is not by its very nature intrinsically dangerous, but the rule is otherwise where the plan to be executed by the contractor is known by him and the employer to be hazardous or injurious to third persons.

27. Poisons ⇐6

In action to recover for injuries caused by breathing hydro-cyanic acid gas which was used by independent contractor in fumigating adjoining premises, where case was submitted to jury on cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity, determining factor with respect to liability of building owner and lessee was knowledge, actual or implied, on their part of the dangerous nature of the work being performed by contractor.

28. Poisons ⇐6

In action to recover for injuries caused by breathing hydro-cyanic acid gas which was used by independent contractor in fumigating adjoining premises, where case was submitted to jury on cause of action based upon theory of absolute liability for miscarriage of an ultra-hazardous activity, whether building owner and lessee had knowledge of the dangerous nature of the work as carried out by contractor was a question for jury.

29. Appeal and error ⇐843(2)

Whether law would impose upon building owner and lessee same liability for injuries from breathing hydro-cyanic acid gas, as upon fumigating contractor in the event they had actual knowledge of the dangerous character of chemical which contractor chose to use, became moot when jury in resolving a conflict in the

testimony found upon sufficient evidence that such knowledge was lacking, and hence question would not be decided by the District Court of Appeal.

Appeal from Superior Court, Sacramento County; Lowell L. Sparks, Judge.

Action by Albert L. Luthringer against R. L. Moore, individually and doing business under the name of Orchard Supply Company, Sacramento Medico-Dental Building Company, and others, on two causes of action to recover damages for injuries sustained as a result of breathing hydro-cyanic acid gas. From a judgment in favor of plaintiff against the named defendant on the first cause, the named defendant appeals; from judgments of nonsuit on the second cause and from judgment in favor of the other defendants on the first cause, the plaintiff appeals.

Affirmed.

Butler & Reckers, of Sacramento, for appellant Luthringer.

Busick & Busick, of Sacramento, for appellant Moore.

Van Dyke & Harris, Gerald M. Desmond, and Henry & Bedeau, all of Sacramento, for respondents.

PEEK, Justice.

The plaintiff commenced this action to recover damages for injuries sustained as a result of breathing hydro-cyanic acid gas which had escaped from adjoining premises into the drug store where he was employed.

The drug store is located on the ground floor of an office building owned by the defendant Medico-Dental Building Company in the City of Sacramento. Immediately to the north of said building and contiguous thereto is a one story building also owned by said Building Company and leased to the defendant Bedell for use as a restaurant. The Building Company's superintendent occupied an office in the basement of the office building from which a doorway leads into one of the basement rooms in the restaurant building. The south wall of the superintendent's office projects upward, forming the north wall of the pharmacy in which plaintiff was employed.

For some time prior to November 1943, cockroaches from the restaurant basement had invaded the superintendent's office. After discussions between Mr. Bedell and Mr. Oser of the Building Company, Bedell engaged defendant R. L. Moore, doing business under the name of "Orchard Supply Company," to eradicate the pests. Moore began fumigation on the evening of November 16, 1943, after the premises had been prepared by sealing cracks, etc. by introducing hydro-cyanic acid gas into the restaurant building basement and the superintendent's office.

Coming to work the following morning plaintiff entered the pharmacy by means of a back door which opened into a hallway off the building lobby. Shortly thereafter he became nauseated and lost consciousness, allegedly as a result of contact with gas which had escaped from the basement rooms. He was discovered lying on the floor by the bookkeeper who entered the premises between 9:15 and 9:30 A. M.

The complaint sets forth two causes of action. The first is based upon the theory of absolute liability for the miscarriage of an ultra-hazardous activity within the rule announced in Restatement of Torts, sections 519 et seq. The second alleges negligence on the part of the defendants in the manner of introducing the gas into the premises and allowing it to escape.

At the conclusion of plaintiff's case each of the defendants moved for a non-suit as to both causes of action. The trial court denied the motions as to the first cause of action, but granted the nonsuit on the second. From statements of the trial judge made at the time of granting the motion it appears that he believed the question of negligence had become immaterial and that it would be confusing to submit the case to the jury on both theories.

The jury returned a verdict for plaintiff and against defendant Moore in the sum of $20,000, and a verdict in favor of defendants and respondents Bedell and the Building Company. The judgment against Moore was later reduced to $10,000 by the trial court with the consent of plaintiff upon defendant's motion for a new trial.

The plaintiff has appealed from the judgments of nonsuit on the second cause of ac-

tion and from the judgment in favor of defendants Bedell and the Building Company entered on the verdict of the jury on the first cause of action. The defendant Moore has appealed from the judgment against him.

Appeal of Defendant Moore.

The defendant and appellant Moore in his assignment of errors raises as his first point the objection that the evidence is not sufficient to sustain the verdict, in that there is no evidence that plaintiff breathed any hydro-cyanic acid gas, or that the gas could have or did escape from the basement into the drug store.

[1, 2] It is of course too well settled to warrant citation that the appellate court's power on such question begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the trial court. That the evidence on this point is clearly conflicting is quite obvious, and while certain evidence cited by appellant Moore would tend to show that there was no gas present in the pharmacy, and would itself have supported a verdict the other way, there also is considerable evidence which he does not cite from which the jury could have concluded that the plaintiff was injured by the breathing of such gas. Numerous witnesses, including the bookkeeper, a fireman who worked on plaintiff while unconscious, persons employed about the building, and doctors who examined the plaintiff on his entering the hospital, testified variously to having observed the peculiar odor of the gas in and about the drug store both before and after the plaintiff was found unconscious, and having detected the odor on plaintiff's breath and clothes. Dr. Schofield testified that from observing such odor on plaintiff's breath and other physical finding at the time Luthringer was examined by him immediately after entering the hospital, he made a definite diagnosis of prostration from cyanide poisoning. Defendants' contention that such evidence is insufficient to sustain the verdict is therefore wholly without merit.

[3] The further contention is made that the judgment of $10,000.00 is excessive for the reason that the evidence is insufficient to show that plaintiff suffered any injuries of a permanent nature, or that the cyanide poisoning, if any, contributed to the symptoms of which he now complains. Main reliance is placed upon the testimony of defendants' expert witness that persons overcome by hydro-cyanic acid gas either die or recover completely within a short period of time. Opposed to this is much testimony from several medical experts that the chronic inflammatory condition of plaintiff's respiratory tract is possibly due to the deteriorating action of the gas upon the cellular structure of the tissues. This is coupled with the testimony of plaintiff and others who were in a position to observe his physical condition before and after the accident that the conditions complained of appeared *after* the experience while they did not exist *prior* thereto. There being sufficient evidence, which taken alone will support the conclusion of the jury that the plaintiff suffered injuries of a more or less permanent, chronic and disabling nature, this court will not weigh such evidence to determine the direction of the preponderance.

[4-6] The question of the amount of damages is one for the jury, and secondly, for the trial court on a motion for a new trial, who may in the proper exercise of his function reduce the amount of the judgment if in his sound discretion it appears to be excessive. An appellate court will not interfere unless the amount allowed is so "outrageously excessive as to suggest, at the first blush, passion or prejudice." Lahti v. McMenamin, 204 Cal. 415, 420, 268 P. 644, 645. See also Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 117 P. 2d 850; Reilly v. California Street Cable R. Co., 76 Cal.App.2d 620, 173 P.2d 872.

[7, 8] Moore further assigns as error the trial court's ruling sustaining plaintiff's objection to the admission in evidence of certain hospital records relating to plaintiff. The court admitted the day by day records and charts of the nurses but excluded those documents offered which consisted of reports, notes etc. which were signed by the doctors.

Hospital records have been held to be admissible in evidence under the Uniform Business Records as Evidence Act. C.C.P.

sections 1953e–1953h; Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1; McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797; Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271. The admission of business records is an exception to the hearsay rule, the object being to eliminate the necessity of calling each witness to a transaction. In the present case the doctors who signed these reports were sworn as witnesses at the trial and were competent to testify as to the matters comprising the reports, and which they had made relative to plaintiff's physical condition. The documents were not offered for the purpose of impeaching contradictory testimony but as affirmative proof of the matters recited. Under such circumstances their exclusion could not have been prejudicial to said defendant. The facts are similar in this respect to those in Loper v. Morrison, supra, wherein the Supreme Court in refusing to reverse a judgment on the ground of error in excluding certain hospital records stated: "Before this court can reverse a judgment for improper exclusion of evidence, an examination of the entire cause must show that the error complained of resulted in a miscarriage of justice. Cal.Const. art. VI, sec. 4½." (23 Cal.2d 609, 145 P.2d 51). Whether or not the exclusion of the hospital records was a proper application of the hearsay rule is immaterial, for it is apparent that said defendant's case was not prejudiced by the action of the trial judge.

The most important question we are called upon to decide, and which is one of first impression in this state, concerns the application by the trial court of the doctrine of absolute liability without negligence to the facts of this case. Specifically, objection is made to the following given instructions:

"I instruct you that any person engaging in an ultra-hazardous activity, who knew, or in the exercise of reasonable care, should have known its ultra-hazardous character, and thereby proximately causes injury to another by a miscarriage of such activity, is liable to the person harmed, unless the latter knew or in the exercise of reasonable care should have known its ultra-hazardous nature and failed to exercise reasonable care for his own safety, or unless he knowingly and voluntarily invited the injury, and brought it upon himself.

"Likewise, any person, firm or corporation who brings, or permits to be brought upon its premises that which is of an ultra-hazardous nature, and who knew, or in the exercise of reasonable care should have known its ultra-hazardous nature, is liable for any injury proximately caused another, by its miscarriage, unless the person so harmed knew, or in the exercise of reasonable care should have known of its ultra-hazardous nature and failed to exercise reasonable care for his own safety or unless he knowingly and voluntarily invited the injury, and brought it upon himself.

"This principal of the law does not require a findings of negligence upon those so engaging in such activity, or upon those bringing or permitting it to be brought upon the premises.

"I instruct you as a matter of law that under all the facts and circumstances of this case, the use and release of *hydroyanic* acid gas by the defendant Moore, in the premises of defendants Bedell and Sacramento Medico-Dental Building, a corporation, all as appears in the evidence, constituted an ultra-hazardous activity."

"Your are instructed that defendant R. L. Moore, doing business as "Orchard Supply Company", was engaged under all the facts and circumstances of this case in what the law considers to be an ultra-hazardous activity when he used hydro-cyanic acid gas to fumigate the connected basement rooms which have been referred to as Bedell's storeroom and the Superintendent's office. A person who carries on an ultra-hazardous activity is liable to another whom the actor should recognize as likely to be harmed by the miscarriage of the activity for harm resulting to said person from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm, unless the person injured knew or in the exercise of reasonable care should have known its ultra-hazardous nature and fails to exercise reasonable care to avoid the harm threatened thereby after it has miscarried or is about to miscarry. In the present case, if you find from a preponderance of the evidence that defendant R. L. Moore, doing

business as "Orchard Supply Company", should have recognized that persons in nearby parts of the Medico-Dental Office Building were likely to be harmed if hydrocyanic acid gas escaped from the rooms being fumigated and that hydro-cyanic acid gas did in fact escape and find its way to the Medico-Dental Pharmacy premises thereby coming in contact with and causing harm to the plaintiff Albert L. Luthringer, unless you also find from a preponderance of the evidence that plaintiff Albert L. Luthringer knew or in the exercise of reasonable care should have known that fumigation with hydro-cyanic acid gas was being carried on and that the gas had escaped or was about to escape to the pharmacy premises and then failed to exercise reasonable care to avoid the harm threatened, or unless he knowingly and voluntarily invited the injury and brought it upon himself, your verdict must be for the plaintiff Albert L. Luthringer and against defendant R. L. Moore, doing business as "Orchard Supply Company". "

It is the contention of appellant Moore that such instructions are against law for several reasons: First, that the principle of strict or absolute liability is not a part of the law of this state; secondly, if applicable as a general principle, the activity here carried on was not such as would come within the rule; and thirdly, that the instructions given invaded the province of the jury whose function it was to determine the ultra-hazardous nature of the acts.

The imposing of liability in the absence of international injury or negligence is not uncommon in Anglo-American jurisprudence, either as a development in the common law or by legislative enactment. Many examples might be cited. Unintentional trespass upon land, libel, and keeping of dangerous animals, are but a few. Implied warranty, especially in the sale of foods, and the objective theory of contracts fall within the same category. In the field of legislation, Workmen's Compensation Acts, and statutes making owners of automobiles liable for damage resulting from another's use thereof are classic illustrations.

[9-14] The concept of liability without fault in tort actions is one of social and economic expediency and has its origin in the fundamental aim of shifting a loss from one upon whom it has fallen to another whose acts have been the proximate cause of a foreseeable risk. Obviously the application of the rule is to be confined within reasonable limits. Thus the injury for which a recovery is allowed must have been the proximate result of the activity in its ultra-hazardous nature, and the risk must have been one which was foreseeable. An activity carried on in one place reasonably may be considered as ultra-hazardous while the same acts done elsewhere may not be such. Thus in this state blasting operations or storage of explosives carried on in an isolated or properly selected district have been held not to impose liability upon the operator in the absence of negligence or nuisance. Houghton v. Loma Prieta Lumber Co., 142 Cal. 500, 93 P. 82, 14 L.R.A., N.S., 913, 14 Ann.Cas. 1159; Kleebauer v. Western Fuse etc. Co., 138 Cal. 497, 71 P. 617, 60 L.R.A. 377, 94 Am.St.Rep. 62. But when the same activity is carried on in a thickly populated area our courts have allowed recovery in the absence of any showing of negligence. Colton v. Onderdonk, 69 Cal. 155, 10 P. 395, 58 Am.Rep. 556; McKenna v. Pacific Electric Ry. Co., 104 Cal.App. 538, 286 P. 445. See also Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515, 24 P. 303, 18 Am.St.Rep. 248; McGrath v. Basich Bros. Const. Co., 7 Cal. App.2d 573, 46 P.2d 981. In similar cases liability has been imposed upon the application of the principle of res ipsa loquitur. Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146. However, the true basis of the liability imposed in such cases is not that of negligence but more nearly approximates the elements of a willful tort in that a person is presumed to intend the natural and probable consequences of his acts. Negligence is defined as conduct which is unreasonable with respect to the utility derived from the particular way in which it is done. Restatement of Torts, sec. 282. Another method of doing the same thing might be equally useful but occasion less risk to others. Society demands that the act be

done with a minimum amount of risk consonant with the result to be attained. In cases where liability without fault is imposed for resulting damage caused by the miscarriage of an ultra-hazardous activity, the performance of the act is sanctioned because of the great amount of utility either to the individual or to the public generally from the permitting of such acts. To the ordinary prudent man the act is justified and the risk is a reasonable one even though resulting damage may be said to almost certainly follow despite every precaution. However, the dangerous enterprise must "pay its way" and the tendency of the courts is to impose liability for resulting injuries which are foreseeable within the risk created. See Prosser, Torts, pp. 426 et seq.

The leading California case and the one which has gone furthest in imposing liability without fault is that of Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475. The basis of strict liability is therein clearly stated (205 Cal. at page 334, 270 P. at page 955, 60 A.L.R. 475) as a broad and fundamental rule that "where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury." See Carpenter, The Doctrine of Green v. General Petroleum, 5 So.Cal.Law Rev. 263.

[15] The common law never has been so inflexible as to prohibit the application of basic rules and principles to new situations arising in a rapidly changing and developing society. Our failure to discover a case in which recovery has been allowed for injuries resulting from the use of this gas for fumigation on the theory of absolute liability does not prevent the application of the rule to the present situation.

[16] Expert testimony was introduced at the trial of this case showing that hydro-cyanic acid gas is a highly volatile and penetrating gas, that it is extremely difficult or practically impossible to confine and that even with the utmost care the gas would escape to other portions of a building being fumigated. Also the gas is extremely lethal, a small amount inhaled being sufficient to produce death, and in this respect is unlike fuel gas. Appellant Moore maintains that the use of this gas for fumigation is an activity of common usage in the community and for that reason comes within the exception to the rule as embodied in Restatement of Torts, section 520. Such contention obviously is without merit. It would be equally as absurd to assert that dynamite is a common material used in blasting and therefore its use is not ultra-hazardous. We cannot say that fumigation with such a lethal gas is a matter of common usage in that it is carried on by the great mass of mankind or by many people in the community. On the contrary, as testified to by the defendant, because of the very nature of this gas only a few pest control operators are licensed to use it in fumigation.

[17] Whether or not the activity comes within the rule is a question for the trial judge, and it is proper to instruct the jury that they may find for the plaintiff even though there is no showing of negligence on the part of the defendant. Munro v. Pacific Coast Dredging etc. Co., supra. This is the rule laid down in Restatement of Torts, section 520, Comment h.

[18] The jury was repeatedly instructed that the use of hydro-cyanic acid gas creates a liability, independent of negligence, only when it appears that the gas was the proximate cause of the injuries complained of. The verdict against the defendant Moore necessarily implies a finding of the jury that the use of that agency under the circumstances of this case was the proximate cause of the injuries sustained by plaintiff. There is evidence to support that finding. The court merely instructed the jury in this regard that as a matter of law the use of hydro-cyanic acid gas under the circumstances "constituted an ultra-hazardous activity."

[19-23] The remaining assignments of error made by appellant Moore consist of

the trial court's refusal to give certain instructions proposed by the defendants, some twenty-seven in number. It would serve no useful purpose to set forth all of these instructions here. They were either inconsistent with the evidence and the pleadings or the theory of the case as applied by the trial court, which we have here approved, or were covered by other instructions given. To have given these instructions would have served no purpose but to confuse the minds of the jurors. Under the well established law of this state not only is there no error in refusing to give instructions on issues outside the case but if given would have constituted reversible error in the event that judgment had been for the defendants. (Shepherd v. Jones, 71 Cal. 223, 16 P. 711; Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4; Arundel v. Turk, 16 Cal.App.2d 293, 60 P.2d 486.) Where as here the given innot reversible error to refuse instructions which are merely cumulative or repetitious structions as a whole properly inform the jury of the law applicable to the case it is and were covered by other instructions given. (Hicks v. Ocean Shore Railroad, Inc., supra; 24 Cal.Jur. 806, and cases there cited.)

Appeal of Plaintiff Luthringer

The plaintiff's appeal is from the judgments of non-suit and from the verdict in favor of the defendants Bedell and the Building Company.

[24] The case went to the jury with instructions that if defendants Bedell and the Building Company knew or in the exercise of reasonable care should have known of the ultra-hazardous nature of the operations, and if the injuries to plaintiff were proximately caused by the leakage of the gas from the basement rooms, they were to find for the plaintiff. Under such instructions the question of negligence was withdrawn from their determination, and by returning a verdict for these defendants, the jury necessarily must have found from the facts and circumstances as shown by the evidence that these defendants did not know of the nature of the work which Moore intended to perform in the extermination of the cockroaches. Considered in connection with such a finding there could have been no different result had the case been submitted also on the theory that the fumigation was done by defendant Moore in a negligent and careless manner. It follows that no reversible error was committed in this respect of which the plaintiff can complain.

[25] It is next contended that the verdict in favor of these defendants is not supported by the evidence. There can be no argument but that the defendant Moore in the performance of his work acted as an independent contractor. Such fact is impliedly conceded by the plaintiff in his brief on appeal. The evidence further clearly shows that he was not hired by the Building Company but by Bedell, and, according to the testimony of the latter, was given complete independence as to the manner and method of exterminating the pests.

On this point defendant Bedell testified that he did not know what kind of gas was going to be used and denied having been told by Moore of its nature, that he had destroyed cockroaches before with chemicals in the form of powders which were irritating but produced no ill effects, and that he supposed the reason for making the premises air tight was to keep the fumigant in contact with the insects—as he put it—"to smother them." This and other testimony of the Building Company's superintendent is not so incredible as to be unworthy of belief, and sufficiently supports the finding of the jury on the question of knowledge.

Plaintiff relies upon the case of Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P.2d 929, to support his position that the possessor of land is liable for the miscarriage of an ultra-hazardous activity carried on by an independent contractor on the premises. The decision in that case holds that a landlord who is under a duty to keep the premises in repair cannot delegate that duty to an independent contractor and thus escape liability for negligence in making the repairs. The present case clearly does not come within the rule of the Brown case or section 422 of Restatement of Torts which is cited and relied upon in that opinion. Nor does this case come within the rule of Miles v. A.

Arena & Co., 23 Cal.App.2d 680, 73 P.2d 1260, imposing liability upon one who hired an independent contractor to perform inherently dangerous work (spraying of crops with arsenic dust from an airplane) where the contractor was employed to do a specific job in a particular manner with an insecticide furnished by the employer. The distinction lies in the fact that defendant Moore was not hired to fumigate with hydro-cyanic acid gas but merely to exterminate the cockroaches.

[26-28] Under circumstances similar to the present situation but in actions based on negligence, courts of other jurisdictions have charged the employer of an independent contractor who is hired to fumigate a house or dust crops with the duty of ascertaining at his peril the nature of the poison used, imposing liability on such employer for the negligent performance of the inherently dangerous act. Medley v. Trenton Inv. Co., 205 Wis. 30, 236 N.W. 713, 76 A.L.R. 1250; Ferguson v. Ashkenazy, 307 Mass. 197, 29 N.E.2d 828; Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484. The law in California, however, has been stated to be that an employer is not liable for the negligent acts of an independent contractor where the work to be done is not by its very nature intrinsically dangerous. Boswell v. Laird, 8 Cal. 469, 68 Am.Dec. 345; Houghton v. Loma Prieta Lumber Co., supra; Schmidlin v. Alta Planing Mill Co., 170 Cal. 589, 150 P. 983. But the rule is otherwise where the plan to be executed by the contractor is known by him and the employer to be hazardous or injurious to third persons. Williams v. Fresno C. & I. Co., 96 Cal. 14, 30 P. 961, 31 Am.St.Rep. 172; Miles v. A. Arena & Co., supra. In the present case it was not the mere fact that fumigation was to be carried on but the use of cyanide gas which under the circumstances made the act hazardous. Obviously the determining factor is knowledge, actual or implied, on the part of the employer of the dangerous nature of the work. Here the record discloses testimony that defendant Moore was not employed by Bedell to execute a plan involving an ultra-hazardous activity but to achieve an end result namely, the extermination of the cockroaches in whatever manner Moore in his discretion deemed most efficient. The question of knowledge on the part of defendants Bedell and the Building Company was one of fact for the jury where the evidence on this point was in conflict.

[29] It may be that the law would impose upon defendants Bedell and the Building Company the same liability as upon Moore in the event they had actual knowledge of the dangerous character of the chemical Moore chose to use. Rest. Torts, sec. 835f. However, we should not assume the task of deciding that question which has now become moot in view of the holding that the jury in resolving a conflict in the testimony found upon sufficient evidence that such knowledge was lacking.

The judgment in favor of plaintiff Luthringer and against defendant Moore, the judgment of non-suit and the judgment in favor of defendants Bedell and Medico-Dental Building Company are affirmed.

THOMPSON, Acting P. J., and SCHOTTKY, Justice pro tem., concur.



80 Cal.App.2d 166

PERRY v. CITY OF SAN DIEGO.

Civ. 3660.

District Court of Appeal, Fourth District, California.

June 4, 1947.

Rehearing Denied June 27, 1947.

Hearing Denied July 31, 1947.

1. Municipal corporations ⇐857

A claim alleging that suddenly and without warning the roof of a picnic shelter collapsed and fell upon claimant supported an action for damages against city, which admittedly owned and controlled the shelter and maintained shelter for use of people visiting beach, under statute specifying that claim should state the name and address of claimant, and the date, place of accident and extent of the injuries re-

ceived, and claim was not required to allege that dangerous or defective condition of the shelter was due to negligence of some officer or agent of the city. Government Code, §§ 1981, 1982.

2. Municipal corporations ⇐741(2)

Where a reasonable attempt is made to comply with claim statutes in good faith and no intent to mislead or conceal appears, the claim will be upheld in the absence of anything indicating that the municipality has been misled, if the claim substantially conforms to the requirement of the statute.

3. Appeal and error ⇐989

District Court of Appeal where evidence is conflicting is only required to summarize that evidence which tends to support the verdict and judgment, and the weight of the evidence are matters settled in the trial court.

4. Municipal corporations ⇐791(1)

Constructive as well as actual knowledge of a dangerously defective sidewalk or street may render a municipality liable for damages for injuries sustained on that account when such defects should be reasonably anticipated by the officers in charge or when reasonable inspection would have disclosed the dangerous condition.

5. Appeal and error ⇐996

When reasonable minds may differ regarding the question as to whether defective conditions which have existed for sufficient time, under the particular circumstances, will charge a municipality with constructive knowledge thereof, conclusions of the jury in that regard may not be interfered with on appeal.

6. Municipal corporations ⇐857

Question whether a municipality is chargeable with constructive notice of a dangerous and defective condition of property is usually one of fact for the trier of facts.

7. Municipal corporations ⇐857

In action against city for injuries resulting when picnic shelter collapsed and roof fell on plaintiff, evidence sustained finding that city had constructive notice of dangerous and defective condition of shelter resulting from beach visitors taking supporting members of shelter for firewood.

8. Trial ⇐202

Constitutional provision authorizing court to instruct jury regarding law applicable to the case is permissive only. Const. art. 6, § 19.

9. Appeal and error ⇐216(1)

Failure of trial court to instruct on measure of damages was not reversible error where no instruction had been requested. Code Civ.Proc. § 607a.

10. Damages ⇐130(3)

$15,500 was not excessive for compression fractures of two vertebrae from which plaintiff was still suffering at trial approximately 16 months after injury and which confined plaintiff to hospital for several weeks and to bed at home for additional weeks and from which severe pain continuing to time of trial was suffered, and which required wearing of a heavy brace for months followed by lighter types up to time of trial.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Pearl E. Perry against City of San Diego, a municipal corporation, for personal injuries. From an adverse judgment, defendant appeals.

Judgment affirmed.

J. F. DuPaul, City Atty., J. H. McKinney, Deputy City Atty., and Monroe & McInnis, all of San Diego, for appellant.

James B. Abbey, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $15,500 for damages suffered by her on June 3, 1945, when a picnic shelter at Pacific Beach in the City of San Diego collapsed upon her. It is admitted that the shelter was under the control of and belonged to the city of San Diego and was maintained for the use of people visiting the coast line of Pacific Beach.

Defendant presents four grounds for reversal of the judgment. They are: (1) That the claim filed by plaintiff was legally insufficient as it failed to state any claimed

negligence on the part of the City of San Diego or any of its officers, agents or employees; (2) that the evidence failed to show any constructive notice to defendant of the dangerous or defective condition of the shelter, it being admitted that there was no evidence of actual notice thereof; (3) that the trial court erred in failing to instruct the jury on the measure of damages; (4) that the judgment is excessive.

Picnic shelters had been erected along the coast line of San Diego at an undetermined time when the Works Progress Administration was functioning. The one in question was close to the edge of the bluff overlooking the ocean at Pacific Beach. It was rectangular in shape and rested on cement corner blocks on which rested 4" x 4" corner posts. These corner posts were joined together at the base at least on three sides with timbers toe-nailed into them. Also on the same three sides they were tied together with other timbers about four feet above those at the base. These two sets of timbers were joined together with vertical boards making a solid wall about four feet high which served as support to the structure as well as a wind break to those sitting inside. The roof, estimated to weigh between seven and eight hundred pounds, rested on the corner posts and was attached to them by four boards at the corners which were nailed to the corner posts and members of the roof. The landward side of the shelter was open. Benches used as seats were constructed along the inside of the closed sides.

While this was the condition of the shelter when it was constructed, it is admitted that people picnicking on the beach had taken boards from it for use in beach fires and that it was much changed at the time of the accident. One of the witnesses for plaintiff described its condition at the time of the accident, and before, as follows: "All the boards—originally it was closed in on three sides. The boards up about four feet high, all those boards had been knocked off, the stringers taken out that the boards were originally nailed to, and the braces knocked out from up above, leaving the roof of the building just standing there on four posts just like a table on its legs.

"Q. In other words, there were no braces of any kind holding it up? A. No.

"Q. And that condition had existed for how long? A. About a year."

Plaintiff, her son, his wife and two children went to the beach on the afternoon of June 3, 1945. About five o'clock they went to the shelter where they remained for not more than half an hour. Plaintiff, her daughter-in-law, one grandchild and one Marion Johnson were seated in the shelter. Just as plaintiff and her relatives were preparing to leave the shelter suddenly and without warning pitched over towards the ocean pinning plaintiff under the roof and seriously injuring her. No cause for this is suggested in the evidence other than the delapidated condition of the structure. No one touched it and there was a breeze with a velocity of about seven miles an hour blowing in from the ocean. It is evident that the shelter collapsed into this breeze, not away from it.

The verified claim filed by plaintiff contained the following: "That suddenly and without any warning to the undersigned Claimant, the roof of the structure, picnic shelter and building collapsed and fell upon the undersigned Claimant, pinning her underneath said roof and crushing her * * *."

Defendant argues that under the provisions of section 1981 of the Government Code it was necessary for plaintiff to allege in her claim that the dangerous or defective condition of the structure was due to the negligence of some officer or agent of the city of San Diego and, that failing to do so, it was legally insufficient to support an action for damages.

Plaintiff argues that the claim is sufficient in stating that the structure suddenly and without warning collapsed as negligence must be implied in permitting the structure to get into such a dangerous and defective condition that such an accident could have happened.

[1, 2] The claim must be held to be sufficient. It is no more specific than the one held sufficient in Kelso v. Board of Education, 42 Cal.App.2d 415, 416, 109 P.2d 29. See also Silva v. County of Fresno, 63 Cal.App.2d 253, 146 P.2d 520; More v. City of San Bernardino, 118 Cal.App 732,

5 P.2d 661; Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048. From these authorities it seems clear that California courts have taken a reasonably liberal view of the claim statutes and that where a reasonable attempt is made to comply with the law in good faith and no intent to mislead or conceal appears the claim will be upheld in the absence of anything indicating that the municipality has been mislead, if the claim substantially conforms to the requirements of the statute.

A more compelling argument is found in section 1982 of the Government Code and in Section 1 of an Act of the Legislature passed in 1931, Stats. 1931, p. 2475, which specifies what should be stated in a claim, namely, the name and address of the claimant, the date and place of the accident and the extent of the damages or injuries received. The claim filed by plaintiff sufficiently stated each of these necessary items.

It is conceded that defendant had no actual notice of the condition of the shelter so plaintiff's case must of necessity rest on constructive notice. Such constructive notice must depend on the obvious condition of the shelter and its weakening by persons whom defendant terms "vandals" who removed supporting members for use as firewood. According to the witness for plaintiff whom we have already quoted, this condition of weakness was obvious and had probably existed for nearly a year. Other witnesses testified to the weakened condition of the structure for periods ranging from about two months to over one year prior to its collapse.

In Fackrell v. City of San Diego, 26 Cal.2d 196, at page 206, 157 P.2d 625, at page 630, 158 A.L.R. 773, it is said: "Actual notice of a defect or dangerous condition is not required. Constructive notice satisfies the statute. Laurenzi v. Vranizan, 1945, [25 Cal.2d 806, 812] 155 P.2d 633; Dawson v. Tulare Union High School, 1929, 98 Cal.App. 138, 142, 276 P. 424; Hook v. City of Sacramento, 1931, 118 Cal.App. 547, 553, 5 P.2d 643; Bennett v. Kings County, 1932, 124 Cal.App. 147, 153, 12 P.2d 47. Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry, he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections fc the discovery of unsafe or defective conditions. (Laurenzi v. Vranizan (1945), supra. [25 Cal.2d at] pages 811, 812, pages 636, 637 of 155 P.2d; Nicholson v. City of Los Angeles (1936), 5 Cal.2d 361, 364, 365, 54 P.2d 725.)"

[3] While the evidence on the length of time that the shelter had been stripped of its supporting members is conflicting, we are only required to summarize that tending to support the verdict and judgment, as conflicts in the evidence, and its weight, are matters settled in the trial court and not here.

[4, 5] The evidence in the instant case on the question of notice falls within the following rule announced in the case of Kirack v. City of Eureka, 69 Cal.App.2d 134, 158 P.2d 270, 273. "The rule is well established that constructive as well as actual knowledge of a dangerously defective sidewalk or street may render a municipality liable for damages for injuries sustained on that account when such defects should be reasonably anticipated by the officers in charge, or when reasonable inspection would have disclosed the dangerous condition. When reasonable minds may differ regarding the question as to whether defective conditions which have existed for sufficient time, under the particular circumstances of a case, will charge a municipality with constructive knowledge thereof, the conclusions of the jury in that regard may not be interfered with on appeal. (Citing cases.)"

[6, 7] As the question of constructive notice to a municipality of a dangerous and defective condition of property is usually one of fact for the trier of fact and as the necessary conclusion of the jury on the question has the support of substantial evidence we cannot disturb it here. Silva v. County of Fresno, supra.

The trial court failed to give any instruction on the measure of damages and in summarizing the allegations of the complaint and the statement in the claim filed with the city stated that plaintiff alleged and

claimed damages in the sum of $50,000; that the amount stated in the claim was no evidence of the amount to which plaintiff was entitled, if it was determined she was entitled to recover, but only fixed the limit beyond which she could not recover in any event. In this connection it should be pointed out that neither party proposed or requested any instruction on the measure of damages.

[8] Defendant now argues that it was prejudicial error for the trial judge to fail to instruct on this question on his own motion. In support of this argument defendant cites section 19 of Article VI of the Constitution and sections 2061 and 2101 of the Code of Civil Procedure. The section of the Constitution is permissive only and specifies certain things the trial court *may* do in instructing the jury. We find nothing in section 2101 of the Code of Civil Procedure relating to instructions. Section 2061 of the same code provides that the jury is "to be instructed by the court on all proper occasions" on seven enumerated subjects. The instructions given covered five of those subjects. The evidence did not raise the issues covered by the other two so in this trial there was no *proper occasion* for instructing on them. The section does not require an instruction on the measure of damages.

Defendant also cites such cases as Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682; Fries v. American Lead Pencil Co., 141 Cal. 610, 75 P. 164; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Hiatt v. Brockman, 7 Cal.App.2d 88, 45 P.2d 411; Sills v. Forbes, 33 Cal.App.2d 219, 91 P.2d 246; Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 108 P.2d 699, and Diel v. Baxter, 58 Cal.App.2d 383, 136 P.2d 789.

It is unnecessary to review those cases in detail. In some of them we can find nothing bearing on the question before us. In some others appear statements to the effect that the trial judge should instruct on the law applicable to the case. Speaking very generally such statements were made in connection with either erroneous instructions given, erroneous instructions proposed, or instructions refused when covered by others. They do not support the argument made by defendant here.

Section 607a of the Code of Civil Procedure places on counsel the duty of proposing instructions applicable in the case on trial.

[9] It is a rule generally recognized in California that a party may not complain of the failure of the trial court to instruct on a subject in the absence of that party's request to give a proposed instruction thereon. McFate v. Zuckerman, 130 Cal.App. 172, 19 P.2d 532; Bramble v. McEwan, 40 Cal.App.2d 400, 104 P.2d 1054; Peckham v. Warner Bros. Pictures, supra. In Ellis v. Tone, 58 Cal. 289, it was held that it was not reversible error to fail to give an instruction on the measure of damages where none had been requested.

[10] Defendant urges that the judgment is excessive. Plaintiff suffered compression fractures of two vertebrae. She was injured on June 3, 1945, and the case went to trial on October 22, 1946. At the time of trial she was still suffering from the injuries. Two physicians, one a witness for each party, could not predict a complete recovery for her although both testified her condition was improving. She had been confined to a hospital for several weeks and to her bed at home for additional weeks. She suffered severe pain which continued to the time of trial. She had continued headaches, probably caused by a damaged nerve. The movement of her limbs was restricted and she had difficulty bending over. She wore a heavy brace for months followed by lighter types up to the time of trial. She was seriously injured and we cannot as a matter of law hold the verdict and judgment excessive. Johnston v. Long, —— Cal.2d ——, 171 P. 538.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

CARTER et al. v. CITY OF LOS ANGELES et al.

Civ. 15464.

District Court of Appeal, Second District, Division 1, California.

May 29, 1947.

Rehearing Denied June 17, 1947.

Hearing Granted July 24, 1947

1. Municipal corporations ⇐205, 206

Where director of the commercial division of Department of Water and Power of the City of Los Angeles requested the Board of Civil Service Commissioners to certify names of two women for appointment to positions of field collectors, and names of only three women appearing on the eligible list were certified by the Board to director, appointment of two of the women was not contrary to law because women did not stand highest on the eligible list for the positions. Const. art. 20, § 18.

2. Municipal corporations ⇐205, 206

The suspension of female civil service employees who had attained permanent status as field collectors in Department of Water and Power of the City of Los Angeles, who were not charged with misconduct or dereliction and who were replaced by women from lower classifications performing substantially the same duties, was arbitrary and capricious, under the facts, and amounted to an abuse of discretion.

3. Municipal corporations ⇐218(11)

Under charter provision requiring that demand by civil service employee for reinstatement be made within 90 days after suspension, demand must be filed within 90 days after order of the board sustaining action of the department.

4. Municipal corporations ⇐218(11)

City and officials which had attempted to dissuade suspended civil service employees from bringing action for reinstatement were estopped to urge as a bar to action for reinstatement, alleged noncompliance by employees with charter provision requiring that demand by civil service employees for reinstatement be made within 90 days after suspension, as a condition precedent to action.

5. Mandamus ⇐168(4)

In mandamus proceeding by suspended civil service employees against the City of Los Angeles and others to compel reinstatement as field collectors in department of water and power, evidence established that employees were regularly appointed to their positions and that their suspension was arbitrary and capricious and amounted to an abuse of discretion, and hence employees were entitled to reinstatement to their positions as field collectors.

6. Municipal corporations ⇐220(6)

A civil service employee who has been unlawfully deprived of his position is entitled to recover accrued salary for period he is prevented from performing his duties, less remuneration received from other employment during that period.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Mandamus proceeding by Ruby Carter and another against the City of Los Angeles and others, to compel the reinstatement of petitioners as suspended civil service employees and the payment of salaries from date of suspension. From a judgment denying the petition, petitioners appeal.

Reversed with directions.

See, also, 67 Cal.App.2d 524, 154 P.2d 907.

Jerrell Babb, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., for Water and Power, Wendell Mackay and A. L. Lawson, Deputy City Attys., all of Los Angeles, for respondents.

YORK, Presiding Justice.

Petitioners instituted the instant proceeding in mandamus to compel respondents to reinstate them as field collectors in the Department of Water and Power of the City of Los Angeles, from which positions petitioners allege they were improperly removed upon the unfounded charge that there was lack of work; and for the payment to them of the compensation which they would have received had they not been suspended.

Respondents defended on the grounds, among others, that petitioners were never legally appointed or employed by the Department of Water and Power, because they were not appointed from among those standing highest on the civil service eligible list for field collector, and that even though they were legally appointed, they were laid off in the manner provided by section 125 of the Charter of the City of Los Angeles.

From the judgment of the trial court in favor of respondents which apparently was based upon the two grounds above recited, petitioners have perfected this appeal.

It appears from the record herein that from November 6, 1936, to December 31, 1940, appellants were classified civil service employees of the respondent department; that early in 1936 respondent board of civil service commissioners held an examination for the class of field collector, which petitioners took and passed; that on May 14, 1936, said respondent board established an eligible list of field collectors containing the names of 398 persons who had passed said examination; that of the 398 only three, including appellants, were women. Immediately prior to November 6, 1936, respondent department requested respondent board of civil service commissioners to certify the names of two women from such eligible list of field collectors, and in response thereto said board certified the names of appellants, as being female persons eligible for appointment and assignment in the class of field collector. Pursuant to such certification, appellants were employed on November 6, 1936, by respondent department as field collectors in the commercial division, and were assigned to duty in the special collection unit by the director of the division, where they served until December 31, 1940, when they were laid off upon the alleged ground of lack of work. After their suspension, appellants appealed in writing to the respondent civil service commission under the provisions of section 112(a) of the city charter, and on March 10, 1941, they filed demands with said commission, pursuant to section 112½ of said charter, for reinstatement and for compensation. Said commission heard and considered said appeals and demands from December 13, 1940 (the day upon which notice of suspension was served upon appellants), to about July 7, 1941, when it denied the same, it being alleged in the petition herein that such denial was capricious, arbitrary and unlawful. It is also alleged that since their suspension, appellants' positions have been filled continuously by employees of other and different civil service classes, which allegation is admitted by respondents.

No question has been raised as to the capabilities of appellants, it being conceded by respondents that they were able and efficient employees and "were laid off solely for the reason of a lack of work for Field Collectors."

Appellants urge that certain of the trial court's findings are not supported by the evidence and are against law, to-wit:

No. VIII: "* * * It is true that notwithstanding the fact that the petitioner Ruby Carter was member 216 on said eligible list of Field Collectors, and Elizabeth A. Baltes was number 76 on said eligible list, the respondent Board of Civil Service Commissioners purportedly certified the petitioners' names for appointment, out of regular order, as Field Collectors. * * * that thereafter, and on November 6, 1936, the Department of Water and Power purportedly appointed the petitioners under and pursuant to such certifications, to positions in its Commercial Division. * * * that said positions * * * were not positions the duties of which could only be properly, efficiently, reasonably or satisfactorily performed by a female person, but on the contrary * * * could have been performed * * * by either men or women. * * * that the certification of the names of these petitioners, and the said appointment of said petitioners out of regular order was contrary to law in that it violated the provisions of sections 109 and 424 of the Charter of the City of Los Angeles, and section 18 of Article XX of the Constitution of the State of California."

No. XIII: "* * * It is not true that the respondents have unlawfully or arbitrarily refused to permit the petitioners, or either of them, to work in the classified civil service positions as Field Collectors, or in any other position * * * (or) that the respondent Board of Civil Service Commissioners acted capriciously, arbitrarily or un-

lawfully in sustaining the suspension of petitioners * * * (or) in denying the claims for compensation or for the reinstatement of the petitioners, or either of them."

No. XIX: "It is not true that ever since * * * the 6th day of May, 1937, the petitioners, or either of them, have been and are now permanent classified civil service employees in the Commercial Division of the Department of Water and Power of the City of Los Angeles."

No. XXVII: "* * * It is true that the suspension of such persons, including the petitioners, was made in accordance with their relative seniority, i. e., that the provisions of section 125 of the Charter of the City of Los Angeles governing the order of layoff for lack of work was duly complied with."

No. XXIX: "It is not true that petitioners * * * are entitled to any salary or compensation subsequent to the 31st day of December, 1940 * * *."

No. XXXI: "It is not true that the respondents, or any of them have arbitrarily, unlawfully, or without right, refused to certify to the payroll account of the petitioners, or either of them, or without authority have refused to pay the petitioners * * * salary for the time they have been suspended from the Department of Water and Power."

No. XXXII: It is not true that it is the mandatory duty of the respondents * * * by provisions of the Charter of the City of Los Angeles, to certify to the payroll account of petitioners * * * or to pay the petitioners * * * any salary for the time they * * * have been suspended from the Department, or to reinstate the petitioners * * * to the respective positions which they occupied on and before December 31, 1940, and from which they were removed on said date."

Appellants urge that the foregoing findings and the conclusions of law based thereon indicate that the trial court decided against them "only on one ground and that ground is in effect, that the appellants were illegally employed in the beginning. * * * All other findings are favorable to appellants." Also, "that there is no evidence in the record that will support" such findings.

Respondents argue that the court found against appellants "in at least three material respects: First, * * * that the duties of the positions to which appellants were appointed could have been performed by either men or women; Second, * * * that appellants were appointed out of regular order; Third, * * * that even though appellants were legally appointed, their suspensions were made in their relative order of seniority"; that the court concluded from these findings "that the appellants were illegally appointed to their positions and * * * were laid off in the manner required by law", and that there is substantial evidence to support the three findings mentioned.

Section 109 of the City Charter provides that the head of a department in which a position classified by the Board of Civil Service Commissioners is to be filled "shall notify said board of that fact, and said board shall certify to such officer the name and address of one or more candidates, not exceeding three, for each position to be filled, who stand highest on the register for the class to which said positions belong, and said appointing officer or department shall fill such places from the names certified to him or it by said board therefor within thirty days from date of said certification. Provided, however, that when two or more positions are to be filled at the same time said board shall not certify to such officer more than two names and addresses above the number of positions to be filled. In making such certifications, sex shall be disregarded, except when statute, the rules of said board, or the appointing power specify sex."

[1] It is clear from the record herein that the eligible list for the position of field collector which was established by respondent board on May 14, 1936, contained the names of only three women; that prior to November 6, 1936, the then director of the commercial division of the Department of Water and Power requested said board to certify the names of two women for appointment to the positions of field collectors in said division of said department; that the names of the three women appearing on such eligible list were certified by the board

to such director and he thereupon selected and appointed appellants, who were assigned to the special collections unit of the commercial division of respondent department.

The certification by respondent board and the selection and appointment of appellants under the facts hereinbefore recited, amounted to a compliance with the provisions of section 109 of the charter, in that the names so certified were the names of "women" candidates who stood highest on the register, and such certification was in response to a request specifying a preference for women, which is directly permitted by section 109, supra.

In the circumstances, the court's finding that the appointment of appellants was out of regular order and contrary to law is not supported by the evidence.

[2] Mr. Homer C. White, director of the Commercial Division of respondent department from December 12, 1936, to April 30, 1945, testified that during the entire period he worked for the department he "objected to the idea of women Field Collectors"; that he kept appellants working in the division from the time he came in until December 31, 1940, "because there was some question about their classification of field collectors that had never been construed by civil service action * * * I raised the question"; that he was familiar with the duties of field collectors and after he laid appellants off, he placed two girls on their desks, who did and continued to perform the identical work that appellants had been doing, but were persons of different and other classifications than field collectors, to-wit: Grace Sparks, general-clerk-typist, was assigned to appellant Baltes' desk, and Teresa Fowles, a typist, was assigned to appellant Carter's position; that there were no males in the special collection unit doing the same or similar work that appellants were doing; that he had "nothing but women" doing that type of work; that the function of the special collection unit of the commercial division was to enforce the collection of bills; that neither appellant "regardless of whether it was her duty to do so or not ever" refused "to do anything she was requested to do"; that his objection to women being employed as field collectors was because of his "knowledge of the work a field collector was required to do, such as digging holes in the ground with a pick or with a shovel, and turning off water service connections and with the necessity of going into backyards and going into the rear of houses and turning off electric services, sometimes under duress from the consumers, and also because of the fact on many occasions field collectors were accosted by vicious dogs. And in my opinion I felt that was not the kind of work for a woman field collector, but the work of a man that would have to face such conditions." To the question: 'What were the functions of the commercial division other than to collect bills?" said witness replied: "To read meters, take orders, to turn off and turn on service connections, prepare bills, take application for new connections, obtain cash deposits to cover the payment of bills, and keep a correct account of all records in connection with the preparation of collection of consumer bills for light, water and power."

Appellant Baltes testified that the special collections unit where she worked "took care of all work that went to the field collections, it had to progress through our department before field action could be taken"; that field collections and special collections were coordinating departments dealing in collections. "It was all work going to the field collection, must go through the special collections before it was ready to go to the field collections * * * My work was considered the field desk, all closing bills or delinquent bills * * * practically all the work that went to the field men had to go through my desk." Similar facts were testified to by the appellant Carter, it being shown that the two field desks were set up in the special collections unit on November 6, 1936, appellants placed at such desks, where they remained on duty until December 31, 1940.

The record in this case clearly shows that appellants held their positions under tenure acquired under the charter of the City of Los Angeles in that each had attained a permanent status and that neither was charged with any misconduct or dereliction of duty, but that for some reason, not disclosed herein, the department head under whose supervision appellants had been em-

ployed for several years questioned their classification as field collectors and made some insubstantial changes in the classification of positions in the department in order to justify appellants' suspension. Although the procedure followed was that outlined in section 125 of the charter, the facts and circumstances, upon which the suspension was based, were insufficient to warrant the ousting of appellants and the appointment of other women from lower classifications to perform substantially the same duties. In other words, such suspensions were arbitrary and capricious and amounted to an abuse of discretion.

[3] Respondents raise for the first time upon this appeal, the question of the sufficiency of the petition herein to state a cause of action, it being contended that appellants' failure to allege therein the presentation of "demands for reinstatement within 90 days after the date of the civil service commission's order sustaining their layoffs, is a bar to this proceeding."

Section 112½ of the charter provides: "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. * * * Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. * * *"

In the case of Steen v. Board of Civil Service Com'r, 26 Cal.2d 716, 722, 160 P.2d 816, 819, the supreme court held that "the demand for reinstatement is from the final action of the board perfecting a final discharge." In other words (26 Cal.2d at page 720, 160 P.2d at page 818) "the written demand must be filed as required by section 112½ within 90 days after the order of the board sustaining the action of the department."

[4] The petition herein alleges service upon petitioners of notice of suspension on December 31, 1940; and that said petitioners filed their claims for compensation and demands for reinstatement with the respondent board of civil service commissioners on March 10, 1941, which claims and demands were denied by said board under date of July 7, 1941. It is further alleged that immediately after July 7, 1941, petitioners continued to discuss the matter of their suspension with respondents and threatened to file an action for reinstatement, but that respondents dissuaded them from bringing such action and advised them to make "application to the Board of Commissioners of the Department of Water and Power for reinstatement to (their) Civil Service position(s) and to negotiate with the Civil Service Commission", whereupon petitioners, believing that respondents were acting in good faith in their behalf and also believing that they would be reinstated, "did negotiate with said Civil Service Commission and did on or about the 2nd day of October, 1941, file a written application with the Board of Water and Power Commissioners * * * and from that time on up to on or about the 25th day of September, 1942, negotiations continued between petitioner(s) and respondents in reference to (their) reinstatement to (their) position(s) as field collector(s) in the Commercial Division of the Department of Water and Power"; and that despite promises made by respondents "that the matter of (their) reinstatement * * * would be regularly brought before respondents for a vote", the matter was not brought to a vote and that "respondents still continue to dissuade" petitioners from bringing action for reinstatement. The amended answer alleges that after petitioners were suspended they importuned divers members of the Board of Water and Power Commissioners in their individual capacity, and did submit to said Board a document, dated October 2, 1941, which requested said Board to review the suspensions and reinstate petitioners in their former positions; that on Jan. 28, 1942, said Board advised petitioners that proper procedure had been followed in

their suspensions and that it could do nothing further in behalf of petitioners and reiterated its position by a letter of similar import dated September 22, 1942.

The court found to be true the matters alleged in the petition and in the amended answer, hereinbefore recited, finding specifically that the petitioners "acted in good faith and believing that they, and each of them, would be reinstated, did negotiate with said Civil Service Commission, and did, on the 2nd day of October, 1941, file a written application with the Board of Water and Power Commissioners."

In view of the alleged activities of respondents in attempting to dissuade appellants from bringing the instant action, as well as advising them to negotiate with the board of civil service commissioners and to make application to the board of commissioners of the department of water and power for reinstatement, which advice appellants followed literally by filing such written application on October 2, 1941 (a date falling within the 90 day period after final action by the respondent board of civil service commissioners), which fact is alleged in the answer and found by the trial court to be true, — respondents are now estopped to urge as a bar to the instant action appellants' noncompliance with the provisions of section 112½, supra, as that section is interpreted by Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816.

[5] The evidence adduced at the instant trial is amply sufficient to establish that appellants were regularly appointed to their civil service positions, and that their suspension was arbitrary and capricious and amounted to an abuse of discretion on the part of respondents. As a result, appellants are entitled to reinstatement to their positions as field collectors.

[6] Appellants urge that under section 112(a) of the City Charter, they are entitled to receive compensation from the city "the same as if he (they) had not been removed, discharged or suspended by the appointing board or officer." In this regard, it appears to be settled that a civil service employee, who has been unlawfully deprived of his position, is entitled to recover the amount of his accrued salary for the period he is prevented from performing his duties, less remuneration he has received from other employment during that period. Stockton v. Department of Employment, 25 Cal.2d 264, 273, 153 P.2d 741; Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 632, 128 P.2d 23.

The judgment appealed from is reversed with directions to the trial court to determine the amount of remuneration received by appellants from other employment since their suspension, and thereupon to issue its writ of mandate requiring the reinstatement of appellants as field collectors with accrued salary from the date of their suspension, less such amounts as were received by them as salary from employment subsequent to their dismissal.

DORAN and WHITE, JJ., concur.



PEOPLE v. WESTEK.*

Cr. 4075.

District Court of Appeal, Second District, Division 1, California.

May 28, 1947.

Rehearing Denied June 11, 1947.

Hearing Granted June 26, 1947.

1. Criminal law ⇐1159(3)

Where there is a conflict of evidence on an essential issue, appellate court is bound by determination of jury.

2. Criminal law ⇐369(1)

In prosecution involving lewdness, evidence of other crimes is not admissible. Pen.Code, § 288.

3. Criminal law ⇐369(1), 1186(4)

In prosecution for sodomy and for another sex perversion, admitting evidence of defendant's commission of criminal acts on certain boys other than those named in information was error, notwithstanding defendant on cross-examination had denied committing such other acts, and the error was not cured by constitutional provision regarding harmless error. Pen.Code, §§ 286, 288; Const. art. 6, § 4½.

* Subsequent opinion 190 P.2d 9.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George Westek was convicted of violating Penal Code §§ 286 and 288, and he appeals.

Reversed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

The defendant was convicted by a jury of several counts of violation of Penal Code Sections 286 and 288; Section 286 denouncing the crime of sodomy, and Section 288 denouncing another sex perversion, euphemistically described as lewdness. The asserted victims were boys. The defendant's application for probation was denied and he was sentenced to state's prison.

[1] As is usual in such cases, the boys testified to the acts in question, and the defendant categorically and specifically denied the charges—which is about all that any defendant can do under such circumstances. A jury of three men and nine women convicted the defendant, and the judge who heard the testimony denied his motion for a new trial. When there is a conflict of evidence on an essential issue, appellate courts are bound by the determination of the jury. People v. Yankee, 79 Cal.App.2d 431, 179 P.2d 582; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633; 8 Cal.Jur. 587, Sec. 581.

After specifically denying each charge in the information, the defendant testified on direct examination that he had not committed any act of sodomy, nor any lewdness, in the county of trial nor in any other county upon any boy. Thereupon, he was asked upon cross-examination if he had not committed such acts upon certain boys other than those named in the information. This he denied. Upon rebuttal these latter named boys testified that he did. These acts were not charged in the information and the boys testified that they were committed in counties other than Los Angeles County, the place of the trial.

[2] The testimony adverse to the defendant was admitted over his objection, and he now argues it was inadmissible, being proof of other offenses not connected with those for which he was tried. In criminal cases in California, the trend of decision has been to allow evidence of other crimes generally, to show guilty knowledge, motive, intent, or a common scheme or plan. 8 Cal.Jur. 61. But in cases involving lewdness, the rule that evidence of other crimes is not admissible has not been relaxed. People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607, and cases therein cited. The reason for this is stated in People v. Huston, supra, 45 Cal. App.2d at page 597, 114 P.2d at page 607:

"This court on previous occasions has directed the attention of the profession to the reasons for this rule, which are so aptly stated in the universally acknowledged pronouncement of Lord Chief Justice Hale on the subject of the crime of rape, which also applies to offenses interdicted by section 288 of the Penal Code. It is as follows:

" 'It must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent; (and we should) be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses.' "

And the same rule of exclusion is applicable in sodomy cases. People v. Wyett, 49 Cal.App. 289, 193 P. 153; People v. Singh, 121 Cal.App. 107, 8 P.2d 898.

The only theory upon which the testimony may stand in the record in this case is that the defendant himself opened the door to its reception. The argument in support of this theory runs as follows: Section 1323 of the Penal Code permits cross-examination upon any matter testified to by a defendant in chief. It is as-

serted that in People v. Henry, 40 Cal.App. 2d 186, 104 P.2d 525, a situation similar to the case at bar was considered by this court, but if it was, it is not mentioned in the opinion. Therefore, so runs the argument, applying general legal reasoning to this situation, the defendant opened the door to the introduction of the testimony by his sweeping and all-encompassing denials, and the testimony was properly admissible as rebuttal. See 20 Am.Jur. 263; People v. Brac, 73 Cal.App.2d 629, 167 P. 2d 535.

The evidence of the other boys was collateral to any issue in this case and was immaterial, unless, as stated, the door for its reception was opened by the defendant himself. The controlling rule is set forth in People v. McDaniel, 59 Cal.App.2d 672, at page 677, 140 P.2d 88, at page 90: "The argument that defendant's counsel 'opened the gates' is unavailing. An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' 27 Cal.Jur. p. 74. 'It is a settled rule that cross-examination as to matters irrelevant to the issue may and should be excluded—even though, in some cases, testimony relative thereto was elicited upon direct examination—and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules.' 27 Cal. Jur. p. 106."

[3] Therefore, under the circumstances of this case, it was error to admit evidence of other crimes over defendant's objection. And, obviously, such error may not be cured by the provisions of Sec. 4½, Art. VI of our Constitution.

Having come to this conclusion, it is unnecessary to discuss the questions of corroboration, or the instructions given.

The judgments and order appealed from are, and each of them is reversed.

YORK, P. J., and WHITE, J., concur



80 Cal.App.2d 28

WILLIAMS v. WILLIAMS.

Civ. 13314.

District Court of Appeal, First District, Division 2, California.

May 27, 1947.

As Amended June 20, 1947.

Hearing Denied July 24, 1947.

1. Divorce ⇐312

On appeal from order denying wife's motion for modification of final divorce decree to require husband to pay certain sum for support of minor son under wife's custody, the only question involved was whether the trial court abused its discretion.

2. Appeal and error ⇐1008(1)

An appellate court will not substitute its views for the findings of a trial court based on trial court's examination and inspection of the parties and witnesses. Const. art. 6, § 4½.

3. Divorce ⇐309

Trial court did not abuse discretion in denying wife's motion for modification of divorce decree to require husband to pay $250 a month for support of a minor son in her custody, where there was evidence that husband gave some aid to maintenance of minor son, undisputed evidence showed that husband had previously conveyed ample funds for wife to provide for care of son, and there was no evidence to show that more was needed for son's maintenance.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action for divorce by Doris L. Williams against William Andrew Williams, wherein the plaintiff obtained a decree. Plaintiff filed a motion for a modification of the final decree to require the defendant to pay $250 a month for a minor son under the plaintiff's custody. From an order denying the motion, plaintiff appeals.

Order affirmed.

Morse & Richards, of Oakland, for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff in an action for divorce moved for a modification of the final decree to require the father to pay $250 a month for the support of a minor son who is under her custody. The motion was denied.

The final decree was entered August 30, 1939. No provision was made therein for support of the four minor children but a property settlement was made under which real and personal property was transferred to the wife and the husband agreed to pay her $1,000 a month alimony as long as she remained unmarried and, in the event of remarriage, $100 a month for support of each of the minor children. Plaintiff has remarried three times since the settlement. Three of the children have reached majority and are not involved in this proceeding. Defendant has also remarried and has two minor children requiring his support. Following the divorce defendant suffered financial losses and became in arrears in his alimony payments to the extent of $8,000. In 1940 a new settlement agreement was made. The accrued alimony was paid. Plaintiff was given 1714 shares of the stock of Andrew Williams Stores, Inc.; she has received real estate in Oakland costing over $100,000, furnishing and personal property costing $150,000, real estate in Honolulu costing $91,000; and proceeds of insurance policies amounting to between $35,000 and $40,000. She sold 1000 shares of the Andrew Williams Stores for $100,000, taking $20,000 in cash and a note for $80,000 paying 5% interest; she purchased additional stock of this company which pays substantial dividends. She sold the home property in Oakland given her under the settlement and purchased another home for $12,500. The original property was valued at $100,000, but she did not disclose what she received in the sale or what was done with the proceeds. It thus appears that appellant has received from respondent property valued at between $375,000 and $400,000, but the court was unable to get from her her present worth or income.

On the part of respondent the evidence is that he was reduced to near bankruptcy and was compelled to liquidate his holdings to make these provisions for appellant and the minor children. He went to San Diego where he engaged in business with a relative, acquired a meat packing business, and during the war period enjoyed a good income. Proof of his financial ability to pay was confined to his statement for income tax purposes for the year 1945. Having remarried the tax return was a consolidated return of husband and wife showing a net worth of $144,567.36, and a net income of $59,934.97. What part of these assets or income belonged to the wife does not appear.

It is not disputed however that the enterprise was a "war baby" which furnished meat to the large population of war industry workers and that no evidence was had as to future possible income. It was also shown that respondent had two minor children of his second marriage who required his support.

[1, 2] On this evidence the trial court denied the motion for additional support of the minor son. There is only one question involved in an appeal from such an order—did the trial court abuse its discretion? Where this is the issue the universal rule is that an appellate court will not substitute its views for the findings of the trial court which are based upon its examination and inspection of the parties and the witnesses, 2 Cal.Jur. p. 896; Sharpe v. Sharpe, 55 Cal.App.2d 262, 265, 130 P.2d 462; Hale v. Hale, 55 Cal.App.2d 879, 883, 132 P.2d 67; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 308, 77 P.2d 301. In

the Lent case this court said, 25 Cal.App. 2d at page 308, 77 P.2d at page 302: "An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. (Const., art. 6, § 4½; Davies v. Ramsdell, 40 Cal. App. 432, 433, 183 P. 702; Sunset Farms, Inc., v. Superior Court, [supra] (9 Cal. App.2d 389, 405, 50 P.2d 106.)"

[3] Here the trial court had evidence that respondent had given some aid to the maintenance of his minor son. No evidence was taken to show that he needed more. Undisputed evidence was heard showing that respondent had theretofore conveyed to appellant ample funds to provide for the care of the son. The appellant's testimony was so evasive, contradictory and equivocating that the trial court had good reason to reject it in toto. Hence, we cannot say that discretion was abused.

Order affirmed.

GOODELL, and DOOLING, JJ., concur.



80 Cal.App.2d 123

TORNELL et al. v. MUNSON et al.

Civ. 7313.

District Court of Appeal, Third District, California.

May 29, 1947.

Rehearing Denied June 28, 1947.

Hearing Denied July 24, 1947.

1. New trial ⇐9

Where award of damages is less than special damages suffered by plaintiff and none of the amount awarded can be considered as general damages, new trial for insufficiency of damages must be awarded on all the issues, but where jury awarded some general damages although inadequate, new trial may be granted only on issue of damages.

2. Damages ⇐159(2)

Loss of earnings are recoverable under an allegation of general damages, whatever plaintiff may have denominated as special damages or however the element of loss of earnings may have been set forth in plaintiff's pleadings.

3. Damages ⇐37, 216(8)

Actual earnings prior to accident are taken merely as evidence of extent to which earning capacity of individual has been impaired either totally or partially during the time between the date of the action and the trial, and it is not actual amount of earnings lost which are recoverable as special damage but loss of earning capacity, and such evidence presents to jury question of facts from which it may find that earning power was either partially or totally impaired during period of time in question and therefore may allow only a part of amount of earnings lost.

4. New trial ⇐9

An award of new trial on single issue of damages on ground of insufficiency of $3,000 damages awarded to plaintiff was not abuse of discretion under facts as against contention that inadequate verdict was as a matter of law the result of compromise on issue of liability and that therefore a new trial on all the issues should have been awarded.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by G. S. Tornell and Naemy Tornell against Merrill C. Munson and another to recover damages from defendants by reason of defendants' alleged operation of their automobile. From an order denying defendants' motion and granting plaintiffs' motion for new trial, Merrill C. Munson appeals.

Order affirmed.

Bronson, Bronson & McKinnon and Harold Ropers, all of San Francisco, for appellant.

Rowan Hardin, of Sonora, for respondents.

PEEK, Justice.

Plaintiffs seek to recover damages from defendants by reason of defendants' alleged negligent operation of their automobile. By their answer defendants denied plaintiffs' claim and affirmatively alleged that the injuries, if any, suffered by plaintiffs resulted from their own negligence. A trial by jury resulted in a verdict for plaintiffs in the sum of $3,000. Both parties moved for a new trial—the defendants upon substantially all of the statutory grounds—the plaintiffs primarily upon the ground of insufficiency of the damages. The order of the trial court denying defendants' motion and granting plaintiffs' motion upon the sole issue of damages does not appear to be an abuse of discretion under the facts presented by the record.

However, defendants contend that such order granting a new trial on the single issue of damages was an abuse of discretion in that the surrounding facts and circumstances conclusively show as a matter of law that the inadequate verdict was the result of a compromise on the issue of liability. The question of the defendants' liability, it is said, was the only issue contested, and that the plaintiffs' case on this point was very weak. In addition, the compromise character of the award is demonstrated by the fact that the jury after having been out for more than two hours requested further instructions, and after another three and one-half hours returned a unanimous verdict for a sum less than the special damages alleged and proved.

[1] If, as appellant declares, the award is less than the special damages suffered by Mrs. Tornell and none of that amount can be considered as general damages, then upon the rule as stated in Benoich v. Market Street Railway Co., 20 Cal.App.2d 518, 67 P.2d 398, the order granting a new trial should include all of the issues. But if it can be said that the jury awarded some general damages, although inadequate, then the order of the trial court, if otherwise correct, must be sustained.

Appellant states that the special damages suffered were damages to automobile $600, medical expenses $797.98, and loss of earnings to date of trial $6,400, or a total of $7,797.78, and that therefore the award of $3,000 is $4,797.78 less than the special damages. However, if the loss of earnings is not a special damage but to the contrary a general damage then the sum of $1,602.22 (automobile damage and medical expense totalling $1,397.78) would be the portion of the award applicable to general damages. The question thus presented is whether or not such award of general damages is of sufficient substantiality as not to be so tinged with the attributes of compromise as to warrant a retrial on all issues.

[2] If, under the well established law of this state, plaintiffs could recover for Mrs. Tornell's loss of earnings under an allegation of general damages, then whatever plaintiffs may have denominated as special damage, or however they may have set forth in their pleadings the element of loss of earnings, would be wholly immaterial to the question presented. Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498, 13 Am.St.Rep. 175; Le Jeune v. General Petroleum Corp. of California, 128 Cal.App. 404, 18 P.2d 429; Armstrong v. Ford, 30 Cal.App.2d 347, 86 P.2d 385; Wilcox v. Sway, 69 Cal.App.2d 560, 160 P.2d 154; Stoltz v. Converse, 75 Cal.App.2d 909, 172 P.2d 78.

[3] The rationale of the above-cited cases in so far as applicable to the question here in issue appears to be that the actual earnings prior to the accident are taken merely as evidence of the extent to which the earning capacity of the individual has been impaired, either totally or partially during the time between the date of the accident and the trial. It is not the actual amount of earnings lost which are recoverable as a special damage but the loss of earning capacity. Such evidence presents to the jury a question of fact from which it may find that the earning power was either partially or totally impaired during the period of time in question, and therefore may allow only a part of the amount of earnings lost.

Defendants' statement that the only question contested was that of defendants' liability is inaccurate. Evidence was introduced, consisting of the testimony of Mrs.

Tornell's physician under cross-examination, to show that her inability to continue her music teaching is not due entirely to a disability arising out of the accident but because of an arthritic condition. Therefore the award of the jury could well have been based upon the conclusion that her loss of earnings was not due to the accident exclusively but that the disability from this cause was only temporary or partial.

[4] From this it follows that the verdict in the present case cannot be held to be a compromise as a matter of law as defendants contend inasmuch as all of the actual expenses incurred by plaintiffs were included therein. This is an entirely different situation from those presented in the cases cited and relied upon by appellant. Keogh v. Maulding, 52 Cal.App.2d 17, 125 P.2d 858; Wallace v. Miller, 26 Cal.App. 2d 55, 78 P.2d 745; Bencich v. Market Street Railway Co., 20 Cal.App.2d 518, 67 P.2d 398; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845.

Each of those cases were thoroughly discussed in Hughes v. Schwartz, 51 Cal.App. 2d 362, 124 P.2d 886. No useful purpose would be served by reiterating that discussion here. Suffice it to say that the court in summary stated, 51 Cal.App.2d at page 367, 124 P.2d at page 888: "It will be observed that in the Donnatin case the jury, in effect, awarded no damages. The action of the trial court in refusing to grant a limited new trial was affirmed. In the Bencich case the damages awarded were less than the special damages and loss of compensation suffered by plaintiff. The appellate court reversed the court's action in refusing to grant a new trial, but, in the exercise of its discretion, refused to limit the new trial. In the Wallace case the award was less than the amount of special damages."

However, observing that the cited cases undoubtedly imposed a limitation on the discretionary power of the trial court to grant a new trial, the court therein concluded that: "* * * the extent of that limitation is simply that where no award at all is made for general damages the only possible explanation is that the jurors compromised the issue of liability, and it is error to limit the new trial to the issue of damages alone. But where, as in the instant case, a substantial but inadequate award of general damages is made, the question as to whether the new trial should be limited rests within the discretion of the trial judge. The cases hereafter discussed so hold." (Citing cases.)

It appears that the instant case presents a situation more comparable to that disclosed in Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 390, 121 P.2d 829, 833. There the plaintiff was awarded a verdict of $1,250 for injuries, in the treatment of which he had incurred expenses in the sum of $811. There, as in the present case, both parties made similar motions for a new trial and the court granted plaintiff's motion solely upon the issue of damages. In sustaining the order of the trial court the reviewing court held that although the evidence therein supported the conclusion that the damages awarded were inadequate, nevertheless such inadequacy would not justify that court "in concluding, contrary to the trial judge, that the jury compromised the question of negligence by its inadequate award of damages."

Here, as in the Cox case, supra, "such a conclusion on this record would be more speculative than inferential."

The trial court had the opportunity to hear the testimony and observe the witnesses, and in the exercise of its sound discretion concluded that the issue of the defendants' liability was clearly established, the only error of judgment on the part of the jury being as to the amount of damages sustained by the plaintiffs.

The order is affirmed.

THOMPSON, Acting P. J., and SCHOTTKY, J., pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

McDONALD et al. v. PRICE et al.

Civ. 7296.

District Court of Appeal, Third District, California.

June 3, 1947.

Rehearing Denied June 28, 1947.

Hearing Denied July 31, 1947.

1. Witnesses ⇐280, 281

Though a wide latitude should be given in cross-examinations, counsel, in putting questions to a witness, should not be allowed to assume facts not in evidence and state as positive assertions facts, which, if true, would be detrimental to the opposing party's case and of such a nature as to inflame the jurors' minds, especially where there is no proof of the facts asserted.

2. Death ⇐68

In action for wrongful death, the moral habits of the deceased, such as habitual intemperance, gambling or lack of thrift, have a bearing on the value of his life to his wife and family, since his habits of sobriety and economy are reflected in his earning capacity and monetary value to his family.

3. Appeal and error ⇐1170(7)
Death ⇐68

In action for wrongful death, wherein issues of negligence and contributory negligence were close, overruling of plaintiffs' objection to questions to deceased's widow if she knew that deceased on certain dates had pleaded guilty to charges of burglary and petty theft, for purpose of minimizing his monetary value to his family, was reversible error, where there was no proof that deceased had ever been found guilty of such offenses. Const. art. 6, § 4½.

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Juanita McDonald and Nita McDonald, a minor, by and through her guardian ad Litem, Juanita McDonald, against Leonard Glen Price and others to recover for wrongful death. From an adverse judgment, the plaintiffs appeal.

Judgment reversed.

Jack J. Miller and Len H. Honey (of Honey & Mayall), both of Stockton, for appellants.

J. W. Hawkins, (of Hawkins & Hawkins), of Modesto, and Dudley W. Sheppard (of Neumiller, Ditz, Beardslee & Sheppard), of Stockton, for respondents.

PEEK, Justice.

This is an action for damages for wrongful death brought by the wife and minor child of the decedent. The case was tried before a jury which returned a verdict in favor of defendants.

Plaintiffs' sole assignment of error relates to the prejudicial misconduct of defendants' counsel in asking a series of questions over plaintiffs' objections with respect to criminal activities of the decedent some years prior to his death.

The particular matter complained of consisted of the following cross-examination of decedent's wife by defendants' counsel:

"Q. How long had you known your husband before your marriage? A. Three or four years.

"Q. So you knew your husband, then, about back in 1940? A. Yes.

"Q. You knew, didn't you, Mrs. McDonald, that your husband frequently indulged in intoxicants? A. Yes.

"Q. And you knew that he had been arrested on many occasions for that, didn't you? A. Yes.

"Q. Did you know that in April of 1937 he pleaded guilty to a charge of burglary and served six months in the road camp?"

At this point plaintiffs' counsel objected to the question as incompetent, irrelevant and immaterial, and as prejudicial misconduct on the part of counsel. After some colloquy between various counsel and the court the objection was overruled and the witness answered "No".

Counsel for defendants, continuing his questioning, then asked:

"Q. Your husband did not tell you that prior to your marriage? A. No.

"Q. Did you know that in May of 1939 he was charged with three counts of petty theft to which he plead guilty?"

The objection of counsel for plaintiffs again was overruled by the court, and again she answered "No".

Nowhere in the record before this court does the truth of these assumed convictions appear. The only mention of them is in the questions asked by defendants' counsel and there they are stated as matters of fact. However, neither proof nor offer of proof of such facts were made by counsel. From all that appears here the statements well might have been entirely a fiction of counsel's imagination. The complete failure to prove such criminal convictions strongly indicates a lack of good faith in asking the questions.

[1] While a wide latitude should be given in cross-examinations, counsel in putting questions to the witness should not be allowed to assume facts not in evidence and state as positive assertions facts which if true would be detrimental to the opposing party's case and of such a nature as to inflame and prejudice the minds of the jurors. This is especially true where, as in the present case, there is no proof of the facts asserted. People v. Fleming, 166 Cal. 357, 136 P. 291, Ann.Cas.1915B, 881; People v. Wells, 100 Cal. 459, 34 P. 1078; People v. Mullings, 83 Cal. 138, 23 P. 229, 17 Am.St.Rep. 223; Estate of Martin, 170 Cal. 657, 151 P. 138. While the factual situations in the cases cited are not similar to that presented herein, nevertheless the reasoning expressed in those opinions is directly applicable to the instant situation. The inherent vice of the matter lies in the attempt to bring before the jury in a round about way facts which could not be proved and which from all appearances may have been entirely false.

Inasmuch as upon the issues of negligence and contributory negligence the case here was close we cannot say that the questions objected to were considered by the jury merely as bearing upon the issue of damages in accordance with the instruction of the court. As stated in People v. Mullings, supra, 83 Cal. at page 146, 23 P. at page 232, 17 Am.St.Rep. 223, to assume that the asking of improper questions which included statements of damaging facts which could not be proven does not prejudice the opposite party in the minds of lay jurors "is to ignore human experience and the dictates of common sense." It seems apparent that it was the questions and not the answers which defendants' counsel thought important. The purpose of the questions clearly was to keep before the jury the assumption of facts which could not be proven, and thus impress upon them the probability of the existence of the assumed facts upon which the questions were based.

[2] In an action for wrongful death the moral habits of the deceased, such as habitual intemperance, gambling or lack of thrift, have a bearing on the value of his life to his wife and family (Taylor v. Western Pacific R. Co., 45 Cal. 323; Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 P. 767; Pell v. Herbert, 33 Cal.App. 730, 166 P. 386), for his habits of sobriety and economy are reflected in his earning capacity and monetary value to his family. Additionally respondents contend that evidence of criminal tendencies on the part of the decedent is admissible to show his standing in the community, earning capacity and value to his family.

However, in the present case the evidence which the form of the questions was designed to elicit could have no bearing upon such issue. It was immaterial whether or not the wife knew of the prior convictions of burglary and theft. The questions were not framed so as to discover the existence of any convictions for crimes but merely to indicate the wife's knowledge of the alleged fact of convictions. The obvious conclusion is, as stated before, the important factor was the type of questions and not the answers.

[3] Assuming but not deciding that if the case in favor of defendants had been very strong a different conclusion might be reached, under the present circumstances prejudice to the plaintiff is so highly probable that we are not justified in assuming its nonexistence or in saying that there has been no miscarriage of justice within the meaning of California Constitution Article VI, section 4½.

The judgment is reversed.

SCHOTTKY, J. pro tem, THOMPSON, Acting P. J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

79 Cal.App.2d 731

In re SHAPIRO'S ESTATE.

SHERWOOD et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 15790.

District Court of Appeal, Second District, Division 2, California.

May 19, 1947.

1. Estoppel ⇐52

A person may waive any civil right and the benefit of any statute or Code provision in respect of his rights and obligations unless such waiver would be against policy. Civ.Code, § 3513.

2. Trusts ⇐161

Where there were no creditors of testamentary trust, beneficiaries could waive codal requirement that a trustee appointed to fill a vacancy in a testamentary trust must give a bond before acting, since the requirement is for the benefit of the creditors and beneficiaries of the trust. Probate Code, §§ 1126, 1127; Civ.Code, § 3513.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Nathan W. Shapiro, deceased. Petition of Harry Sherwood, formerly known as Harry Shapiro, to be reappointed as sole trustee without bond of the testamentary trust created by the will of Nathan W. Shapiro, against the Superior Court of the State of California in and for the County of Los Angeles. From an adverse order denying the petition, Harry Sherwood and others appeal.

Reversed with directions.

A. Joseph Shapiro, of Los Angeles for appellants.

McCOMB, Justice.

This is an appeal from an order of the probate court denying the petition of Harry Sherwood (formerly known as Harry Shapiro) to be reappointed as sole trustee *without bond* of the testamentary trusts created by the will of Nathan W. Shapiro.

The undisputed facts are these:

Nathan W. Shapiro died December 20, 1936, leaving surviving as his sole heirs his wife, Rose Rabenowitz, two adult sons, Harry Sherwood (petitioner herein) and Joseph Shapiro, and one adult daughter, Charlotte Lewis. By his last will and testament decedent appointed two brothers and petitioner, or the survivors or survivor of them, to act as trustees of certain trusts provided for in his will. There was no provision in the will that the trustees post security. The two brothers declined to act as trustees and consented that petitioner act as sole trustee. Accordingly, in a decree of distribution made on July 25, 1938, the bulk of decedent's estate was distributed to petitioner as sole trustee, to act *without bond*. Petitioner so acted continuously until July 31, 1942.

On July 10, 1942, petitioner was inducted into the armed forces of the United States, at which time he petitioned the probate court to accept his resignation as trustee, expressly providing that such resignation was "without prejudice to his reappointment as sole trustee of such trusts at such time in the future as he is able to devote the necessary time and attention to the duties of such trusteeship". In his petition he requested that his sister, Charlotte Lewis, be appointed as trustee to act in his stead during the period of his military service, and without prejudice to his reappointment as sole trustee upon the termination of such service. The sister petitioned to be appointed trustee "without prejudice to the reappointment of Harry Shapiro as sole trustee of such trusts being administered in the matter of this estate, at such time in the future as said Harry Shapiro will again be able to assume the duties of such trusteeship". On July 31, 1942, the probate court made an order accepting petitioner's resignation and appointing Charlotte Lewis as trustee "without prejudice to the reappointment of Harry Shapiro as sole trustee".

Petitioner Sherwood on October 18, 1945, was honorably discharged from the Army of the United States of America. Thereafter Charlotte Lewis filed her resignation as trustee, requesting that it be accepted and that petitioner be reappointed as sole

trustee of the trusts created by decedent. Concurrently therewith the present petition was filed. At the time of the hearing on said petition Rose Rabenowitz, Charlotte Lewis, Joseph Shapiro and Harry Sherwood, being all of the beneficiaries under the trusts and comprising all of the heirs at law of the decedent, filed their consent in writing that petitioner be reappointed as sole trustee of said trusts, *without bond.* Likewise it is to be noted that there were no creditors of the trust estate. The judge of the probate court, being of the opinion that he lacked jurisdiction to grant Harry Sherwood's petition for appointment as sole trustee *without bond* by virtue of section 1127* of the Probate Code, denied his application.

This is the sole question presented for our determination:

Can all the beneficiaries of a testamentary trust waive the provision of section 1127 of the Probate Code which requires a trustee appointed to fill a vacancy in a testamentary trust to give a bond before acting?

[1] This question must be answered in the affirmative. Any person may waive the advantages of a law intended solely for his benefit. (Sec. 3513, Civil Code; Leonard v. Board of Education, 36 Cal.App.2d 595, 599, 97 P.2d 1032.) The general law on this subject is aptly stated in 25 California Jurisprudence (1926) at page 929, Waiver, section 4, as follows: "A person may waive any civil right and the benefit of any statute or code provision in respect of his rights and obligations, unless such waiver would be against public policy. Indeed, it is one of the maxims of jurisprudence that 'anyone may waive the advantage of a law intended solely for his benefit.'"

[2] It is clear that the requirement of section 1127 of the Probate Code that the trustee furnish a bond is for the benefit of the beneficiaries and creditors of a trust. Hence, since there are no creditors, the beneficiaries of the trusts herein were entitled to waive the advantages of the law intended for their benefit. This they did, and the probate court had jurisdiction to appoint petitioner as trustee of the testamentary trust *without bond.*

For the foregoing reasons the order is reversed and the probate court is directed to make an order in conformity with the views herein expressed.

MOORE, P. J., and WILSON, J., concur.



In re HALL'S GUARDIANSHIP.
SHEEDY v. HATCH et al.*
Civ. 3629.

District Court of Appeal, Fourth District, California.

June 5, 1947.

Hearing Granted July 31, 1947.

1. Insane persons ⇐64

Monthly allowances made to guardian of incompetent mother to maintain household in which incompetent was residing with guardian in same manner as in the past, and to cover both household and living expenses of incompetent and the guardian and her family, was not intended as an order distributing surplus income under section of the Probate Code providing that

* Sections 1126 and 1127 of the Probate Code read:

"1126. If a trustee of a testamentary trust dies, resigns or is removed after distribution, and a vacancy in the trusteeship is created thereby, the court which had jurisdiction over the settlement of his accounts shall have the power to appoint a new trustee to fill the vacancy, upon the petition of anyone interested in the trust estate and notice given for the period and in the manner required by section 1200 of this code. The petitioner shall cause notice of the hearing to be mailed to the beneficiaries at their last known addresses, as provided in said section 1200, whether they have requested special notice or given notice of appearance or not.

"1127. The person appointed under section 1125 or section 1126 of this code, before acting as trustee, shall give a bond such as is required of a person appointed administrator. He shall be allowed the cost of such bond to the extent provided by section 541.5."

* Subsequent opinion 187 P.2d 396.

under certain circumstances court may disburse surplus income of an incompetent person to that person's next of kin. Probate Code, §§ 1557, 1558.

2. Insane persons ⇐42(1)

Superior court's order, excusing guardian of incompetent mother from making a detailed account of expenses for maintenance of household in which incompetent resided with guardian and her family, did not excuse guardian from making some account and from showing that amounts were expended for the purposes set forth in probate court's order.

3. Insane persons ⇐65

Provision in superior court's order that guardian of incompetent might continue operation of incompetent's ranch was limited by prayer of guardian's petition that she be authorized to continue maintenance and operation of the ranch "as in the past", and guardian was not authorized to extend greatly the activities of the ranch, or to maintain and operate it in some new and unusual manner.

4. Insane persons ⇐42(1)

Where interests of incompetent were to some extent interwoven with those of guardian, who was incompetent's daughter, and guardian's family, some leeway was permissible to court in accounting required of guardian and some liberality could be exercised in allowing the guardian some benefit from things raised on incompetent's ranch on which incompetent, guardian, and guardian's family resided insofar as such things had theretofore been used by the common family.

5. Insane persons ⇐42(1)

In accounting proceeding by incompetent's guardian who had been allowed monthly sum of $800 to maintain household in which incompetent resided with guardian and her family, guardian should have been required to show that she had complied with terms of such order, that monthly allowance was expended for purposes named in court's order, that any further living expenses for incompetent were necessary, and that amounts expended for operation of incompetent's ranch on which the parties resided were reasonable and within limits of order, and where such things were not done and account showed total annual expenses of around $39,000, order settling guardian's account was improper.

6. Insane persons ⇐42(1)

In accounting proceedings by incompetent's guardian to whom court had made an allowance of $800 a month to maintain household in which incompetent, guardian, and guardian's family resided on incompetent's ranch, items expended for clothes, dressmaker bills, beauty shop treatments, and ordinary medical treatment for incompetent, were part of incompetent's living expenses, and should not have been charged as ranch expenses or incidentals.

7. Insane persons ⇐65

Where court authorized incompetent's guardian to run incompetent's ranch on which the parties resided, in the same manner in which that ranch had previously been run, guardian was not authorized to expend large amounts for the purchase and maintenance of blooded saddle horses for use of guardian's family.

8. Insane persons ⇐42(4)

Where, on record before District Court of Appeal, many of the items incorrectly allowed in accounting by guardian of incompetent could not be segregated and proper correction made, and account as rendered, was obviously excessive, the matter was remanded for further hearing.

9. Insane persons ⇐42(2)

Where, though court found that attorneys had rendered services to guardian and estate of incompetent during the year of the reasonable value of $600, the order was that guardian was authorized and directed to pay such amount to those attorneys for such services, the order was not void on ground that it ran directly in favor of the attorneys.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Proceeding in the matter of the guardianship of the person and estate of Frances Clapp Hall, an incompetent person. From an order settling the second annual account

of Rosalie G. Sheedy, guardian of the person and estate of Frances Clapp Hall, an incompetent person, Anna Pearson Hatch, objector, and Frances Clapp Hall, an incompetent person, by and through Anna Pearson Hatch, her guardian ad litem, appeal.

Order reversed and matter remanded for further hearing.

Clarence Harden, of San Diego, and Henry F. Walker, of Los Angeles, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order settling the second annual account of a guardian. Mrs. Sheedy, the guardian, and Mrs. Hatch, the objector, are daughters of the ward. About a year before this guardianship proceeding was started, Mrs. Hall purchased a "ranch" near Alpine in San Diego County, giving a trust deed for part of the purchase price. Her main income came from a trust in an eastern bank, of which she was a beneficiary.

On May, 21, 1943, without notice to Mrs. Hatch, Mrs. Sheedy was appointed guardian of the person and estate of Mrs. Hall on a petition alleging that by reason of old age and physical condition she was unable to properly manage her property, and was liable to be deceived or imposed upon by artful or designing persons. On June 22, 1943, Mrs. Sheedy, as guardian, filed a "petition for monthly allowance." She alleged that her mother had been living as a member of her household for two years; that the ranch had been purchased for the benefit of her mother's health; that petitioner, her husband and children, and her mother had lived on the ranch for about a year; that her mother had been receiving an average income of $15,000 a year from a trust established by her parents; that since they had been living together her mother had contributed approximately $800 per month to the household and family expenses of herself and the petitioner and her family; that there was ample income to permit a continuance of such allowance; and that there would be further expenses in maintaining and operating the ranch. The prayer was for such a monthly allowance for this purpose and for authority to continue the maintenance and operation of the ranch "as in the past." On the same day, the court entered an ex parte order that Mrs. Sheedy, as such guardian, "is hereby granted an allowance of $800 per month, with which to meet household and living expenses of said petitioner, her family and her mother, to be used and expended to maintain and conduct the household of said petitioner, with whom said incompetent resides, in the same manner as said household has been conducted in the past, and that said Guardian is hereby relieved from filing a detailed account of the expenditure of said sums." This order further authorized the guardian "to continue the operation of the Alpine, California, ranch and to expend such additional sums as may be necessary for that purpose out of the income of said incompetent."

On August 6, 1945, the guardian filed her second annual account. This account showed total receipts of $42,137.19 and total expenses of $40,964.36, with a balance on hand of $1172.83. The receipts consisted of:

Cash from the year before	$ 512.22
Income from the eastern trust	31,571.83
Income from the ranch	1,877.08
Insurance from a ranch building which burned	1,137.30
From liquidation of eastern assets	3,528.76
Borrowed from a bank to pay taxes and trust deed payments	3,500.00

The expenses listed showed only $2000 had been paid on this $3500 loan, leaving an actual deficit instead of a small surplus.

Omitting the amount on hand at the beginning of the period and disregarding the $3500 loan and the payments thereon, and using round figures, the report discloses that the actual receipts for this year were $38,000, including about $1900 income from the ranch, and that the actual expenses claimed were $39,000.

Of the $39,000 spent, payments amounting to $9639 are not questioned. They include $1075 for cost of administration,

$5773 paid on the trust deed on the ranch, and $2791 for taxes including $312 taxes on the ranch home. A further $7070 was spent to rebuild the building which had burned on the ranch. While no permission to make this expenditure was obtained this item is not attacked. This leaves $22,291 which was expended in paying $9000 for the monthly allowance and $12,691 in operating the ranch and for incidentals. The guardian testified that each month she took out $800 from the ward's funds, which she deposited in her own bank account. With the approval of the court she refused to disclose what she did with this money. According to the account and her testimony, the other $12,691, used mostly in operating the ranch, was spent as follows: $3665 for labor; $2000 for animals purchased, including three blooded riding horses and a dog; $4000 for feed and equipment for animals; $800 for gasoline and repairs for four automobiles; $400 for the cost of several automobile trips taken by the ward, the guardian, her husband and one child; $300 for clothes and ordinary medical expenses for the ward; and the balance for various supplies for the ranch and home.

Objections to this account were filed by Mrs. Hatch, the sister. On the hearing, it developed that in operating the ranch the guardian had bought and expensively maintained several riding horses which were used exclusively by the members of her family other than the ward. Also, that she had bought and fattened cattle and hogs, some of which had been sold but which had largely been butchered, placed in deep freezers and used by the family, along with milk, butter, eggs and chickens. The court, in its findings and order, disallowed $300 spent on buying and feeding the dog, and ordered the guardian not to maintain thereafter, in the operation of the ranch, more than two milk cows, two work horses and a reasonable number of chickens. All other items in the account as rendered were allowed, although the future maintenance of animals was restricted. From this order Mrs. Hatch personally, and the ward through Mrs. Hatch as guardian ad litem, have appealed.

The appellants first contend that the account as filed is legally insufficient since it merely lists the amounts received and expended during the year, with no statement of the property on hand or of other facts showing the actual condition of the ward's estate. While the account was not as complete as might be desirable it cannot be held entirely insufficient, especially since no such issue was raised in the pleadings.

It is next contended that the order of June 22, 1943, for a monthly allowance was invalid and void on the grounds that no notice was given, and that the court had no authority to include therein an allowance for the living expenses of the guardian and her family; and that no accounting was made to show that this money was properly used. The respondent contends that this allowance was property made under section 1558 of the Probate Code, which provides that under certain circumstances the court may make an order disbursing surplus income of an incompetent person to that person's next of kin; and that such an order may be made ex parte under the provisions of sections 1558 and 1557. It is then argued that this monthly allowance was ordered paid to Mrs. Sheedy as next of kin and not as guardian; that her duty ended when she paid the amounts to herself; that when thus paid these amounts became her absolute property; and that she could not be required to make any account as to what she did with the same.

[1-3] It is quite evident from the language used in the petition and in the order that this order for a monthly allowance was not intended as one distributing surplus income, under section 1558 of the Probate Code. Although the court had the power to make such a distribution, it clearly appears that the order here in question was made, not for that purpose, but for the purpose of properly caring for the ward, with an incidental benefit to the guardian, in order that the ward might continue to live in the same manner as in the past. It further appears that these monthly allowances were not awarded to Mrs. Sheedy personally and as her absolute property, but were granted to her as guardian for the specific purposes set out in the order: to maintain the household in which the ward was residing in the same manner as in the past, and

to cover both the household and living expenses of the ward and the petitioner and her family. If it be assumed that the court could legally excuse the guardian from making a detailed account of such expenses, the order neither provides that the guardian may take these amounts as her own property, nor that she need make no account of any kind as to what she did with the money. To excuse her from making a detailed account as to how each cent was spent does not relieve her from the duty of making some account, and of showing that these amounts were expended for the purposes set forth in the order. The further provision in the order that the guardian might continue the operation of the ranch is limited by the prayer of the petition that she be authorized to continue "the maintenance and operation of the ranch as in the past." This did not authorize her to greatly extend the activities of the ranch, or to maintain and operate it in some new and unusual manner.

[4] The gist of the appellants' complaint is that the respondent has not only improperly obtained and used a very high monthly allowance, designed to cover the living expenses both of the ward and, to some extent, of the guardian and her family, but that she has further spent nearly $13,000 of the ward's money for what amounts to living expenses for the guardian and her family and for their use and benefit, while she has retained a large part of the $9600, taken as monthly allowance, for purposes entirely personal to herself and family. The appellants' position is understandable, and it is also easy to understand the respondent's feeling that she was properly allowed to share in the benefits that would naturally come from continuing the support of the ward in the same home and in the same manner as in the past. Under the circumstances, it should not be held that the court was without power to make the order in question even though it varied somewhat from the usual order and was not confined to a proceeding under section 1558 of the Probate Code, especially where no attack was made prior to the accounting. It was a family matter, the interests of the ward were to some extent interwoven with those of the guardian and her family, and some leeway was permissible to the court. Moreover, some liberality could well be exercised in allowing the respondent some benefit from things raised on the ranch insofar as such things had been theretofore used by the common family.

[5] However, such privileges, even liberally construed, should not be abused. The fact that more than $22,000 of the ward's money was spent this year on the living expenses of this family and the operation of this "ranch," from which there was a purely incidental income of less than $2000, would indicate either great mismanagement or something worse. The facts as disclosed by the account called for a careful investigation and full explanation at the hearing. Regardless of any permissible liberality in connection with the order and the benefits which might be derived therefrom, the guardian should have been required to show that she had complied with the terms of this liberal order, to show that the monthly allowance was expended for the purposes named in the order, to show that any further living expenses for the ward were necessary, and to show that the amounts expended for the operation of the ranch were reasonable and within the limits prescribed by the order. These things were not done, apparently because of the respondent's position, adopted by the court, that the guardian was not required to account for what she had done with the $9600 taken as monthly allowance, and that a sufficient explanation of any other expenditure was that the amount had been spent in operating the ranch. The result was that no real hearing was had on the account under the general objection that large amounts had been improperly used, that objections to specific items were considered on the wrong theory, and that evidence material to these issues was excluded as inadmissible.

[6, 7] The account showed that several hundred dollars was expended for clothes, dressmaker bills, beauty shop treatments and ordinary medical treatment for the ward which were charged as ranch expenses or as incidentals. These items were a part of the living expenses for which the monthly allowance was specifically made,

and these additional charges should not have been allowed in the absence of a showing that such allowance, having been properly spent, had proved insufficient. The large amount spent for the purchase and maintenance of blooded saddle horses was obviously a departure from the way the ranch had previously been run, and for the personal pleasure of the guardian and her family. While the court recognized the impropriety of this by restricting such operations in the future, all amounts expended for this purpose during the year in question were approved. Other large expenses in connection with the operation of the ranch were approved without any inquiry or evidence as to whether they were in accordance with the terms of the order. Several hundred dollars in gifts to individuals, to charities and to a political organization were approved without sufficient supporting evidence. Nearly $1000 in charges for gasoline and other automobile expense, including the rental of parking space in San Diego, which were separately charged as ranch expenses, were approved when the evidence indicates that a large portion thereof should have been personally charged to the guardian or, at best, included in the household and living expenses which were covered in the order for a monthly allowance. Many items for supplies and equipment were charged as expenses of operating the ranch when the evidence indicates that some were in fact household expenses, and fails to show that others were either of a different nature or reasonably necessary to the continued operation of the ranch in the same manner.

[8] On the record before us many of the items incorrectly allowed cannot be segregated and a proper correction here made. The account, as rendered, is obviously excessive and should be reexamined and passed upon, with the correct principles in mind, and with such evidence as is material to the accounting required of such a guardian, both generally and by the order made on June 22, 1943.

[9] A further contention is made that the order allowing attorneys' fees is void on the ground that it runs directly in favor of the attorneys and therefore comes within the principle laid down in Garra v. Superior Court, 58 Cal.App.2d 588, 137 P.2d 31. While the court found that these attorneys had rendered services to the guardian and the estate of the ward during this year of the reasonable value of $600, the order was that the guardian was authorized and directed to pay this amount to these attorneys for these services. The case cited is not applicable and no invalidity appears in this respect.

The order appealed from is reversed and the matter remanded for a further hearing in accordance with the views herein expressed.

MARKS and GRIFFIN, JJ., concur.



79 Cal.App.2d 708

SMITH v. STUTEMAN.

Civ. 15311.

District Court of Appeal, Second District, Division 3, California.

May 16, 1947.

1. Libel and slander ⇐130

"Slander of title" is a tort action for redress of an invasion of a particular property right, that of immediate salability of the property involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Slander of Title".

2. Abatement and revival ⇐55(1)

A cause of action for a slander of title survives the death of its owner.

3. Executors and administrators ⇐429

Under codal provision authorizing an action against executor and administrator of a decedent who in lifetime committed a "trespass on real property" of plaintiff, the quoted words include consequential injuries,

such as slander of title, as well as direct injuries. Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespass on Real Property".

4. Appeal and error ⇐173(1)

On plaintiff's appeal from order dismissing action, a defense in the nature of a defense in abatement which was not pleaded and was not stated as a ground of the motion to dismiss the action was not available to defendant.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action for slander of title to real property by George Charles Smith against Mattie Stuteman, as executrix of the estate of Myrtle E. Smith. From order dismissing the action, plaintiff appeals.

Order reversed and case remanded.

Russell H. Pray and Samuel J. Nordorf, both of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal from an order dismissing an action for slander of title to real property, on the ground that such a cause of action did not survive the death of the original defendant, Myrtle E. Smith, defendant's testate, the alleged wrongdoer. The alleged slander of title consisted of the recording of a lis pendens in an action for divorce by Myrtle E. Smith against plaintiff herein, in which the former was claiming an interest in the real property.

[1, 2] Slander of title is a tort action for redress of an invasion of a particular property right, that of immediate salability of the property involved. Coley v. Hecker, 206 Cal. 22, 27, 272 P. 1045; Restatement, Torts, sec. 624. As a cause of action arising out of a violation of a property right it survives the death of its owner. Civil Code, sec. 954; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959. It has been held that it necessarily follows that such a cause of action also survives the death of the defendant. Vragnizan v. Savings Union, etc., Co., 31 Cal. App. 709, 713, 161 P. 507.

Respondent contends, however, that in California the survival of causes of actions involving property rights after the death of the defendant is governed exclusively by sections 573 and 574 of the Probate Code, and that section 574 alone applies to the instant case. Assuming these contentions to be correct (without so deciding), the question is presented whether section 574 authorizes the survival of the cause of action of slander of title to real property.

The order appealed from was entered and this case was briefed prior to the decision of our Supreme Court in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913. Apparently counsel for both parties labored under the erroneous impression, doubtless derived from the language and statutory history of section 574, that the greater portion of the section applied only to tangible personalty and that the only portion which covered real property was the phrase "or committed any trespass on the real property of such person." As a consequence the briefs as respects section 574 are limited to argument over the meaning of the words "trespass on the real property." Respondent argues that the last-quoted words embrace only such causes of action as were covered by the common law action of trespass, as distinguished from trespass on the case, and that slander of title to real property comes within the latter category. "Trespass upon * * * real property," as used in section 338 of the Code of Civil Procedure (relating to the periods of limitation), has been given the restricted meaning urged by respondent. Hicks v. Drew, 117 Cal. 305, 308-310, 49 P. 189; Daneri v. Southern Calif. Ry. Co., 122 Cal. 507, 508, 509, 55 P. 243; Porter v. City of Los Angeles, 182 Cal. 515, 518, 189 P. 105; Brush v. So. Pac. Co., 47 Cal.App. 54, 57, 190 P. 216. Appellant takes issue with both points of this argument and claims that "trespass on the real property," as used in section 574, should include the causes of action embraced within the common law action of trespass on the case as well as those contained within the common law action of trespass. This

position conforms to the broad view of trespass taken in Coley v. Hecker, supra, 206 Cal. at page 28, 272 P. at page 1048: "The trend of decisions of this court is generally in accord with the doctrine, whenever the question has come before it, that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries."

[3] We believe that under section 574 of the Probate Code, as construed in Hunt v. Authier, supra, a cause of action for slander of title to real property survives the death of the defendant. Our Supreme Court there said, 28 Cal.2d at page 295, 169 P.2d at page 917: "The change of the term 'goods and chattels' to the all-inclusive word 'property' in section 574 requires that the intent of the Legislature be given its proper effect by the recognition of every property right or interest as 'property' within the meaning of the section, and that the waste or destruction thereof need not have been the result of a direct injury. That change clearly indicates an intent to place no restrictions or limitations on the types of property for the injury to which compensation may be recovered from the estate of the wrongdoer, and to make no distinction as to the method by which such destruction or injury is affected." The court further said, 28 Cal.2d at page 296, 169 P.2d at page 918: "The Legislature has definitely spoken by the amendment of our statute so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the Legislature has so provided the courts should not countenance a tortious deprivation of property without redress." In view of this declaration by the Supreme Court as to the broad purpose of the legislature in making use of the word "property," we must construe the words "trespass on the real property" to include consequential injuries, such as slander of title, as well as direct injuries.

[4] Respondent has raised in her brief the further contention that the order of the trial court should be affirmed, on the ground that one spouse cannot sue the other for damages in tort. This defense was not pleaded and it was not stated as a ground of the motion to dismiss the action. Accordingly, respondent cannot now avail herself of its protection. Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 761, 110 P. 123, 137 Am.St.Rep. 165. A defense in the nature of a defense in abatement is presumed to be waived if not made before the trial court. Preston v. Knapp, 85 Cal. 559, 561, 562, 24 P. 811. In any event it is extremely doubtful whether the claimed incapacity to sue extends to actions seeking to protect property rights. Peters v. Peters, 156 Cal. 32, 36, 103 P. 219, 23 L.R.A.,N.S., 699.

The order dismissing the action is reversed and the case is remanded to the trial court for further proceedings.

WOOD, J., and KINCAID, Justice pro tem., concur.

30 Cal.2d 240

BLISS et al. v. CALIFORNIA CO-OP. PRODUCERS et al.

Sac. 5729.

Supreme Court of California, in Bank.

June 3, 1947.

Dissenting Opinion June 12, 1947.

1. Bills and notes ⇐348

Generally, under the Negotiable Instruments Law and the common law, the transferee of an installment note is not a "holder in due course" as to any part of the note when the transfer has been made after maturity of one or more but less than all of the installments. Civ.Code, § 3133.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

2. Bills and notes ⇐339

The transferee of an installment note may assume that the regular course of business has been followed, and that each matured installment was paid when due, but, if the installments due on the face of the instrument have not been paid and the transferee has notice of that fact, he is put on the inquiry that there may be some defense against the instrument and he cannot be a "holder in due course". Civ.Code, § 3133; Code of Civ.Proc. § 1963.

3. Bills and notes ⇐348

A transferee of an installment note is a "holder in due course" as to installments to mature in the future when the transfer is made after one or more but not all of the installments are due on its face, unless the past-due installments have not in fact been paid and he has notice of that fact. Civ.Code, § 3133; Code of Civ.Proc. § 1963.

4. Appeal and error ⇐1178(6)

Where court, in action by transferee on fruit growers' installment notes, did not consider case in light of law dealing with holders in due course of installment notes on which installments are due prior to transfer, and evidence as to existence of notice to transferee that due installments had not been paid was sketchy, judgment on notes was reversed and case remanded for retrial only on issue of notice of non-payment. Civ.Code, § 3083, subds. 2, 3; § 3133, subd. 2; § 3164, subd. 2.

5. Bills and notes ⇐97(1)

"Failure of consideration", which is a good defense to an action on a negotiable instrument by one not a holder in due course, is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Civ.Code, § 3109.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

6. Contracts ⇐83

In a bilateral contract, failure of consideration is a defense to an action for a breach of contract inasmuch as it is contemplated that the performance of unilateral promises shall be in exchange for each other; the performance being considered as equivalent in value.

7. Agriculture ⇐6

Where, though there was no express promise in marketing contract on part of co-operative corporation to process and market fruit growers' products nor a fixed time during which growers agreed to deliver fruit to corporation, notes given by growers to corporation were payable in ten annual installments, it could fairly be implied that the promises under the contract were to run for at least ten years, and, if growers delivered fruit and were able and willing to do so in the future, corporation was under equal obligation to continue to receive, process, and market fruit as long as installments on notes continued to come due.

8. Agriculture ⇐6

Where co-operative corporation three years after its incorporation failed to handle fruit growers' products in accordance with marketing contracts, and to maintain insurance policies on lives of growers, because of the voluntary bankruptcy of the corporation, rendering corporation incapable of further performance, there was a breach of the contracts by the corporation. Civ.Code 1929, § 653(a).

9. Assignments ⇐101

Generally, an assignee of a chose in action is subject to all equities and defenses

existing at or before notice of assignment; but, where there is a failure of consideration under a bilateral contract consisting of a breach by the assignor, such failure is a good defense to an action by the assignee whether it occurred before or after notice of assignment. Civ.Code, § 1459; Code Civ.Proc. § 368.

10. Bills and notes ⇐315

Generally, an assignee of a note who is not a holder in due course takes subject to all defenses, such as defense of failure of consideration, that would be available against the assignor. Civ.Code, § 3083, subds. 2, 3; § 3133, subd. 2.

11. Bills and notes ⇐98

Where fruit growers entered into marketing contract with co-operative corporation in 1927 and gave corporation notes payable in ten annual installments, and in 1928 growers learned of the transfer of their notes to plaintiffs, and the corporation was declared a bankrupt in 1930, growers were not estopped to raise defense of failure of consideration in action against them on the notes because of the fact that they had accepted the benefits of the marketing contract up to corporation's bankruptcy.

12. Corporations ⇐1

In action on fruit growers' installment notes pledged to plaintiffs by payee co-operative corporation as security for its notes to plaintiffs, growers were not precluded from setting up defense that there was a failure of consideration as to their notes as result of insolvency of the corporation, on ground that corporation was the alter ego of the growers, where the corporation was not a non-stock, non-profit co-operative corporation, since there was no basis for disregarding the corporate entity. Civ. Code 1929, § 653(a).

TRAYNOR, and EDMONDS, JJ., dissenting.

Action by Charles A. Bliss and others against the California Co-operative Producers (a Co-operative corporation), I. C. Shidler, Helen A. Winchester, B. J. Galbreath, and others to recover on certain notes. From a judgment in favor of the plaintiff on the notes as against I. C. Shidler, Helen A. Winchester, and B. J. Galbreath, they appeal.

Judgment reversed.

Prior opinion 172 P.2d 62.

B. J. Galbreath, of Marysville, and Muldary & Elkington, of San Francisco, for appellants.

Charles A. Bliss and Irvin C. Ford, both of Sacramento, for respondents.

CARTER, Justice.

Judgment was given for plaintiffs against defendants and appellants Shidler, Winchester and Galbreath on three promissory notes of which they were the makers. Their defenses, among others, were fraud and failure of consideration. Plaintiffs are the transferees of the notes, the payee being California Co-operative Producers, a corporation.

The series of events leading up to the execution of the notes had their beginning in 1926. In that year the idea was conceived by Mr. Johnson, president of the Union Construction Company, and a Mr. Campbell, to use the shipping terminal facilities and property at the harbor in Oakland, California, then held by the Union Construction Company under a lease from the City of Oakland, for a terminal for processing and shipping agricultural products. It was proposed to form a corporation to be known as California Co-operative Producers (hereinafter referred to as the corporation, which was later formed), as the instrumentality to conduct the enterprise. A promotional firm, Allen, Hobson and Simons, a co-partnership, was engaged under contract of April 15, 1927, to promote and organize the business and conduct a campaign to induce growers of agricultural products to let the corporation handle their products. The corporation was incorporated on April 26, 1927, with a capital stock of $15,000 under the then section 653 (a) of the Civil Code authorizing ordinary business corporations to divide a portion of their profits among persons other than their stockholders. The stock (other than director's qualifying shares) was to be issued only to associations of producers (which were to be organized) who marketed their

products through the corporation. Johnson was named president and Hobson and Allen directors of the corporation. Pursuant to a permit therefor one share of stock was issued to each director.

The promotional firm launched its drive, made financial arrangements, and obtained Manufacturing and Marketing contracts, hereafter called marketing contracts, for the corporation from many producers of agricultural products, including the three appellants, in which the producers agreed to market their products through the corporation. Appellants, as producers, were members of either one or the other of two producer's associations formed pursuant to the plan. The associations' Manufacturing and Marketing agreement, hereafter referred to as association contract, with its member-producers and the marketing contracts required its members to deliver their products to the corporation. The marketing contracts called for the procurement of policies of insurance on the lives of the producers, the corporation to pay the premiums, and provided: "In order to assist in the manufacturing and/or marketing of said products, and in further consideration of the payment of the premiums on policies of endowment life insurance on the life (name of defendant signing same) for the amount of (amount of insurance issued), if and when issued and assigned to California Co-operative Producers, said producer hereby extends his credit to California Cooperative Producers in the amount of a certain promissory note of even date herewith in the principal sum of $—— (amount of note executed, and sued for herein) made by said producer in favor of said California Cooperative Producers." The notes involved were executed in 1927 as a part of the transaction by appellants and were non-interest bearing negotiable instruments payable in annual installments. The principal of the notes was arrived at by an estimate of the annual produce to be delivered by the producer and maker of the note to the corporation.

On April 17, 1928, the corporation pledged the notes to plaintiffs, together with others, as security for the payment of a note for $5,000 in which the corporation was maker and plaintiffs payees. The pledge was made in the usual course of business and under circumstances which would indicate that plaintiffs were holders in due course and thus the defenses urged would not be available unless some other factor took them out of the favored position.

The court found that plaintiffs acquired the notes in good faith and without notice of any defenses of appellants. (As above stated, the defenses were fraud and failure of consideration.) The first installment on the principal of appellants' notes became due on January 2, 1928. The transfer (on April 17, 1928) was after that date, hence we have the issue of whether a transferee of an installment note is a holder in due course where the transfer is made after one or more but less than all of the installments are due. (In this connection it should be noted that in the instant case the notes did not contain an automatic acceleration clause upon default in the payment of an installment, thus we do not decide the law in that situation.)

On the issue of whether or not the transferee of a negotiable installment note taken after the maturity of one or more or less than all of the installments, is a holder in due course, reference must first be made to the negotiable instruments law as embodied in our statutes: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) * * * (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact" (Civ. Code, sec. 3133); "The instrument is dishonored by nonpayment when—(1) * * * (2) Presentment is excused and the instrument is overdue and unpaid." Civ.Code, sec. 3164. To determine whether a note is "overdue" when less than all of the installments are unpaid it must be noted that installment notes are expressly made negotiable by the statute. "The sum payable is a sum certain within the meaning of this act, although it is to be paid—(1) * * * (2) *By stated installments*; or (3) By stated installments, with a provision that upon default in payment for any installment or of interest, the whole shall become due" [Emphasis added] (Civ.Code, sec. 3083), and the policy is stated: "There is

no doubt that the fact that a note is payable by instalments does not destroy its negotiability. The authorities seem to be in favor of the continued negotiability of the note after the indorsement of payments thereon. In case of an instalment note, the time for the payment of each instalment is fixed so that it is within the rule requiring certainty as to time of payment. By the Uniform Act it is declared that the sum payable is a sum certain although it is to be paid by stated instalments." 7 Am.Jur., Bills and Notes, sec. 150. This policy woud be impaired if a note became in effect non-negotiable before less than all of the installments became due. A vast number of credit transactions might be thus jeopardized. As to the installments that have become due the transferee cannot be a holder in due course, for that portion of the note is undoubtedly overdue but as to the future installments he may or may not be such a holder, depending upon the factors presently discussed.

[1-3] It has been stated repeatedly, as a general proposition, under the negotiable instruments law and the common law that the transferee of an installment note is not a holder in due course as to any part of the note when the transfer has been made after the maturity of one or more but less than all of the installments. Cases in which uniform negotiable instruments law not mentioned: Hall v. E. W. Wells & Son, 24 Cal.App. 238, 141 P. 53; Archibald Hardware Co. v. Gifford, 44 Ga.App 837, 163 S.E. 254; General Motors Acceptance Corporation v. Talbott, 39 Idaho 707, 230 P. 30; Vinton v. King, 4 Allen, Mass., 562; McCorkle v. Miller, 64 Mo.App. 153; turns on lack of payment Shadman v. O'Brien, 278 Mass. 579, 180 N.E. 532; Norwood v. Leeves, Tex.Civ.App., 115 S.W. 53; First Nat. Bank of Waverly v. Forsyth, 67 Minn. 257, 69 N.W. 909, 64 Am.St.Rep. 415. Cases decided under the uniform negotiable instruments law: Hibbard v. Collins, 127 Me. 383, 143 A. 600; City of New Port Richey v. Fidelity & Deposit Co., 5 Cir., 105 F.2d 348, 123 A.L.R. 1352; United States v. Capen,D.C., 55 F.Supp. 81; see, 10 C.J.S., Bills and Notes, § 312; Daniels on Negotiable Instruments, 7th Ed., Vol. 2, sec. 910; 44 Harv.L.Rev. 464; 40 Harv.L.Rev. 634; 8 Am.Jur., Bills and Notes, sec 432; Hobart M. Cable Co. v. Bruce, 135 Okl. 170, 274 P. 665, 64 A.L.R. 457. These cases stress the point that the installment was unpaid as well as being overdue on its face, a factor of significance. More is required. There would be little free commerce in installment instruments if before accepting the same the transferee was required to ascertain whether or not the past due installments had been paid. Thus he may assume that the regular course of business has been followed (Code Civ. Proc. § 1963), and that each installment was paid when due. It is not significant, like it is where the whole principal is overdue, that the note is still in the hands of the payee or holder. Where the whole principal is overdue, that should warn the transferee that the note probably has been dishonored and there may be some reason for it which would constitute a defense. The possession by the payee or holder of an installment note before all of the installments are due does not signify dishonor. The holder would necessarily retain it for collection of the balance of the installments. If, however, the installments due on the face of the instrument have not been paid and the *transferee has notice of that fact,* he is put on inquiry that there may be some defenses against it and he cannot be a holder in due course. It is said in United States v. Capen, D.C., 55 F.Supp. 81, 83: "'Where the principal of a note is payable in installments and one installment is overdue and unpaid at the time of transfer of the note, the transferee is not a holder before maturity and hence is not a holder in due course, *unless he does not take with notice* of the past-due installment.'" [Emphasis added.] Therefore, the rule is that a transferee of an installment note is a holder in due course as to the installments to mature in the future when the transfer is made after one or more but not all of the installments are due on its face unless the past due installments have not in fact been paid and he has notice of that fact.

The decision in this case must turn on whether the installment due on January 2, 1928, had been paid, and if not, whether plaintiffs had notice thereof. In regard

to payment of the first installment, plaintiffs alleged in their complaint that no part of the principal had been paid on any of appellants' notes, an allegation in substance that the first installment had not been paid. That allegation was denied by appellants, which amounts to an assertion that the installment had been paid. We thus have the peculiar situation of plaintiffs and appellants taking positions in their pleadings opposite to their interests under the rule of law as above stated. Under that rule plaintiffs' position now requires a claim that the installment was paid, and appellants, that it was unpaid. The court found that all of plaintiffs' allegations were true, thus finding that the first installment had not been paid. It also found (and it would seem to be conflicting) that pursuant to the marketing contracts appellants delivered produce to the corporation in 1927, and the corporation on August 31, 1928 (*after* the transfer of the notes), entered credits on its books for the first installment; that plaintiffs were not holders in due course because the notes were transferred after the first installment was due but that "plaintiffs were purchasers and holders of said notes in good faith and for value and without notice of any equity or defense in favor of defendants or any of them; and in this connection the court finds that in each instance said California Cooperative Producers had in its possession and under its control pursuant to and under the said Financing and Manufacturing and Marketing Agreement on said 2nd day of January, 1928, money, property or credits belonging to each of said defendants, being the products or the proceeds of the products of such defendants, delivered pursuant to said Financing and Manufacturing and Marketing Agreement sufficient in value or amount to pay, satisfy and discharge the amount of said First Installment payments of each of said respective promissory notes in full." The court further found that the notes were not to be paid by credits for fruit delivered by the growers (appellants) stating: "It is not true that it was represented by said Producers to said defendants [appellants], or any of them, that no payment would be required to be made by the signers of said notes; or that as each yearly installment became on the face of the note due or payable to said California Cooperative Producers, said California Cooperative Producers would debit the balance of the amount of the yearly installment then due to said signer of said note or charge the same against said signer's credit balance, if any, or that thereafter said Producers would assign said sums or any sum, to corporate reserves, or any reserves, except as is stated in said Financing and Manufacturing and Marketing Agreement." The court gave judgment for plaintiffs which included the first installment in the instance of appellant Winchester, but not as to the other two appellants. The conclusion as to the latter appellants was based, however, on the finding that the statute of limitation had run upon the first installment as to those appellants. It is evident from the foregoing that the court found that the crop which had been delivered to the corporation by appellants *did not constitute payment.* Although it found the existence of the credits by the delivery of the crop it found *that the first installment had not been paid* and gave judgment for it, thus indicating that it considered that the credits did not constitute payment, a matter which may have turned on the intention of the parties. Therefore, it has been determined in this case that the first of the two conditions, that is, non payment of the past due installment, which makes a transferee after maturity of one of the installments not a holder in due course, is present.

[4] On the subject of notice to plaintiffs of appellants' failure to pay the first installment, the findings are unsatisfactory. It is found that they (plaintiffs) were bona fide holders without notice of any defenses, but it is also found that they were not holders in due course. They may not have had notice of any defenses, yet they may have had notice of the default and thus were put upon inquiry. In the latter event they would not be holders in due course. It is evident from the findings that the court did not consider the case in the light of the law as heretofore stated. The evidence with reference to the existence of notice is sketchy. Precisely what was done and said when the notes were transferred is not clear. The $5,000 note for which the in-

stant collateral notes were given as security states: "This note is secured by a pledge of the following installment notes, payable to the order of the maker hereof." Then follows three columns designated "Name of Maker," "Date of Note" and "Amount," respectively, under which each note is listed *giving the full face amount of the note.* It might be inferred from the foregoing that the first installment had not been paid. In the state of the evidence and the findings we believe the issue of notice should be retried. In the event it is found that plaintiffs had notice, and were not therefore holders in due course, for the guidance of the court we will discuss the issues pertinent to the defenses interposed by appellants.

[5-7] Thus turning to appellants' defenses, the court found that the corporation and its officers were the agents of appellants in the marketing of their products. The stock of the corporation was to be issued to associations of producers. The corporation was "in effect owned" by the associations of which appellants were members. The notes executed by appellants were a part of the same transaction in which they executed the marketing and association contracts. The interest on the $5,000 note delivered to plaintiffs by the corporation was paid until July 17, 1930, but none of the principal was paid although $4,000 of it became due before that date. On the issue of appellants' defense of failure of consideration or failure by the corporation to perform under the marketing contract, it appears that the corporation failed to pay the premiums on the insurance policies after July, 1930; that because of its insolvency, it has failed to and could not since then pay such premiums or process, manufacture or market appellants' products. Failure of consideration is a good defense to an action on a negotiable instrument by one not a holder in due course. Civ.Code, § 3109. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise. And in a bilateral contract, such failure of consideration is a defense to an action for a breach of the contract inasmuch as it is contemplated that the performance of the unilateral promises shall be in exchange for each other, the performance being considered as equivalent in value. It is said in Bray v. Lowery, 163 Cal. 256, 260, 124 P. 1004, 1005: "This case therefore comes within the rule stated in Richter v. Union Land & Stock Co., 129 Cal. [367], 372, 62 P. [39], 40, as follows: 'In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code.' See, also, Sterling v. Gregory, 149 Cal. [117], 121, 85 P. 305, and Cleary v. Folger, 84 Cal. 316, 24 P. 280, 18 Am.St.Rep. 187." See, also, Mulborn v. Montezuma Imp. Co., 69 Cal.App. 621, 628, 232 P. 162; Rest., Contracts, sec. 266 et seq.; Williston on Contracts, Rev.Ed., Vol. 3, secs. 813, 814. In the instant case, although there was no express promise in the marketing contract on the part of the corporation to process and market appellants-producers' products nor a fixed time during which the producers agreed to deliver their products to the corporation, we believe it may fairly be implied that the promises in that connection were to run for at least ten years inasmuch as the notes were payable in ten annual installments. It will be noted from the heretofore quoted paragraph from said contract, that in order to assist in the marketing and processing of the products, and in *further consideration* of the payment by the corporation of the premiums on the insurance policies, the notes were given. They were given as an extension of credit to the corporation, inplying that the corporation was to continue its activities and maintain the insurance policies in return for the continuation of the extension of credit by the notes which were payable, not in a lump sum, but in ten annual installments. The court found that the notes were executed for the purposes mentioned in the marketing contracts and "at the same time and as a part of the respective transactions." The court also found that from 1927 to 1930 *pursuant to the marketing contracts* appellants delivered their products to the corporation and the corporation *entered*

credits on its books as payments on the notes, indicating that the continued operation of the corporation was exchanged for the payment of the promissory notes. A further indication of the reciprocal nature of the promise in the notes and that of the corporation appears from the following clause in the marketing contracts: *"The release of the Producer from delivering his said products* or any part thereof in accordance with said Manufacturing and Marketing Agreement, or a failure on his part so to deliver his said products or any part thereof, *shall not release the maker from any portion of his liability under said promissory note."* [Emphasis added.] The producers were obligated on the note even if they violated their agreement to deliver their produce. It necessarily follows that if they did deliver their products and were able and willing to do so in the future, the corporation was under an equal obligation to continue to receive, process and market it as long as the installments on the notes continued to become due.

[8] The breach of the marketing contracts consisted of the failure after 1930 to handle appellants products and maintain the insurance policies in force arising from the voluntary bankruptcy of the corporation in that year rendering it incapable of further performance. The insolvency of a promissory in a bilateral continuing contract is tantamount to a breach of the contract by him. Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 142 P.2d 741; Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U.S. 581, 36 S.Ct. 412, 60 L.Ed. 811, L.R.A. 1917B, 580.

[9, 10] Plaintiffs urge that the asserted failure of consideration did not occur until after appellants had notice of the transfer of their notes to plaintiffs and thus the failure of consideration is not a defense. The general rule is that an assignee of a chose in action is subject to all equities and defenses existing at or before the notice of the assignment. Civ.Code, § 1459; Code Civ.Proc. § 368; 3 Cal.Jur. pp. 286-289. But where there is a failure of consideration under a bilateral contract consisting of a breach by the assignor, such failure is a good defense to an action by the assignee whether it occurred before or after the notice of assignment. It is said: "On the other hand, payment to the assignor or other defenses acquired by the debtor against the assignor after notice of the assignment are invalid, *unless the defense, though acquired after notice, is based on a right of the defendant inherent in the contract by its terms. Thus if payments under an executory contract are assigned, the debtor may set up failure of the assignor to fulfill his part of the contract though such failure occurs after notice of the assignment,* for the assignor cannot give another a larger right than he has himself;" (Emphasis added.) Williston on Contracts, Rev.Ed., Vol. 2, sec. 433. In Stern v. Sunset Road Oil Co., 47 Cal.App. 334, 190 P. 651, the court held that recoupment was available to the debtor against the assignee although the breach of the contract by the assignor occurred after notice of the assignment. See, also, Pacific Rolling Mill Co. v. English, 118 Cal. 123, 50 P. 383; Res. Contracts, secs. 161, 167(1), illus. 3. Plaintiffs refer to the statement in 19 Cal. Jur. p. 1002 that: "A failure of consideration in whole or in part after the transfer of an instrument to a bona fide holder is no defense in a suit by such holder, notwithstanding his full knowledge of the original consideration for which the paper was given." The cases cited for that proposition (Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L.R.A.,N.S., 861; Bank of Ukiah v. Gibson, 109 Cal. 197, 41 P. 1008; Splivallo v. Patten, 38 Cal. 138, 99 Am.Dec. 358; Pratt v. Dittmer, 51 Cal.App. 512, 197 P. 365; First Nat. Bank of Antioch v. Fickert, 51 Cal.App. 99, 196 P. 112) concern situations where a negotiable note given as a part of a contract transaction was transferred before maturity to a bona fide purchaser in the regular course of business. In other words, the transferee was a holder in due course. The court merely held that the knowledge of the transferee that the note was given as consideration for an executory promise in the contract but without notice that the promise had not been performed, was insufficient to destroy his status as a holder in due course. In the instant case, assuming that plaintiffs

were not holders in due course because of notice of non payment of the installment, the availability of the defense here asserted is not dependent upon actual notice of equities in favor of appellants. The general rule has been repeatedly stated that an assignee of a note who is not a holder in due course takes subject to all defenses that would be available against the assignor, one of such defenses being failure of consideration.

[11] Plaintiffs contend that there was no failure of consideration when the notes were pledged to them. (That, as we have seen, is immaterial.) And further, that appellants have enjoyed the fruits of the marketing contract with the corporation and hence are estopped to raise the defense of failure of consideration. The failure of consideration was, as above shown, the failure and inability after insolvency of the corporation to continue to accept, process and market appellants' products and maintain the life insurance policies in effect. In this connection the court found:

"That on or about the 21st day of May, 1928, [appellants] became aware of the transfer of their respective notes * * * to plaintiffs, * * *; that said [corporation] was declared a bankrupt on its voluntary petition September 5th, 1930; that during the whole time between said dates, [appellants] continued as members of said corporation and said producers associations [the associations who were stockholders in the corporation] and delivered and marketed their products through said corporation, enjoyed and received the benefits of the insurance on their respective lives, the premiums on which insurance were paid by the corporation; accepted and retained the benefits of the money borrowed from plaintiffs [the $5,000 borrowed by the corporation for which appellants' notes were pledged as security], which money was used in the processing and marketing of the products of [appellants], as above recited, and all other benefits of their membership in and affiliation with said [corporation] and said Growers Associations, but they never at any time repudiated or rescinded or attempted to rescind the said transactions between themselves and said corporation or between said corporations and plaintiffs herein.

"* * * that [appellants], by the execution of said * * * Marketing [contract] * * * by the execution of said notes, and by delivering the same to said corporation for the purpose of extending to it their credit in the amount of said notes, thereby enabling said corporation to borrow said $5,000 from plaintiffs; by the receipt of the benefits of life insurance on their respective lives, and the benefits of said loan by plaintiffs to said defendant corporation, and by all other benefits provided in said * * * Marketing [contract]; and by continuing as members of said corporation after the borrowing of said money as aforesaid, and after they had knowledge of the borrowing of said money as aforesaid, and after having knowledge of the transfer of their notes as security therefor, and all of the other matters and things herein found to be true, said [appellants], ratified the acts of said corporation in borrowing said money from plaintiffs, and transferring said notes to plaintiffs as security for its repayment; and they are by their said acts and conduct, and by the benefits they received as herein found, estopped from setting up any defense to this action on the ground of any alleged fraud * * *, or from making any other defense thereto, * * * and that by their said acts and conduct as herein found, said defendants waived any and all rights that they may or might have had to set up any defense to this action on the ground of any alleged fraud practiced by their said agent, California Cooperative Producers, or its agent, or from making any other defenses thereto, as to the matters hereinabove found."

We do not find any estoppel or reason springing from the foregoing circumstances which prevent appellants defending on the ground of failure of consideration. The awareness on their part of the pledge of their notes to secure the payment of the $5,000 did not impose upon them any duty with respect to the assignees. They could assume that inasmuch as the assignees had no greater rights then, and were subject to the same defenses as the corporation assignor, they would govern their acts and

protect themselves accordingly. Certainly they continued as members of the associations, which were stockholders in the corporation, and delivered their products to the corporation. They were bound to do that under the marketing and association contracts and were privileged to assume that the corporation would continue its performance and that the plaintiffs-assignees would be subject to the defenses arising from the failure of the corporation-assignor to perform. Appellants did receive the benefits of the marketing contracts prior to insolvency but they were entitled to receive them under those contracts. Plaintiffs cite Maddock v. Russell, 109 Cal. 417, 42 P. 139, and Rohrbacher v. Kleebauer, 119 Cal. 260, 51 P. 341, for the proposition that appellants cannot complain because they have enjoyed the fruits of the contracts. Those cases are not in point inasmuch as the contracts here involved are the marketing contracts and there has been a failure of consideration therein as above stated. The corporation has been unable to perform since 1930. Appellants did not rescind the contracts. They had no grounds for doing so in so far as failure of consideration is concerned. There was no failure of consideration until the insolvency of the corporation. Appellants did nothing to mislead plaintiffs. It is not found that they promised to pay the $5,000 the corporation borrowed or to pay to plaintiffs the notes executed by them. Prior to the insolvency they did not waive the defense of failure of consideration. It had not failed as yet and there is nothing to indicate that they did so as to a future possibility of a breach by the corporation.

[12] Running through the above quoted finding of the court is an undercurrent intimating that the corporation was the alter ego of the appellants-producers and the associations to which they belonged; that the insolvency was their act; and, that hence the $5,000 note was really their note. The court also found that the corporation "was in effect owned by said 'Producers Associations' composed of the fruit growers, the latter constituting the membership of the 'Producers Associations,' and these fruit growers were also directly connected with the California Cooperative Producers by the Financing, Manufacturing and Marketing agreement executed by each of them." And that "said corporation and its officers were agents of [appellants] in the marketing of their products." We see no basis for disregarding the corporate entity. It was not a non-stock, non-profit cooperative corporation. It was one in which persons others than stockholders could share in the profits. Accepting the agency relationship the marketing contracts were still binding and the corporation-agent was obligated to perform thereunder. The borrowing of the $5,000 by the corporation from plaintiffs was on its own liability, not on that of the members. If that were not so, we would be disregarding the corporate entity, and the action would have been on the $5,000 note rather than the pledged notes. The corporation was the agent of appellants in the sense that it was a processing and marketing agent for the producers. It is true that appellant Galbreath became a director of the corporation after the $5,000 note was given and appellants' notes were pledged but that still does not prevent him from asserting failure of consideration under a contract he had with the corporation. It was still a corporate entity. There is no finding that the voluntary bankruptcy of the corporation was not in good faith. As far as appears no other course was open. Indeed on the subject of disregarding the corporate entity, plaintiffs state in their brief:

"Plaintiffs have not at any time contended that the Cooperative was in law the alter ego of Appellants.

"It should also be borne in mind that this is not an action to enforce shareholders' liability, although a number of the statements in the opening brief might lead the casual reader to so believe. As appellants have stated, it had already been decided that the shareholders were liable on the Corporation note here involved; but they have not met that obligation. This is an action upon promissory notes executed by Appellants to the California Cooperative Produers and by that organization pledged to the Plaintiffs and Respondents. By reason of the nature of the defenses interposed by the Defendants, it has become necessary to show that they were so closely related to

the Cooperative that they cannot escape liability on those notes by the defenses relied upon."

It will be recalled that as to appellant Winchester judgment was given for the face amount of the note including the first installment. Inasmuch as it is now conceded by plaintiffs that this appellant was entitled to a credit for the amount of that installment that portion of the judgment cannot stand. As to the other appellants the statute of limitation was found to have run on the first installment of each of said notes.

The judgment is reversed and the case may be retried only upon the issue of notice of non payment of the first installment at the time of the transfer, and judgment may thereafter be entered in accordance with the views expressed herein in the light of the determination of the issue of notice.

GIBSON, C. J. and SHENK, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, and EDMONDS, JJ., dissent.

TRAYNOR, Justice (dissenting).

I dissent.

In my opinion it is unnecessary to remand this case to the trial court for a finding on the question of notice, since the findings and the evidence show that plaintiffs took the notes without notice that the first installments had not been paid. Moreover, I do not understand by what reasoning my associates reach the conclusion that despite a finding that the transferee of an installment note acted in good faith and the fact that an inquiry would have revealed no defenses he cannot as a matter of law be a holder in due course if he acquires the note with notice of the nonpayment of a past due installment.

The first question to determine is whether the first installments were due and unpaid at the time the notes were pledged. There is confusion in the findings as to whether under the marketing agreement, payment was made upon defendants' delivering fruit of enough value to meet each installment as it became due or upon the payee's deducting the amount of each installment from the proceeds from the sale of the fruit. The trial court found that the payee had in its possession on the due date of the first installments, money and property or credits of defendants "sufficient in value or amount to pay, satisfy and discharge the amount of said First installment payment of each of said respective promissory notes in full." The money, property, or credits referred to consisted of fruit as well as proceeds from the sale thereof. There was evidence that the proceeds alone would not cover the first installments on the due date thereof. It may be assumed for the purposes of this opinion, therefore, that the first installments were unpaid when the notes were pledged. The question then arises whether plaintiffs are holders in due course.

A holder in due course is defined in section 3133 of the Civil Code (N.I.L. sec. 52) as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

No question is raised with respect to subdivisions (1) and (3). Any conclusion that plaintiffs are not holders in due course must therefore be based on subdivision (2) or (4).

The first major issue presented under these subdivisions is whether plaintiffs were precluded from being holders in due course merely because the maturity date of the first installments had passed before they acquired the notes.

Subdivision (2) specifies two conditions: The holder must have taken the instrument

(a) before it was overdue and (b) without notice that it had been "previously dishonored, if such was the fact."

Is an installment note overdue in its entirety when it is transferred after the due date of an installment? An installment note is of course overdue as to installments due before the date of transfer, and, under subdivision (2), a transferee thereof cannot be a holder in due course as to such installments. In the absence of the operation of an acceleration clause, however, the fact that the maturity date of one or more installments has passed cannot make the instrument overdue as to installments payable in the future. The instrument is in part overdue and in part not. Is it overdue within the meaning of subdivision (2)? An instrument is not overdue until the specified maturity of the principal obligation. An installment note, however, has several maturities, and if the maturity of each installment is regarded as the maturity of the instrument, then the instrument would be overdue after the maturity of the first installment. See 40 Harv.L.Rev. 634, 636. This interpretation would make the instrument all black or white. The more realistic interpretation, and the one in accord with the expressed intention of the Uniform Negotiable Instruments Act to make installment notes negotiable (Civ. Code sec. 3083, N.I.L. sec. 2), would be that the instrument, like the principal obligation, is overdue only as to matured installments, but not as to installments payable in the future. A contrary holding would render installment notes nonnegotiable after the due date of the first installment. Even if a transferee could thereafter be a holder in due course if that or subsequent installments were paid, he would still have to ascertain at his peril whether the previous installments had been paid. Thus the privilege of a holder of a negotiable instrument to be free from a duty to inquire into the relations between previous parties to the instrument would be denied the holder of an instrument payable in installments.

Is a transferee who has acquired the note after an installment has matured, without notice of its nonpayment, a purchaser with notice that the note has been previously dishonored? Even if it is assumed that the nonpayment of one or more installments is tantamount to dishonor of the whole instrument, the holder has no notice of dishonor unless he has notice of nonpayment. Circulation of the instrument after the due date of an installment except the last cannot serve as notice that the installment has not been paid, for the instrument was designed to circulate until the maturity date of the last installment. A transferee has no reason to conclude from the mere fact that the note circulates after the due date of one or more installments that such installments were not paid: he may assume that the ordinary course of business has been followed and that the installments have been paid. Code Civ.Proc. sec. 1963 (20). Nor need the transferee of such an instrument find a dated receipt on the note for each installment paid. The Uniform Negotiable Instruments Act does not provide for such notations, and in any event they could be placed on the instrument by the transferor even though the installment had not in fact been paid.

Does subdivision (4) of section 3133 preclude a transferee's being a holder in due course when he has no notice of the fact that an installment was not paid when due? Since the transferee may assume that the matured installments have been paid, and since he has no notice from the note itself of the nonpayment of past installments merely because the note is transferred after the due date thereof, a fortiori he has no notice from that fact alone of any infirmity in the instrument or defect in the title of the person negotiating it. "To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Civ. Code, sec. 3137: N.I.L. sec. 56. It follows that neither subdivision (2) nor subdivision (4) precludes a purchaser of an installment note from being a holder in due course merely because he purchased the same after the due date of one or more installments.

We turn, therefore, to the second major issue in this case, namely, whether a purchaser can be a holder in due course as to unmatured installments if he has taken the note with knowledge that one or more installments were not paid when due. The majority opinion concludes that such a purchaser cannot be a holder in due course but does not explain upon what provision of the Uniform Negotiable Instruments Act its conclusion is based. It is necessary therefore to reexamine the pertinent provisions of that Act to determine whether they afford any justification for that conclusion.

Does notice of the fact that an installment note is transferred after an installment has matured and is unpaid make the whole note overdue within the meaning of subdivision (2) of section 3133 of the Civil Code (N.I.L. sec. 52)? The act makes no provision for notice that a note is overdue. It provides merely that a holder in due course must acquire the note "before it was overdue." When the instrument provides the date of maturity on its face, notice from other sources is irrelevant. See, Britton, Bills and Notes, 498. It has already been observed that a holder cannot be a holder in due course as to installments that were overdue when he acquired the note, but that he can be a holder in due course as to future installments, which are not overdue unless their maturity dates have been accelerated. There is nothing in the statute providing as a matter of law for the acceleration of an installment note on the nonpayment of any installment. The only provision of subdivision (2) that depends on notice for its operation is the requirement that the transferee, to be a holder in due course, must acquire the note "without notice that it had been previously dishonored, if such was the fact."

Does notice of the nonpayment of an installment constitute notice of dishonor of the entire note? Section 3164 of the Civil Code (N.I.L. sec. 83) provides: "The instrument is dishonored by nonpayment when—(1) It is duly presented for payment and payment is refused or cannot be obtained; or (2) Presentment is excused and the instrument is overdue and unpaid." Presentment was waived on the notes involved in this case and therefore the instruments were dishonored as to the first installments if they were overdue and unpaid. It does not follow, however, that the instruments were dishonored in their entirety. Since an installment note can be overdue and unpaid as to certain installments, but not overdue and unpaid as to others, it can likewise be dishonored by nonpayment as to certain installments, but still not be dishonored as to others.

If dishonor by nonpayment of an installment when due is tantamount to dishonor of the instrument as to future installments, it would follow that even if that installment were subsequently paid, the whole note would be regarded as "previously dishonored." Consequently, knowledge of a transferee that one installment was paid late would preclude his being a holder in due course as to future installments, for he would have notice that the instrument was "previously dishonored." It is settled, however, under the provisions of the Uniform Negotiable Instruments Act with respect to notice of dishonor to persons secondarily liable, that dishonor of an installment does not constitute dishonor of the note as to other installments. Section 3170 of the Civil Code (N.I.L. sec. 89) provides that "when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each endorser, and any drawer and endorser to whom such notice is not given is discharged." If dishonor of the instrument as to one installment constituted dishonor of the instrument as to all installments, failure of the holder to give notice of dishonor within the period prescribed as to one installment would deprive him of the right to recover from the persons secondarily liable, when subsequent installments were dishonored. It is established, however, that even though the holder has failed to give proper notice of dishonor as to an installment, he is not prevented from giving such notice as to subsequent installments that are not paid at their maturity dates. Berkowitz v. Kasparewicz, 121 Conn. 140, 145, 183 A. 693, 104 A.L.R. 1326; Warneke v. Preissner,

103 Conn. 503, 507, 131 A. 25; Roberts v. International Bank, 58 App.D.C. 87, 25 F.2d 214, 216; Chamberlain v. Cobb, 129 Wash. 549, 551, 225 P. 414; see 10 C.J.S., Bills and Notes, § 379, p. 896; Uniform Laws Annotated, Negotiable Instruments, note 13 to sec. 89.

An analogy is presented by the cases involving nonpayment of one of a series of notes. According to the cases decided under the Uniform Negotiable Instruments Act, knowledge of the dishonor of one of the notes does not constitute notice that all of the notes of the series are dishonored. Hobart M. Cable v. Bruce, 135 Okl. 170, 171, 274 P. 665, 64 A.L.R. 451; Morgan v. Farmington Coal & Coke Co., 97 W.Va. 83, 99, 124 S.E. 591; Brannan, Negotiable Instruments 566; of, however, 64 A.L.R. 457, 458 (collection of cases decided under common law principles).

The conclusion seems inescapable therefore that if knowledge of nonpayment of a past due installment precludes a purchaser from being a holder in due course as to unmatured installments, it is not because of the provisions of subdivision (2) of Civil code section 3133 (N.I.L. sec. 52(2).) It remains only to determine whether such a result is justified by the provisions of subdivision (4).

Is notice of the nonpayment of an installment, as a matter of law, notice of "any infirmity in the instrument or defect in the title of the person negotiating" the note within the meaning of subdivision (4) of Civil Code section 3133 (N.I.L. sec. 52 (4))? Section 3137 of the Civil Code (N.I.L. sec. 56) provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Knowledge that an installment has not been paid when due is clearly not actual knowledge of an infirmity in the instrument itself or of a defect in the title of the person negotiating it. To prevent the transferee from becoming a holder in due course, such knowledge must therefore be knowledge of such facts that his action in taking the instrument amounted to bad faith.

Under subdivision (4) of Civil Code section 3133 (N.I.L. sec. 52(4)), therefore, if an installment is not paid when due, notice of that fact does not, as a matter of law, preclude the transferee from being a holder in due course. Such notice is at most evidence of bad faith to be weighed by the trier of facts with the other facts to determine whether the transferee took the note in question in good faith. Even if it be assumed that such knowledge would be sufficient to put a prudent man on inquiry to determine if the note was subject to defenses, the transferee is not thereby deemed to have acquired the note in bad faith, for negligence is not a bar to recovery on a negotiable instrument. Civil Code section 3137 (N.I.L. sec. 56) clearly makes the good or bad faith of the transferee the only test. In construing this provision, this court has followed the general rule "that mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith." Popp v. Exchange Bank, 189 Cal. 296, 303, 208 P. 113, 116; Goodale v. Thorn, 199 Cal. 307, 314, 249 P. 11; Merced Security Sav. Bank v. Bent Bros., 207 Cal. 652, 656, 279 P. 765; Nuckolls v. Bank of California, 10 Cal.2d 278, 284, 74 P.2d 271; Barthelmess v. Cavalier, 2 Cal.App.2d 477, 487, 38 P.2d 484; Imperial Gypsum & Oil Corp., v. Chaplin, 4 Cal.App.2d 109, 113, 40 P.2d 596; see, 5 Uniform Laws Annotated, Negotiable Instruments, notes 31-136 to section 56; Brannan, Negotiable Instruments, 6th Ed., 636-641; Rightmire, Bad Faith in Negotiable Paper, 18 Mich.L.Rev. 355, 367, 368; Britton, Bills and Notes, 411-415; 81 U. of Pa.L.Rev. 617. "Under the statute, section 56, * * * a purchaser is not chargeable with notice of an infirmity or defect in the instrument unless he had 'actual knowledge of the infirmity or defect, or knowlege of such facts that his action in taking the instrument amounted to bad

faith.' The statute, by its terms, excludes constructive notice." Allen v. Cooling, 161 Minn. 10, 15, 200 N.W. 849, 851.

The mere fact that one or more installments of an installment note are unpaid when the note is negotiated does not convey knowledge to the transferee of a defense against the note; nor does it reveal such knowledge of circumstances that it can be said that the holder of the note shut his eyes to the facts and in bad faith sought to avoid the knowledge of a defense. In that respect there is no difference between a transferee of a negotiable instrument with knowledge that one or more installments of interest are unpaid and a transferee with knowledge that one or more installments of principal are unpaid. Before the adoption of the Uniform Negotiable Instruments Act there was a conflict of authority with regard to the effect of the late payment of an installment of interest. Under the Uniform Act, however, the rule is now generally recognized to be that "knowledge that interest is due and unpaid does not, of itself constitute bad faith, but such fact may be taken into consideration by the jury along with other facts on the issue of purchase in good faith." Britton, Bills and Notes, 456-457; City of New Port Richey v. Fidelity & Deposit Co., 5 Cir., 105 F.2d 348, 352, 123 A. L.R. 1352.

Similarly, notice of a default in the payment of an installment of principal disconnected from other facts does not prevent the transferee from being a holder in due course. Nor does such notice alone constitute bad faith and put the holder under a duty to make an inquiry. Even if good faith would require the transferee to make an inquiry, it would not necessarily follow that he could not still be a holder in due course. The inquiry may reveal that the default is fully explained by the circumstances and that it constitutes no warning that the maker has a defense with regard to installments to mature in the future. Thus, it may appear that prompt payment has been waived and that the delay with regard to one or more past due installments does not exceed the delay in the payment of other installments that have been paid late in the past. Failure to pay a past due installment may arise from unexpected circumstances affecting the ability of a maker to pay rather than from an equitable defense. Many installment notes containing an acceleration clause provide that the holder can accelerate future installments only if one or more past installments remain unpaid for a specified period. In such cases installments are frequently paid in the interval between the maturity date of the installment and the date at which under the terms of the note the holder would be entitled to accelerate future payments. A rule would be contrary to common experience that held that in each case in which a past due installment is unpaid, notice of such fact alone is notice that the maker has a defense against future installments payable under the note.

In my opinion, therefore, the rule set forth in the majority opinion that a purchaser of an installment note who has knowledge that a past due installment was unpaid when he acquired the note "is put on inquiry that there may be some defenses against it and * * * cannot be a holder in due course" cannot be reconciled with the provisions of the Uniform Negotiable Instruments Act. The cases cited for this proposition include only three cases decided under the Uniform Negotiable Instruments Act. Of these three cases, only one actually held that the late payment of an installment precludes a subsequent purchaser from being a holder in due course. Hibbard v. Collins, 127 Me. 383, 386, 143 A. 600. That case in fact held that notice was immaterial, apparently on the theory that when the first installment was overdue the whole note was overdue. See, Brannan, Negotiable Instruments, 566. Obviously, the majority opinion in the present case is not based on the theory that the note was overdue as to all installments, for the question whether plaintiffs are holders in due course is held to turn on whether or not they had notice of the nonpayment of an installment. In City of New Port Richey v. Fidelity & Deposit Co., 5 Cir., 105 F.2d 348, 352, 123 A.L.R. 1352, there is a dictum to the effect that notice of the nonpayment of an installment prevents a subsequent purchaser from being a holder in due course. The actual holding of that

case, however, is that "known non-payment of interest, though not in law notice of dishonor, is a fact to be considered with all other circumstances on the question of the bona fides of the taking." The majority opinion places great reliance on a statement in United States v. Capen, D.C., 55 F.Supp. 81, 83, but the actual decision in that case turned on a rule adopted in some jurisdictions that where an installment note contains an automatic acceleration clause and the maker fails to pay the first installment, the whole note is automatically overdue. Cf., however, Andrews v. Zook, 125 Cal.App. 19, 22, 13 P.2d 518; Sullivan v. Shannon, 25 Cal.App.2d 422, 425, 77 P.2d 498.

The cases decided under common law principles, the one case deciding the question under the Uniform Negotiable Instruments Act, and the dicta in the other cases relied on in the majority opinion, are all based on the theory that the transferee was a purchaser of overdue paper or was a purchaser with notice of dishonor. See Britton, Bills and Notes, 455. It has already been observed that there is no support for either theory in the provisions of the Uniform Negotiable Instruments Act. The majority opinion cannot be brought within the purview of that Act unless it is regarded as holding that as a matter of law anyone who purchases an installment note with knowledge that an installment is unpaid is a purchaser in bad faith. But even then it cannot be reconciled with the Act, as is well illustrated by the facts of the present case.

Plaintiffs gave a loan of $5,000 to a corporation in which they had no interest and with which they had no other business connections. Even if they knew that the first installments had not been paid and good faith required an inquiry when the notes were pledged, such an inquiry could not have revealed the defense of subsequent failure of consideration now set up to bar their recovery on the notes. Plaintiffs could not learn in advance that years later the corporation would become insolvent and be unable to perform its obligations under its contract with the makers. The rule adopted by the majority of this court actually empowers the maker of an installment note to render the note non-negotiable by refusing to pay an installment, for knowledge of that fact precludes a transferee's being a holder in due course. Such a rule contradicts the basic principle of the statute that a transferee of a negotiable instrument is not required, except by considerations of honesty and good faith, to enter upon an inquiry with regard to transactions that have given rise to the issuance of the instrument.

If the principles set forth in the Uniform Negotiable Instruments Act are applied to this case, knowledge that the first installments were not paid would not as a matter of law prevent plaintiffs from being holders in due course. It would merely be evidence that plaintiffs might not have acquired the notes in good fatih. Good faith may require a transferee to make an inquiry on the basis of such knowledge depending on the facts of the particular case. What constitutes good faith is essentially a question of fact and depends on the circumstances in each case. For example, if the purchaser knew that one or more of the installments were not paid on the due date and made a reasonable inquiry that revealed only that the payments had not been made because of some reason unconnected with any defense, he should not be barred from recovery on the note merely because of subsequent failure of consideration, a defense that could not have been known at the time. On the other hand, if the purchaser acquired the note with knowledge that several installments had not been paid, it would appear that he failed to act in good faith if he failed to make an inquiry, unless the surrounding circumstances showed that this failure was attributable to negligence and not to dishonesty. Such questions, however, are questions of fact for the trial court or jury and should only be considered matters of law when the facts are not in conflict and not reasonably susceptible of conflicting inferences.

Under the holding of the majority opinion, the negotiability of installment notes has been seriously impaired. After any installment has matured, it is unsafe for a purchaser, even though he acts in good faith, to acquire such a note without mak-

ing certain that all past due installments have been paid. His rights as a holder in due course may be questioned at some future date by the maker's merely asserting that an installment was unpaid at the time of the transfer and that the transferee had knowledge of that fact. In such a situation, if the maker had a defense that involves the title of the payee, the holder would have the burden of showing that either the installment was paid when due or that he had no notice of that fact. Civ. Code, sec. 3140; N.I.L. sec. 59. In view of the power and responsibility of the trier of facts under decisions of this court (see, In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689), there is always the risk that the evidence might be held susceptible of an inference that the holder had notice of the nonpayment of a past due installment.

Even under the rule of law announced in the majority opinion, it is unnecessary to remand this case to the trial court on the question of notice.

The trial court found: "That the first installment of each of the said notes given to plaintiff as security for the note of said California producers were past due on its face at the time of the transfer of said notes to plaintiffs, and that plaintiffs are not holders in due course of said collateral notes; but the court also finds that said plaintiffs were purchasers and *holders* of said notes *in good faith and for value* and without notice of any equity or defense of defendants or any of them. * * *" (Italics added.) It was the position of the defendants at the trial that the notice of nonpayment of the first installments was irrelevant since the date for the payment thereof had passed before the notes were transferred to plaintiffs. Under the principles already discussed, the effect of notice of nonpayment of a prior installment is pertinent only to the question whether or not the purchaser acquired the note in good faith. Since there was no evidence that plaintiffs were not holders in due course, except in regard to the first installments, it is obvious that the "finding" that plaintiffs were not holders in due course is based upon defendants' theory and is an erroneous conclusion of law.

Since the trial court found that plaintiffs were holders of the notes in question "in good faith and for value without notice of an equity or defense of defendants," it follows that the plaintiffs are holders in due course. This finding on its face, under the foregoing principles of law, can mean only one of two things: (1) Plaintiffs purchased the notes without knowledge that the first installments were unpaid, or (2) even if the first installments were not paid when due and plaintiffs had knowledge of that fact, under the circumstances of the case, plaintiffs were none the less acting in good faith when they acquired the notes. Since either question is one of good faith, if either theory is supported by the evidence, the judgment must be affirmed, except to the extent that it allows plaintiffs to recover against defendant Winchester for the first installment of her note. This installment was either paid before the transfer of the note or was subject to defenses. Since it was overdue, plaintiffs were not holders in due course as to it.

Even if it is assumed that under the facts of the present case the trial court would not have found that plaintiffs were purchasers in good faith if it believed that the plaintiffs had notice of the nonpayment of the first installment, the reasonable construction of the finding in regard to the good faith of plaintiffs is that they acquired the notes without such notice.

A holder of a negotiable instrument is "deemed prima facie a holder in due course * * *. (Civ.Code, sec. 3140, N.I.L. sec. 59), and a person who acquires an installment note after an installment is due is entitled to rely on the presumption that the due course of business has been followed. Code Civ.Proc., sec. 1963. Since it is an established principle that all inferences and presumptions must be applied to support the judgment of the court, the trial court's finding that the plaintiffs acquired the notes in question as "purchasers and holders of said notes in good faith and for value and without notice of any equity or defense of defendants * * *" must be construed as a finding that the notes were acquired without notice of nonpayment of the first installments.

The remaining question is whether this construction of the finding is supported by the evidence. The principal plaintiff testified that he knew nothing of the status of the pledged notes and that he relied on the recommendation of a Mr. Anderson, the president of a bank that later acted as plaintiffs' agent in delivering the notes. Plaintiff testified that Mr. Anderson told him that the notes would be secured by growers' notes but that Mr. Anderson did not tell him of the nature of the growers' notes.

Defendants introduced no evidence sufficient to controvert this testimony. Mr. Anderson was called as defendants' witness but he was able to state only that he advised one of the plaintiffs that the corporation would use the money to start a cannery in Sacramento and that it would be advantageous to the city and to this plaintiff. Mr. Anderson testified that he could not recall whether at that time he knew anything about the status of the growers' notes. The testimony of this witness was struck from the record as irrelevant. Defendants contend that the testimony was admissible to show that the witness knew of the status of the notes and that he was plaintiffs' agent. The only agency shown, however, was that the witness's bank was subsequently the agent for the delivery of the notes and none of the testimony struck tended to show that plaintiffs had any knowledge of the nonpayment or of any defense available to defendants at that time.

It is contended that an inference that plaintiffs had notice that the first installment was overdue could be drawn from the fact that the $5,000 note from the California Cooperative Producers contained a list of the installment notes transferred to plaintiffs as security, because this list designated the full face amount of each of the pledged notes. It is evident on the face of the principal note, however, that the full amounts were listed for purposes of identification. It was necessary to give the full face amount of each note, since the principal note executed by the corporation, after enumerating the notes given as security, stated, "The maker hereof may, while not in default, substitute as security hereunder, in place of any of said note or notes, note or notes of its grower members, of equal amount, form and character." Even if the trial court could have reasonably inferred from the listing of the notes with their full amounts that plaintiffs had knowledge of the nonpayment of the first installments, it was free to draw or not to draw such an inference.

EDMONDS, J., concurs.



80 Cal.App.2d 158

KLINE v. ROGERSON.

Civ. 15700.

District Court of Appeal, Second District, Division 2, California.

June 4, 1947.

1. Bills and notes ⇐443(1)

Where deposited check of prospective purchaser of ranch was not made payable to prospective vendor, but to broker, and check was not delivered to vendor, but to an agent of broker, and purchaser did not sign escrow instructions relating to sale of ranch, vendor had no title or right to the check, and could not recover on check after purchaser stopped payment.

2. Vendor and purchaser ⇐21

Deposit receipt signed by prospective purchaser of ranch did not constitute an agreement of purchase where it expressly provided that balance of purchase price was to be paid "at $5,000 or more per year, plus interest at 5% or terms to mutual satisfaction," since the parties never agreed on terms which were mutually satisfactory and there was never an agreement of purchase.

3. Bills and notes ⇐443(1)

Fact that preliminary agreement for sale of ranch provided that if sale was not completed, broker might retain amount de-

posited by prospective purchaser as consideration for execution of agreement, did not entitle prospective vendor to recover against purchaser on the deposit check after purchaser had stopped payment, where broker was not a party, there was no showing that broker exercised an option to retain deposit as consideration for agreement, and broker did not assign to vendor any right under the check.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Walter Kline against G. P. Rogerson to recover on a check which had been signed by defendant, but on which the defendant had stopped payment. From a judgment for the defendant, the plaintiff appeals.

Judgment affirmed.

George R. Maury, of Los Angeles, for appellant.

Mitchell & Gold, of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant after trial before the court without a jury in an action to recover upon a check signed by defendant upon which he had stopped payment.

The essential facts are these:

In September of 1945, defendant met Thomas J. Quigley, a real estate broker. Thereafter the broker displayed to defendant plaintiff's ranch which was for sale. On October 18, 1945, defendant executed a check in favor of Thomas J. Quigley in the sum of $10,000 which was handed to one of Mr. Quigley's agents, Mrs. Gray. The following day plaintiff, defendant, Mr. Quigley, and Mrs. Gray returned to plaintiff's ranch where a discussion relative to the property ensued which resulted in plaintiff and defendant executing a deposit receipt.* Thereafter plaintiff, defendant, and Mr. Quigley went to a branch of the Bank of America and opened an escrow. The deposit receipt and the check above referred to, endorsed by Mr. Quigley to the escrow holder, which endorsement contained the escrow number, were handed to the escrow clerk. A preliminary sheet for the use of the bank in preparing escrow instructions was filled in. Written escrow instructions were to be drawn by the escrow clerk and later signed by the parties. Defendant agreed that the check which he had given to Mr. Quigley should be placed in the escrow. Thereafter

* The deposit receipt reads as follows:

"Deposit Receipt

Northridge, California 10/18 1945

Receive from G. P. Rogerson the sum of Ten Thousand Dollars as a deposit on account of purchase price of following described property, situate 11000 Winetka County of L. A. State of Cal. to-wit: Approx. 23. acres at 11000 Winetka Northridge subject to conditions, restrictions, reservations, and rights-of-way now of record. Purchase price to be $52,500.00 Dollars. Balance of purchase price to be paid as follows: total of 20,-000 cash thru escrow, assume loan of Approx $9000.00 and balance at five thousand or more per year plus interest at 5% or terms to mutual satisfaction. And it is hereby agreed: That in the event said purchaser shall fail to pay the balance of said purchase price or fail to complete the purchase as herein provided, the amount paid hereon may, at the option of the Agent, be retained as the consideration for the execution of this agreement.

That the current taxes, insurance, rents and interest of said property shall be pro-rated.

That the evidence of title is to be in the form of policy of title insurance issued by a responsible title company and to be furnished and paid for by the Seller.

That any monies received are subject to owner's approval.

That this offer expires ——— days from date hereof.

T. J. Quigley, Broker
G. P. Rogerson

I agree to purchase the above described property on the terms and conditions herein stated.

——— Purchaser ——— Purchaser

I agree to sell the above described property on terms and condition herein stated, and agree to pay the above signed agent as commission the sum of five per cent, or one-half of the deposit in case same is retained by agent, provided same shall not exceed full amount of the commission.

——— Seller Wally Kline, Seller."

plaintiff and his wife signed escrow instructions prepared by the bank and delivered to the escrow holder a deed, a statement of identity and a fire insurance policy. Defendant did not sign the escrow instructions and on October 23, 1945, ordered payment stopped on the check which he had given to Mr. Quigley. On October 24, 1945, Mr. Gold, attorney for defendant, asked the escrow holder to send him a copy of the conditions and restrictions "subject to the approval of the buyer" and a bill of sale for certain garden tools, and stated that, "the transaction was contingent on payments on the second for $2,000 a year instead of $5,000" a year, to be "subject to the approval of the buyer."

Plaintiff indicated his willingness to accept the request of defendant except as to the payment of $2,000 per year instead of $5,000 per year. Thereafter plaintiff cancelled negotiations with defendant and brought suit upon the check executed by defendant.

This is the sole question presented for our determination: *Was plaintiff the owner or holder of the check executed by defendant?*

[1] This question must be answered in the negative. It is conceded (1) that the check was not made payable to plaintiff, (2) that the check was not delivered to plaintiff, and (3) that defendant did not sign the escrow instructions. Therefore plaintiff has utterly failed to show any title or right to the check or to enforce the obligation represented by the check.

[2, 3] The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid "at $5,000 or more per year, plus interest at 5% or terms to mutual satisfaction". Since the parties never agreed upon terms which were mutually satisfactory, there was never an agreement of purchase and sale. Hence the plaintiff was not entitled to any portion of the purchase price. Neither is there any merit in plaintiff's contention that he is entitled to the $10,000 because the preliminary agreement provided that if the sale was not completed the agent might retain the amount deposited as consideration for the execution of the agreement. The agent is not plaintiff here nor is there any showing that he exercised an option to retain the deposit as consideration for the agreement, nor did he assign to plaintiff any right under the check.

Cases such as Cavanaugh v. Casselman, 88 Cal. 543, 26 P. 515; Easton v. Montgomery, 90 Cal. 307; 27 P. 280, 25 Am.St. Rep. 123; Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78; and Thompson v. Walsh, 76 Cal.App.2d 188, 172 P.2d 745, are not applicable to the facts of the instant case for the reason that in each of the cited cases the factual situation was entirely different from that here presented.

Since there was no evidence that plaintiff was the owner or holder of the check in question, the trial court properly found in accord with the evidence that plaintiff was not entitled to the proceeds thereof.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 136

BAUGH v. ROGERS et al.

Civ. 15511.

District Court of Appeal, Second District, Division 1, California.

June 2, 1947.

Hearing Denied July 31, 1947.

Automobiles ⇐192(1)

The statute, declaring motor vehicle owner liable for personal injury resulting from negligent operation of vehicle by any person with owner's express or implied permission, applies to such operation thereof on private property, as well as on public highway. Vehicle Code, § 402.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ora Baugh against Francis L. Rogers and A. W. Warnock for personal injuries sustained as the result of being struck by defendant Warnock's automobile driven by defendant Rogers. From a judgment for defendant Warnock notwithstanding a jury's verdict against him, plaintiff appeals.

Reversed, and entry of judgment for plaintiff on the verdict directed.

James C. Webb and Kenneth Sperry, both of Long Beach, for appellant.

Nourse & Jones, of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant cause has been tried twice. At the conclusion of the first trial a judgment for defendants was rendered, but plaintiff's motion for a new trial was granted. The order granting a new trial was sustained on appeal by the Supreme Court. Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043.

In the instant trial, the jury rendered a directed verdict in favor of defendant Rogers and brought in a verdict for the plaintiff and against defendant Warnock for the sum of $5,000, whereupon a motion for judgment notwithstanding the verdict was granted in favor of defendant Warnock. From the judgment which followed the granting of such motion, plaintiff has perfected this appeal.

The essential facts which form the background of this extended litigation are the following:

Plaintiff was employed by defendant Rogers, a physician and surgeon, who, in addition to living quarters, maintained certain rooms in his residence as an office. Plaintiff, who was engaged by the wife of defendant Rogers to work at the residence by the hour one day each week, did cleaning and other household duties in such parts of the premises as Mrs. Rogers directed. On July 22, 1941, at a time when plaintiff was cleaning the office, she was directed by Mrs. Rogers to go outside on the driveway and close a window in the office, while Mrs. Rogers was holding said window from the inside. While carrying out such directions, plaintiff was struck and injured by an automobile negligently operated by Dr. Rogers. The automobile was owned by defendant Warnock and was being driven with his consent.

This appeal is presented upon the clerk's transcript and an engrossed settled statement (in lieu of reporter's transcript), the latter document reciting that oral and documentary evidence was offered at the instant trial, which, with the exception of an exhibit and "some additional evidence tending to further establish the status of the driveway, was substantially the same as the evidence introduced at the former trial herein * * *. The evidence so adduced was sufficient to support the verdict of the jury in favor of the plaintiff and against the defendant A. W. Warnock * * * except for the reason as determined by the Trial Court as a matter of law that plaintiff's injuries were sustained by the operation of a motor vehicle upon private property belonging to the defendant Francis L. Rogers, and that the liability created by section 402 of the Vehicle Code has no application thereto."

Said settled statement sets forth the points to be raised on this appeal as follows:

"1. The Trial Court erred in granting the motion of the defendant A. W. Warnock for judgment notwithstanding the verdict.

"(a) The defendant A. W. Warnock was precluded from questioning the sufficiency of the evidence to support the verdict or judgment in plaintiff's favor by reason of the law of the case as established by the decision of the Supreme Court in connection with the former appeal herein, reported in 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, wherein it was, in effect, held that a cause of action in favor of the plaintiff had been established by substantially the same evidence, and wherein the same contentions here urged by the defendant Warnock in support of his motion for a judgment notwithstanding the verdict were presented to the Supreme Court in his Petition for Rehearing in that Court.

"(b) The sole basis for the ruling of the Trial Court, namely, that Section 402 of the Vehicle Code has no application to the

negligent operation of a motor vehicle upon private property, is contrary to the express wording of the statute.

"(c) The ruling of the Trial Court is based upon an erroneous conception of the law."

Appellant urges these points in her briefs now before this court.

That portion of section 402 of the Vehicle Code pertinent to the situation here presented reads as follows: "(a) *Responsibility of owner for negligent operation by person using motor vehicle with permission: Imputation of negligence.* Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

In a recent case decided by this court, towit, Webster v. Zevin, 77 Cal.App.2d 855, 176 P.2d 960 (hearing denied by the Supreme Court), the identical question which now confronts the court was stated as follows: "Does Section 402 of the Vehicle Code apply to impose liability upon the owner of an automobile for injuries or death resulting from its negligent operation by one to whom the automobile was lent solely for his own use and convenience, *where the accident occurs upon private property?*" (Emphasis included.)

In answering that question in the affirmative it was stated (77 Cal.App.2d at page 858, 176 P.2d at page 961):

"As we view the statute in question, the legislature in enacting it was not intent upon curing evils attendant upon the operation of motor vehicles upon the highways alone, but was concerned with the existing evil of unsatisfied judgments in borrowed automobile cases. By clear and understandable language, the lawmaking body imputes the negligence of the driver of a motor vehicle to its owner whenever the driver, at the time of the accident, is operating or using such vehicle with the permission, express or implied, of the owner, regardless of whether such driver is or is not on business for the owner. For a discussion of the conditions which existed at and prior to the passage in 1929 of what is now section 402 of the Vehicle Code, and the evils it was sought to remedy, see Bayless v. Mull, 50 Cal.App.2d 66, 69, 122 P.2d 608. * * *

"We therefore hold that the legislative intent as expressly stated in the statute was to protect persons who might be injured either upon a public highway or upon private property as a result of the negligent operation of motor vehicles by persons other than the owners thereof, who are operating the same with the permission of such owners. Were we to hold otherwise we would be departing from the clear meaning of the language of the statute which is free from ambiguity. We would be required to rewrite a statute to accord with a presumed legislative intent. To write into the statute a limitation of its application to accidents occurring solely upon public highways and to thereby withhold its application from cases where injuries or death occur on private property would not be construction of the statute at all, but would amount to judicial legislation, and courts are without power to legislate."

Applying the above-quoted ruling to the facts presented by the instant cause, the trial court erred when it granted respondent Warnock's motion for judgment notwithstanding the verdict.

For the reasons stated, the judgment appealed from is reversed, and the trial court is directed to enter a judgment in favor of appellant Ora Baugh in accordance with the verdict rendered by the jury herein.

DORAN and WHITE, JJ., concur.

80 Cal.App.2d 83

PEOPLE v. SKAGGS.

Cr. 4046.

District Court of Appeal, Second District, Division 1, California.

May 29, 1947.

1. Criminal law ⇐507(1)

One from whom a bribe is solicited and who refuses to give it is not an "accomplice," since, in order to be an accomplice, a person must be a criminal. Pen.Code, §§ 67, 68.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⇐507(1)

Under statute, when police officer sought alleged bribe, the crime was complete, and if the one solicited refused to give the bribe, but arranged with the police to aid in apprehending officer while officer was accepting money furnished by the police for that purpose, the one solicited was not an accomplice in sense requiring corroboration of his testimony. Pen.Code, § 68.

3. Criminal law ⇐1159(2)

An appellate tribunal may not retry a criminal case or make inferences from the facts proved, that function being a function of the trial court. Code Civ.Proc. §§ 1847, 2061; Const. art. 6, § 19.

4. Criminal law ⇐1159(2)

On appeal from a judgment of conviction, the appellate court is limited to deciding only whether, upon face of the evidence in its entirety, it can justly be held that sufficient facts could not have been found in the evidence in its entirety to warrant the inference of guilt. Code Civ. Proc. §§ 1847, 2061; Const. art. 6, § 19.

5. Bribery ⇐11

In prosecution of police officer for asking and agreeing to receive a bribe from cafe owner who was the subject of a criminal investigation by officer, testimony of owner as complaining witness was not so improbable as to require jury to weigh such testimony in the light of corroborative evidence, notwithstanding his possible motives for fabricating his testimony. Pen.Code, § 68.

6. Bribery ⇐13

In prosecution of police officer for asking and agreeing to receive a bribe from cafe owner who was the subject of a criminal investigation by officer, where officer's defense was that he feigned complicity in bribe agreement and permitted owner to believe that he intended to use the money to protect him from impending prosecution, for sole purpose of securing evidence upon which to prosecute owner for offering and giving a bribe, verity of the defense was for jury. Pen.Code, §§ 67, 68.

7. Bribery ⇐14
Criminal law ⇐1172(1)

Where officer's defense was that he feigned complicity in a bribe agreement, for sole purpose of securing evidence upon which to prosecute cafe owner for offering and giving a bribe, instructions, that whether officer actually intended to have his actions influenced was immaterial if he received money and represented that he would be influenced by the receipt of such money, were improper and prejudicial, in absence of instructions on the law applicable to officer's defense, though instructions thereon were not requested. Pen.Code, §§ 67, 68.

8. Criminal law ⇐824(1)

In criminal cases, the court must give of its own motion instructions on the general principles of law pertinent to such cases, though they are not proposed or presented in writing by the parties themselves.

9. Criminal law ⇐1186(4)

"Miscarriage of justice", within constitutional provision that judgment shall not be set aside unless error complained of has resulted in a "miscarriage of justice", has no hard and fast definition, but does not mean that, merely because the evidence may legally be able to stand under the weight of the judgment, that is sufficient reason for refusing to set aside judgment. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

10. Criminal law ⇐1186(4)

"Miscarriage of justice", within constitutional provision that judgment shall not be set aside unless error complained of has resulted in miscarriage of justice, does not simply mean that a guilty man has escaped or that an innocent man has been convicted, but is equally applicable where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. Const. art. 6, § 4½.

11. Criminal law ⇐1186(4)

The right of accused to a fair trial conducted substantially according to law is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. Const. art. 6, § 4½.

12. Criminal law ⇐1186(4)

The question of guilt or innocence of accused must be determined by an orderly legal procedure, in which the substantial rights belonging to accused are respected. Const. art. 6, § 4½.

13. Criminal law ⇐1186(4)

In prosecution of police officer for asking and agreeing to receive a bribe from cafe owner who was the subject of a criminal investigation by officer, giving of instructions that whether officer actually intended to have his actions influenced by any money received, was immaterial, resulted in a "miscarriage of justice" within constitutional provision, and required reversal. Pen.Code, § 68; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Heber A. Skaggs was convicted of asking and agreeing to receive a bribe, and he appeals.

Reversed.

Morris Levine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was a sergeant of police in the city of Los Angeles and had for some 21 years served as a member of the police department. In an information filed by the District Attorney of Los Angeles County defendant was charged with a violation of section 68 of the Penal Code, in that, on July 3, 1945, he did corruptly, knowingly and feloniously ask and agree to receive from one Kelly Petillo a bribe in the sum of $500 for the purpose of influencing the action of said defendant upon a matter then pending and which was before him in his official capacity, to-wit, the prosecution of the aforesaid Kelly Petillo upon a charge of assault with a deadly weapon.

To the charge of bribery contained in the foregoing information defendant entered his plea of not guilty. The cause proceeded to trial before a jury which returned a verdict finding the defendant guilty as charged. His motion for a new trial was denied. From the judgment and the order denying his motion for a new trial defendant prosecutes this appeal.

By reason of the grounds urged for a reversal it becomes necessary to narrate in some detail the factual background which, as disclosed by the record, gave rise to this prosecution.

On the night of July 1, 1945, Kelly Petillo owned and operated a cafe and cocktail bar in the city of Los Angeles. At about midnight Petillo became involved in an altercation with two marines who were in his place of business. Police officers Anderson and Scheidecker approached the entrance of the cocktail bar and observed two marines "standing in the middle of the floor." At about that time a shot was fired inside the cafe, whereupon the two marines "ran out." Entering the cafe, officer Anderson was attacked by Petillo but subdued him. After interviewing witnesses the officers placed Petillo under arrest and lodged him in jail at University Police Station. Officer Anderson made out what is called an "arrest report," giving

the salient facts of the case and names of witnesses. In accordance with established police practice, further investigation of the case was assigned to the detective bureau. At about 8 o'clock on the morning of July 2, 1945, when the defendant, who was assigned to duty in the detective bureau, reported for duty at University Police Station he discovered that the matter of the arrest and prosecution of Petillo was assigned to him and officer T. K. Perry, also of the detective bureau, with whom the defendant worked on criminal cases. Officer Perry, however, was not on duty during the day of July 2nd.

The First Interview Between Defendant and Petillo.

As was customary in such cases, defendant took the prisoner Petillo from his cell to an office used by members of the detective bureau in the course of their investigations and asked Petillo, "What happened the night before?" In answer to this query Petillo stated that two marines refused to leave his cafe at closing time, that he did not have a fight with the marines, that when they refused to leave he went "in the back room and got a rifle and shot it in order to scare them out." Defendant informed Petillo that in the "arrest report" it was stated he struck one of the marines on the head with a chair and fired the rifle directly at them. These accusations Petillo denied. Petillo then stated that after the marines ran out of the cafe there was a knocking at the front door, whereupon his cousin re-admitted the marines and another man, who Petillo did not recognize; that shortly thereafter he recognized officer Anderson of the vice squad, to whom he surrendered his rifle. That he became excited and commenced to abuse one of the police officers. This was followed by a scuffle and the subsequent arrest of Petillo.

At the trial, Petillo testified that following his recital to defendant of what occurred the preceding night, the latter said to him: "This is a tough deal and it looks like the 'big house' for you. I could squash this if I could get to the marines and of course it will take some money. There are four or five of them have to split on it and it will take about $500.00." Petillo testified that to the foregoing statement of the defendant he replied: "Well, I don't know. I will have to see my attorney Girard and tell him and then he will let you know." Following his arrest defendant stated in answer to questions propounded by deputy chief of police Harrison that at his first interview with Petillo the latter "* * * asked me if it wasn't possible to adjust the matter financially. I asked him what he meant. He stated that he was paying off the vice squad officers, that he had paid off in the county, that he was in a sort of quandary in the City due to the fact that he didn't know who to pay his money to. He said that he had paid $500 to get his dance hall license renewed through Captain ——— and Captain ———, and he said I'd be foolish if I didn't see the same light that they had. I told him that I wouldn't go for anything like that. He said he would have his lawyer see me; that he had been in other beefs and they had been reduced to simple assault by greasing the right party. He informed me that he wouldn't be in jail long, that he had made arrangements to have himself writted out".

At his trial defendant testified that Petillo inquired of him as to the seriousness of the charge and then stated, "That's bad ain't it?" and, "He then asked me what I thought they would do to him, whether there was some way he could get it reduced and I said, 'I don't know, that isn't up for me to say, I will have to take it up with the District Attorney's office,' and he said, 'Isn't there some way I can get to Anderson and that other officer, give them a little money or something and square this beef,' and I asked him what he meant and he said, 'Well I don't know, I don't know who has to be fixed on a fix.' But he said, 'Whoever it is, if you can do it for me, I will let it cost me a "G."' I said, 'Look fellow, let's you and I get this straight,' I said, 'No police officer could do anything like that for you if he wanted to.' I said, 'We can only investigate a case and place it in the laps of the District Attorney's office and it is up to them to say what will happen, I am in no position or no other police officer is in any position to do anything for you.'" Defendant also testified

to further statements allegedly made by Petillo, "Oh, that has been done before"; that his lawyer "could fix it up"; that he, Petillo, had theretofore paid $500 to certain police officials "to get a dance permit back." Following this conversation defendant returned Petillo to his cell in the University jail where he remained until that afternoon when he was released on bond.

The Second Interview.

The record presents no conflict on the fact that sometime after noon on the following day, defendant and his working partner, officer Perry, visited Petillo in the latter's apartment. The defendant testified that the purpose of this visit was to inquire of Petillo about the bullet holes and the direction in which he had fired the rifle on the preceding Sunday night at his cafe. That Petillo stated he did not know. Prior to this visit the officers had been at Petillo's cafe to make an examination of the kitchen for bullet holes but found none. Arriving at Petillo's apartment the defendant testified that he and his partner, officer Perry, again inquired of Petillo concerning the events which preceded his arrest, and particularly inquired as to whether Petillo was sure he fired the rifle in the kitchen because they were unable to find any bullet holes therein. That Petillo replied, "I was all excited, I don't know." Defendant further testified that Petillo said, "Is there some way, something I can do to blow this beef down, they have me charged with trying to kill a couple of guys," and he said, "I never tried to kill anybody, I was only trying to get them out of my place, isn't there something we can do to get to Anderson or somebody and pay them a little money or something and get out of this." That as defendant and officer Perry were leaving the apartment, Petillo "caught hold of me and said he would like to see me a minute," whereupon, according to defendant's testimony, Petillo said, "I must have made your partner sore, I guess maybe I talk too much," and I said, "I don't think you made him any sorer than you made me." And he said, "Look, Skaggs, there is something I wanted to ask you, I wanted to ask you fellows but the other guy got sore," he said, "When I was over in the county running the place I never had any trouble like this, and I want to get lined up with the police," and I said, "What do you mean?" And he said, "If I can pay off the police so they won't come in my place, I'll get along swell," and I said, "How are you going to keep them out of your place?" And he said, "If I could get to the right guy, give him $100 a month to keep out," and he said, "If you can do it for me I will give you $100 a month."

Officer Perry in his testimony corroborated the defendant as to the foregoing conversation of Petillo, except the latter part which occurred outside his presence and during a few minutes that defendant was alone with Petillo in the apartment. The foregoing testimony of the defendant was in agreement with his statement made to his superior officers at the time of his arrest.

As to this second conversation, Kelly Petillo testified that officer Perry left the room "after about two minutes." Referring to defendant Skaggs, Petillo testified that "He said he had to go down to see the marines in Santa Ana to fix it up," that "he was going to take care of all these other fellows with this money, and he was going to Santa Ana and then let me know what he finds out about the marines"; that he, Petillo, stated to the defendant that the former's attorney "would contact him"; that the defendant said, "it would cost $500.00 and I said, 'well I have to see Girard (Petillo's attorney).'"

The Third Interview.

There is no conflict in the evidence that later on the afternoon of the same day, Monday, July 2, the attorney for Kelly Petillo stated that he would like an interview with the investigating officers at Petillo's cafe, pursuant to which request the defendant, officer Perry, Petillo, and the latter's attorney conferred at the cafe. Concededly, at this meeting there was a discussion of the evidence against Petillo, the latter's attorney contending that the evidence was insufficient to sustain a conviction of any criminal offense and that Petillo's conduct on the night of his arrest amounted only to necessary self-defense. The officers contended on the contrary, that the evidence was sufficient to

support a misdemeanor if not a felony charge. After the four men adjourned their conference, the evidence shows that the defendant remained in the cafe with Petillo while the latter's attorney and officer Perry went out on the sidewalk.

The defendant testified that there was no discussion regarding the payment of money at any time while the four men were together or after officer Perry and Petillo's attorney went out on the sidewalk. The defendant's testimony as to the absence of any discussion of the payment of money while the four men were together was corroborated by officer Perry.

Mr. Petillo testified that, while the four men were assembled at his cafe, he, the defendant, insisted "it was a felony and that they could put it through the District Attorney"; that he, Petillo, said, "I don't care what you do, I will fight it, and I don't want to have anything to do with this money that you want, this $500.00 or fixing it up with the marines." Petillo also testified that when the defendant said, "I can fix it up for $500.00," that Petillo's attorney "told him that it was no deal." Petillo also testified that after the conference broke up at the table, the defendant took him back into the restroom of the cafe and there said, "I am going to see these marines and I will give you 24 hours, 9:00 o'clock tomorrow night, and I want you to have this deal ready, the money ready. Otherwise, I am going to push the deal." That to this statement he replied that he would have to see his attorney and would let the defendant know later. Upon cross-examination Petillo testified that the defendant also said in the restroom, "I am going down to see the marines and I will give you 24 hours to get this money; otherwise I am going to put it through somewhere."

As to what took place while the four men were in conversation at the cafe, the testimony of Petillo's attorney utterly fails to corroborate Petillo in any respect with reference to the solicitation or payment of money. When asked at the trial, "In other words, would it be correct to say that you informed Mr. Skaggs and Mr. Perry that you didn't think it was a good case and there wasn't anything to discuss with them about it?" the attorney replied, "That is right." Petillo's attorney also testified that when he, the defendant, and officer Perry were in conversation together on the sidewalk, the attorney said that such discussion "* * * was again to the effect that the occurrence of Saturday night and the crime being investigated did not in my opinion constitute a good prosecution at all. It was further to the effect that it would be unwise and dangerous for any officer whatsoever to ask for or to receive any bribe from Kelly Petillo." But whether this admonition was occasioned because of Petillo's claim that he was paying $500 as a bribe in connection with his efforts to regain his dance permit from the police commission rather than with reference to the charge upon which he was under arrest, is not made to appear from the record.

On the following morning, July 3, about 10 o'clock, after he had visited a deputy in the office of the District Attorney, Petillo's attorney called upon Deputy Chief of Police Harrison, Director of Personnel and Training of the Los Angeles Police Department. Upon this occasion the defendant's claimed connection with the Petillo arrest was discussed. On the afternoon of the same day a meeting was held in the office of Petillo's attorney at which, in addition to the attorney, there were present Deputy Chief Harrison, Assistant Chief Bradley, a police captain and Petillo. After some discussion concerning defendant's connection with the Petillo case, the latter made a telephone call while Deputy Chief Harrison listened on an extension telephone. The call was to the defendant at University Police Station. Deputy Chief Harrison testified that the conversation was as follows: "It was approximately 3:45 P. M. Mr. Petillo asked for Mr. Skaggs, a voice answered and said it was Skaggs speaking, Mr. Petillo identified himself as Kelly Petillo. Mr. Petillo told Sergeant Skaggs that his place was in escrow, he would have the money at approximately 8:00 o'clock that evening and for Mr. Skaggs to be at his place at 9 P. M. Mr. Skaggs said, 'tonight?' And Kelly Petillo said, 'Yes.' Mr. Skaggs said, 'I have been down to the Marine Base today, to

see the marine and he is on his way down to Los Angeles, or uptown, and you had better stay out of sight, he is coming up for satisfaction.' Mr. Petillo said, 'I just talked to my bartender and he told me the marine was in town.' Mr. Skaggs said, 'I left word with your bartender that the marine was on his way to town.' Mr. Petillo said, 'I will see you at 9 o'clock' and Mr. Skaggs said, 'All right,' that was the extent of the conversation."

Petillo's version of this conversation was, "Well, I told him I just sold my night club and I was going to get a $500.00 deposit around 8:00 o'clock and 'I would like to see you as you wanted'—no, no, it wasn't that, 'I have got that $500.00 that you wanted, I will have it by 9:00 o'clock,' and he wanted me to meet him at some other night club and I said, 'No, my place because this fellow is coming down here to give me the money,' and he agreed and we met at 9:00 o'clock."

The defendant testified that the conversation was as follows: "Mr. Petillo said, 'Skaggs?' And I said, 'Yes,' he said, 'You know what we have been talking about,' and I said, 'Yes.' And he said, 'I have sold my place'; he said, 'I had them give me some money down,' and he said, 'I want to see you at 9:00 o'clock.' I said, 'I have been down there looking for you to tell you that those marines were in town or were coming to town and I want you to keep out of sight because we want no more trouble.' He said, 'Well, you know what we talked about, I want to see you at 9:00 o'clock.' I said, '9:00 o'clock tonight or 9:00 o'clock tomorrow morning?' There was a hesitation on the phone and then he said, '9:00 tonight,' and I said, 'Okay, I will be seeing you.'"

Appellant testified that he had visited the marine base on that morning and there had learned that one of the marines involved in the Saturday night disturbance was on liberty. This marine had informed people at the base that he intended to come into Los Angeles and get satisfaction from Kelly Petillo. However, appellant had not seen the marine personally. After returning to the city, appellant went to Petillo's night club, then to Petillo's apartment, and not finding Petillo at either place, returned to the night club and told the bartender that the marine was coming into town and for Kelly Petillo to stay out of sight.

That night after 8 o'clock, Deputy Chief Harrison provided $500 in $20 bills to police officer Brown. The treasury numbers were taken off the bills by Chief Harrison. Then officer Brown went into the night club while Deputy Chief Harrison and other officers waited in police cars in the vicinity. Officer Brown gave Kelly Petillo the $500 and then Brown concealed himself in a storeroom at the head of a stairway above the restrooms where he could observe what occurred in the hallway leading to the restrooms.

At three minutes to 9 the appellant appeared alone driving a city police car. He drove up a side street off Pico Street and parked as the first car in line. While he was under observation by the officers, he walked from the car to the night club. Officer Brown, waiting up on the platform above the restrooms, saw appellant come in with Kelly Petillo and saw Mr. Petillo hand the money to the appellant. He overheard Kelly Petillo say: "Now will this take care of the captain, the district attorney and everybody?" and he heard the appellant say: "Yes, you don't have to worry about a thing."

Appellant was observed by the waiting officers coming out of the night club with Kelly Petillo. When Mr. Petillo lighted a cigarette the waiting officers came up and arrested appellant just before he started to drive away. Appellant had the money in his hand at the time of arrest and the numbers on the bills checked with the record kept by Deputy Chief Harrison.

On the way to the station appellant was asked by the officers why he had taken the money and replied that he did not know. He was also asked if he had been directed to take it by Captain Maxwell (a superior officer), and he stated that he had not.

In the statement given by appellant at the police station he was asked to relate the conversation he had with Kelly Petillo at the time he was given the money. Appellant replied that he did not care to state it, he said the principal conversation was

relative to the marine (Lunsford) in the Petillo case but that the receiving of the money had nothing to do with that.

Appellant, in his own defense, testified at the trial to his conversation with Kelly Petillo, at the time he received the money, as follows: "Mr. Petillo then took a purse from his rear pants pocket and he opened it up. He extracted some bills, a handful of $20.00 bills. He handed them to me and he said, 'You better count them because' he may be $20.00 short. At that time he reached in his pants pocket and he pulled out a $20.00 bill and some smaller bills and some cash. I counted those bills. I said, 'You may be because I only counted $480.-00,' he said, 'Count them again.' I counted them five at a time, one, two, three, four, five, a hundred, one, two, three, four, five, a hundred. While doing this Mr. Petillo said, 'That's right, count it that way.' After I had counted the bills, I folded them in the center, I held them in my right hand. Mr. Petillo said, 'Will that take care of the two captains, officer Anderson, the D. A., and everybody?' And I said, 'Yes, I will take care of everything for you.' And I said, 'Your troubles is all over for the time being.' Mr. Petillo said to me the second time, he said, 'Will that take care of Mr. Anderson, the two captains, the D. A., and your partner and yourself and everybody?' And I said, 'It will take care of everybody, you don't need to worry.' And I told Mr. Petillo, or Mr. Petillo spoke to me, rather, and said that everything was working out swell, that he was getting rid of his place, that now he had blown the beer(f) down and he wouldn't have nothing else to worry about. I said, 'That's right.' I walked through the bar accompanied with Mr. Petillo with the money held in my right hand, Mr. Petillo walked as far as the front door, he turned around and I thought he had re-entered the place."

At the trial defendant testified that on the night he received the $500 from Petillo it was his intention "to make a case against Mr. Petillo." In this regard defendant testified that at University Police Station, prior to his departure therefrom to meet Petillo, he told Sergeant Brunty "that I had a telephone conversation that day that led me to believe Mr. Petillo wanted to make a payoff to me and I had my mind made up that I was going to do something about it if he ever made me another offer and I would like to have him go with me, and Sergeant Brunty said, 'I heard you tell Sergeant Goodman after you received that call that you thought Mr. Petillo was trying to buy you or something to that effect,' Sergeant Brunty asked me why I was interested in making a pinch on a bribery, and I said, 'Ordinarily I would not be interested but never in my life have I been approached like I have in this instance.' I told him that Mr. Petillo had either tried to bribe or beat up most every policeman in town, and I thought it was time that somebody taught the gentleman a lesson." That Sergeant Brunty informed him it would be necessary to see Lieutenant Bowers and if he "O. K'd" it that Brunty would be glad to go with him. Accompanied by Sergeant Brunty, the defendant did see Lieutenant Bowers, whereupon the defendant stated that he and officer Perry were working on the Petillo case, "that all through the case Kelly (Petillo) had talked of buying us off and had made flagrant statements to the effect that he had paid $500 to the police for a dance permit; that the vice squad was trying to buy off; that I had made up my mind to do something about it and that after I had talked to Kelly Petillo in the presence of an attorney I didn't think that Kelly Petillo would make another offer because I was of the opinion that his attorney would probably straighten him out; but he had given me that telephone call that afternoon stating that he wanted to see me; and he couldn't tell me over the phone. He said he had some money, and I was of the opinion that the man wanted to make a payoff, and I said I would like very much to go down there and see what the deal is all about, Lieutenant Bowers said that Sergeant Brunty that night consisted of the entire night watch. The other officers were vacationing or days off or what have you. He said, 'I am stuck with the office and I will need Sergeant Brunty for the emergency calls,' he said, 'Why don't you do this, Skaggs, you go down there and see what you can do and see what the lay of the land is and if you need any help why

you call the station and I will give you help. You call in and we will see that somebody assists you.' "

The foregoing testimony of the appellant was corroborated in every detail by Sergeant Brunty and Lieutenant Bowers. Sergeant Brunty testified that the defendant among other things said to him, "I am supposed to see him (Petillo) tonight and I think he is going to try to give me some money and will you go down and help me on the case?" In his corroborative testimony, Lieutenant Bowers testified that the defendant specifically asked that Sergeant Brunty be sent with him and that the witness, after advising defendant, "they were awful short tonight for men," told the defendant to "go down there first and see what it is all about and then if you need help I will get you some help. If you take anybody with you that he (Petillo) doesn't know and if there is a deal on or set up, why he will be scared off." It should here be noted that defendant's working partner was not on duty that day because he had gone to the mountains on a fishing trip.

Respondent directs our attention to the fact that when, shortly after his arrest, the defendant was asked in a statement taken from him at police headquarters, to tell what was said between himself and Petillo in the backroom when he received the $500, defendant replied, "I don't care to state at this time." At the trial, however, appellant testified that the aforesaid answer was prompted by the fact that "At that time it was going through my mind something had gone wrong, I didn't know what. I am sorry to say it now, but at that time I was afraid that my officers had—that my officers at my own station was in on the deal, the frame-up, because after the telephone call had been received by me, Captain Maxwell wasn't to be found in the station and later I had been permitted to go on the case alone and until such time as I could find out for myself for a certainty whether these officers had anything to do with it, I didn't wish to repeat a conversation that I knew had been previously arranged for the sole purpose of proving me guilty of bribery." There is also testimony in the record that the defendant told other friends of his that Petillo had offered him a bribe and that he proposed to obtain sufficient evidence and prosecute Petillo for bribery.

[1, 2] As a first ground of appeal, it is contended by appellant that the verdict is contrary to the law and the evidence in that the testimony of Petillo, the complaining witness, is incredible, inherently unbelievable and has no substantial corroboration. While it is not clearly ascertainable from the nature of his argument, and from the authorities cited in appellant's opening brief, whether he is urging that Petillo was an accomplice, we shall assume that such is not appellant's claim, for such a contention would be devoid of merit. A person from whom a bribe is solicited and who refuses to give it certainly cannot be classified as an accomplice. In order to be an accomplice a person must be a criminal. Where, as here, there is evidence which, if believed, would support a finding that Petillo refused to give appellant the solicited bribe and arranged with the police to aid in apprehending the appellant while the latter was accepting money furnished by the police for that purpose, Petillo cannot be viewed in the light of anything but a feigned accomplice. Furthermore, there is nothing in the language of section 68 of the Penal Code, for a violation of which appellant was convicted, that manifests any intention to include the victim as an offender. The crime is complete when the individual referred to in the section "asks, receives, or agrees to receive, any bribe." Under some situations, it is conceivable that under the provisions of sections 67 or 68 of the Penal Code the bribe seeker could be the accomplice of the bribe giver, but the evidence in the instant case if believed, presents no such problem, for when appellant sought the bribe, if he did, the crime was complete. It must therefore be held that Kelly Petillo was not an accomplice. People v. Brigham, 72 Cal.App. 2d 1, 6, 7, 163 P.2d 891.

[3, 4] We shall therefore assume appellant's first contention to be that the testimony of Petillo is so incredible and inherently unbelievable that the law in its "solicitation for the protection of the citizen, watches with scrutiny" (People v.

Kempley, 205 Cal. 441, 454, 271 P. 478, 484) Petillo's testimony. And that unless his testimony which supports the ultimate issue involved is corroborated by other evidence which tends to connect the appellant with the commission of the offense the conviction cannot stand. The record herein forbids denial of the fact that, at the trial, the profligate, unmoral, and more or less dissolute character of the witness Petillo was established. A course of personal conduct was shown upon his part that was not consistent with good morals. It was shown that he had been arrested on a charge of serving a minor with intoxicating liquor, a case which was settled out of court, or as one witness stated, the case was "clammed up." It was testified that Petillo on one occasion struck a police officer "in the eye, when I had glasses on and broke the glasses and a piece went into my eye * * *." Petillo admitted assaulting officer Anderson on the night of July 1 when the latter was investigating Petillo's altercation with the marines. He admitted assaulting a traffic officer when the latter attempted to give him a traffic citation and also that he attacked a motorcycle officer who arrested him for speeding. That in the latter case he compromised for $300 a civil suit instituted against him by the last-named officer. It was shown at the trial that Petillo had boasted of having "fixed" his difficulties with the law and that he had paid $500 to certain officials "to get this dance hall permit." Seven witnesses testified that Petillo's reputation for truth, honesty and integrity was bad. It was established that Petillo possessed a deep-seated and abiding hatred for police officers. With reference to Petillo's testimony, the attorney general with commendable candor concedes that "much of his testimony shows that he was unable to relate a conversation fully or to relate events in chronological order at all times." To this we might add that the record reflects that every conversation to which he testified where other people were present, Petillo's version of such conversation was contradicted by the others, particularly in respect to those portions of such conversation which might tend to incriminate appellant. The attorney general also states that, "It may be conceded that he had had former troubles with the police and it may even be conceded that he had some animosity toward some police officers." Respondent however contends that taken as a whole, Petillo's testimony is consistent with the described events as they occurred. That, for instance, Petillo testified that appellant stated he would go down to the marine base, see the marines and "take care of them with money and that he would let Petillo know." The record however reflects that the trip to the marine base was made at the direction of the appellant's superior officer for the purpose of ascertaining the availability of the marines as witnesses in the prosecution of Petillo. Respondent also asserts that upon his return from the marine base appellant did call upon Petillo. That Petillo testified he told appellant he was trying to sell his business to raise money. That when he called appellant while a deputy chief of police listened on the extension telephone, Petillo told appellant he had sold his business, would have the money at 8 o'clock, and requested appellant to meet him at 9 o'clock. That appellant came at the appointed hour, received the money according to plan, and made statements as heretofore set forth which corroborated Petillo's testimony that the appellant solicited a bribe and accepted the $500 in consummation of his agreement to "fix" the case against Petillo.

The law is well settled that it is not within the province of an appellate tribunal to retry the case or to make inferences from the facts proved. That function belongs to the trial court. The appellate court is limited to deciding only whether upon the face of the evidence, and that means the evidence in its entirety, it can justly be held that sufficient facts could not have been found in the evidence in its entirety to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. In such a situation it is obviously not a review of a question of fact but purely one of law. The legislature has ordained, in conformity with our Constitution, art. 6, § 19, which prohibits appellate courts from reviewing evidence except where on its face it may justly be held that it is insufficient to sup-

port the ultimate issue involved, that the jury are the exclusive judges of the credibility of witnesses (Code Civ.Proc., sec. 1847) and are the judges of the *effect* and *value* of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates (Code Civ. Proc., sec. 2061).

[5] Notwithstanding the profligate character of Petillo, his proven animosity and ill-will toward police officers, and his possible motives for fabricating his testimony, nevertheless, under the foregoing established rules, the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that given by witnesses for the prosecution and, therefore, to disbelieve the testimony of the appellant and any other witnesses testifying in his behalf, however weak in places the testimony of the prosecution witnesses may have been made to appear, or however sharply their testimony on other important points might have conflicted with the testimony of the other witnesses. Viewed in the light of the circumstances hereinbefore referred to which might have been regarded by the jury as corroborative of Petillo's testimony, we cannot see how it can be held, as a matter of law, that the latter's testimony, insofar as it concerns the ultimate issue involved, is not true, or is improbable upon its face. In People v. Haydon, 18 Cal.App. 543, 555, 123 P. 1102, 1108, 1114, it is said: "A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do." In view of the facts and circumstances established by testimony other than that given by Petillo, particularly as to the immediate circumstances of the passing of the money to appellant, it cannot be justly said that Petillo's testimony should be strictured as improbable or inherently unbelievable. And not being an accomplice, the jury was not required to weigh Petillo's testimony in the light of corroborative evidence.

[6] It is next contended by appellant that there is ample evidence to show that he feigned complicity in a bribe agreement, accepted the $500 and permitted Petillo to believe that he intended to use the money to protect him from the impending prosecution for his alleged assault upon the marines, all for the sole purpose of securing evidence upon which to prosecute Petillo for offering and giving a bribe. Penal Code, sec. 67. The record reflects that such was the whole defense theory at the trial, and as stated by respondent, "If appellant was pretending to accept a bribe then he is of course not guilty." It is unnecessary to here set forth the evidence offered in support of this theory, as we have hereinbefore narrated it in detail. Suffice it to now state that it was established at the trial that prior to keeping his appointment with Petillo to receive the money, appellant informed no less than three other police officers that he thought Petillo "was giving me a play for a pay off." That appellant said to Sergeant Brunty, "I am supposed to see him tonight. I think he is going to try to give me some money and will you go down and help me on the case?" Officer Brunty agreed if the night lieutenant at University Station approved. Both officer Brunty and appellant sought out night Lieutenant Bowers and appellant asked his superior officer to send Brunty with him but the lieutenant stated that they "were awful short tonight for men" and told appellant to "go down there first and see what it is all about and then if you need help I will get you some help. If you take anybody with you that he doesn't know and if there is a deal on or setup why, he will be scared off." This and other testimony hereinbefore set forth and fully corroborated by Lieutenant Bowers, Sergeant Brunty and officer Goodman is certainly at variance with the propensities and conduct of an officer who was wilfully and unlawfully about to accept a bribe. Bribetakers are not prone to ask for witnesses to their perfidy. True, the verity of this defense was a matter for the jury's determination and the verdict rendered would indicate that they rejected it. But appellant was entitled to have

his defense presented to the jury under proper instructions. Appellant's defense was a vital issue in the case. The proven unmoral reputation of Petillo, his animosity toward police officers, the long and honorable record of appellant as a police officer and his conduct prior to his acceptance of the money, all impress us with the necessity for scrutinizing the instructions given to the jury to ascertain whether those now challenged by appellant operated to prejudice his substantial rights and militated against his receiving that fair and impartial trial guaranteed by law to every person accused of crime.

[7, 8] By the first instructions under attack the jury was admonished that: "You are instructed that whether or not defendant Skaggs *actually intended* to have his actions influenced by any money that he received, if you believe that he did receive any, *is immaterial,* if you believe from the evidence and beyond a reasonable doubt that the said Skaggs did receive said money and that he represented that he would be influenced by the receipt of such money." (Emphasis added.)

By this instruction the jury was told that it mattered not whether appellant received the money with the intention to be influenced thereby or in furtherance of his plan to apprehend Petillo for offering and giving a bribe; that his guilt depended solely upon his representations to Petillo that he would be influenced by the receipt of the money.

Again, the jury was advised that, "You are instructed that whether or not defendant Skaggs actually *intended* to have *his actions influenced* by any money that he received, if you believe that he did receive any, *is immaterial,* if you believe from the evidence and beyond a reasonable doubt that the said Skaggs did receive said money and that he represented that he would be influenced by the receipt of such money." (Emphasis added.)

Both of the foregoing instructions excluded from the jury's consideration the whole defense offered by the appellant. In the absence of any instructions advising the jury of the law applicable to appellant's defense, the giving of the above instructions must be held to be erroneous. That the error was prejudicial is manifest. In view of the grave hazards of possible injustice being done to appellant by the challenged instructions, it must be held that the giving of the same under the facts of this case was serious prejudicial error. If proper instructions had been given, the testimony of appellant and other witnesses who corroborated him, if believed by the jury, would have prevented his conviction.

While appellant did not request instructions on the law applicable to his defense, nevertheless, under the circumstances which the instant case presents, the failure of the trial court to instruct the jury thereon was prejudicial error, because the aforesaid instructions as given were manifestly incorrect for the reason that they excluded from the jury's consideration a very vital issue raised by the evidence. As was said by this court in People v. Heddens, 12 Cal. App.2d 245, 247, 55 P.2d 230: "It is the duty of the court in criminal cases to give of its own motion instructions on the general principles of law pertinent to such cases, even though they are not proposed or presented in writing by the parties themselves." (Citing cases.)

[9-12] With the record in the condition in which we find it, we must look into the effect of the error of the trial court in connection with the disposition of this appeal in the light of the provisions of section 4½ of article VI of our state Constitution, which forbids us to set aside any judgment or grant a new trial unless, after an examination of the entire cause, including the evidence, this court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The phrase "miscarriage of justice," used as descriptive of that condition of a cause, has no hard and fast definition. As was stated by this court in People v. Gilliland, 39 Cal.App.2d 250, 264, 103 P.2d 179, 186: "We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32." The following language used by this court in

People v. Duvernay, 43 Cal.App.2d 823, 829, 111 P.2d 659, 662, is strikingly pertinent to the situation with which we are here confronted: "There is creditable authority for the statment that the phrase 'miscarriage of justice,' as used in the constitutional provision, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused, in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure in which the substantial rights belonging to the defendant shall be respected."' People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975. In the instant case we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of article VI of the Constitution, because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. [State of] Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527."

[13] In the case before us the evidence as to many material facts is in sharp conflict. True, the jury had an opportunity to observe the demeanor of the witnesses, the manner in which they testified, their degree of intelligence, and may have had reason to return the verdict which was found irrespective of the errors committed during the trial. As to this we can of course say nothing. But from a reading of the record we are persuaded the errors may have turned the scale in favor of the prosecution. Being unable to say "'whether appellant would or would not have been convicted but for the errors of the court'" (People v. Black, 73 Cal.App. 13, 38, 238 P. 374, 385), we must direct a reversal.

By reason of the foregoing it becomes unnecessary to consider or determine other questions raised on this appeal.

The judgment and the order denying the defendant's motion for a new trial are, and each of them is, reversed, and the cause remanded for a new trial.

YORK, P. J., and DORAN J., concur.



80 Cal.App.2d 140

GASPARD v. GASPARD.

Civ. 15609.

District Court of Appeal, Second District, Division 1, California.

June 2, 1947.

1. Evidence ⇐450(5)

Where property settlement between husband and wife in writing provided that "all property standing in the name of either of the parties is declared to be community property" permitting wife to testify that parties intended that certain bonds should not be included in the agreement, was error since language of agreement was not ambiguous.

2. Evidence ⇐448

Only if language of written agreement is open to doubt is extrinsic evidence admissible to determine intent of the parties.

3. Husband and wife ⇐264

In action involving terms of written property settlement between husband and wife where evidence revealed that whatever the character of property of the parties was, it was community property for purposes of agreement and for its disposition according to the terms of the agreement evidence did not support trial court's finding

that certain bonds were separate property of wife.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Frederick J. Gaspard against Gladdis Gaspard to recover on a property settlement agreement. From an adverse judgment, plaintiff appeals.

Reversed.

Charles T. Lester and Ralph C. Curren, both of Los Angeles, for appellant

Hahn, Ross & Goldstone and E. L. Saunders, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from a judgment for defendant in an action on a property settlement agreement.

Plaintiff and defendant, husband and wife, entered into said agreement incidental to their separation. The agreement is comprehensive, but it is sufficient to note, as pointed out in respondent's brief, that,

"The question involved is the interpretation of a property settlement agreement between the Appellant husband and the Respondent wife, particularly a clause in the agreement which is as follows:

" 'All the balance of the community property of the parties hereto, (and it is hereby agreed that all property standing in the name of either of them, whether as joint tenants or not, is hereby declared to be community property) shall be and become and is hereby declared to be the separate property of the second party, subject, however, and to be held by the second party as security for payment of all monies payable under the provisions of Paragraph 3 hereof, and the said property shall not be released from said guarantee until such time as Second Party has acquired an annuity payable to First Party at the rate of $250.00 per month during her lifetime, and if and when said annuity has been acquired, and payments thereunder are being made at the rate of $250.00 per month, then Second Party shall be released from any further payments to First Party under Paragraph 3 hereof, and all of the balance of said community property in this paragraph referred to, shall be released free of said guarantee to Second Party.' "

The complaint alleges:

"III. That the defendant has failed and refused and still fails and refuses to perform certain stipulations, conditions and agreements of said contract on her side to be performed, in that at the time of the signing of the contract Gladdis Gaspard had in her possession and standing in her name $4,000.00 in United States Postal Savings Bonds of the fair and reasonable value of $4,000.00, which pursuant to Paragraph 5 of the contract hereto attached was declared to be the community property of the parties and which pursuant to said contract at said time became and is now the property of the plaintiff.

"IV. That although plaintiff has duly demanded delivery of said bonds, defendant has failed, neglected and refused to deliver the same or any part thereof.

"V. That by reason of the premises plaintiff has been damaged in the sum of $4,000.00, no part of which has been paid, although due demand has been made for the payment of the whole thereof.

"Wherefore, plaintiff prays judgment against defendant for the sum of $4,000.00, with interest from August 2, 1943, for cost of suit, and for such other and further relief as to the Court seems just and proper in the premises."

Defendant was permitted to testify as follows:

"Q. By Mr. Hahn: Mrs. Gaspard, did you at any time agree to give your husband the $3,000.00 in bonds?

"Q. By Mr. Hahn: Or Postal savings?

"Mr. Curren: And I have the same objection, your Honor.

"The Court: You may answer.

"Q. By Mr. Hahn: Answer the question. (Question again read.)

"A. No, I did not.

"Q. How long did you have those postal savings bonds before the divorce was instituted?

"Mr. Curren: Objected to on the grounds it is incompetent, irrelevant and immaterial, bearing on no issues in this case.

"The Court: Overruled.

"Q. By Mr. Hahn: Answer that. How long did you have those postal savings bonds before a divorce came up? A. I had them years before the divorce."

* * * * * *

"Q. * * * Where did you get the money to buy those bonds from? A. My check from Carbo-Fung dividends.

"Q. Were they Christmas gifts? A. Some of them.

"Q. Given to you by your husband? A. Yes.

"Mr. Curren: My objection may run to that, your Honor?

"The Court: It is running to the whole line of questions."

The record also reveals that in connection with a hearing for alimony pendente lite in the divorce proceedings, defendant's affidavit contains the following, "Statement of all separate property, both real and personal, owned by wife: nothing".

The findings of fact recite that, "prior to and at the time of the signing of said contract, the defendant did have $3,000.00 in United States Postal Savings Bonds of the reasonable value of $3,000.00; that, however, prior to and at the time of the signing of said contract, said postal savings bonds were the sole and separate property of the defendant and were known to be such by the plaintiff; that the plaintiff specifically agreed prior to and at the time of the execution of said contract that said postal savings bonds were and should continue to remain and be the sole and separate property of the defendant and were not to be included in said contract; that it was not the intention of the parties hereto, or either of them, that said postal savings bonds should become the property of the plaintiff under or by reason of said contract; that if the said postal savings bonds had been included in said contract, the defendant would not have entered into or executed said contract; that said postal savings bonds did not become the property of the plaintiff under or by virtue of said contract but are the sole and separate property of the defendant, and that the plaintiff has no right, title, or interest in said postal savings bonds, or any part thereof, and is not entitled to the value of said bonds, or any part thereof."

It is contended by appellant in substance that there is no evidence to support the above-quoted findings of fact, hence the contract which it is argued is clear and free from ambiguity, should be upheld.

Respondent on the contrary contends that because the words, "separate property of the First Party wife, or the separate property of any of the parties" are not specifically mentioned, the contract is uncertain; hence extrinsic evidence was admissible.

The record supports appellant's contentions. As pointed out by appellant, "There is virtually no dispute as to the facts." With the exception of some exhibits offered by plaintiff, the testimony of defendant which was brief was the only evidence offered. And in that connection it should be noted that the witness' testimony in reply to the question, "Did you at any time agree to give your husband the $3,000.00 in bonds? A. No, I did not." obviously is a conclusion. This is also true with reference to the witness' testimony that the bonds were, "Q. Given to you by your husband? A. Yes."

[1, 2] There appears to be no ambiguity in the language of the agreement nor is there any uncertainty. It affirmatively and clearly appears that "all property standing in the name of either of them" is "declared", and therefor must have been understood by them "to be community property." It appears to have been the acknowledged basis of the agreement. Courts have never upheld the repudiation of an agreement. It is only when the language is open to doubt that courts will undertake to determine the intent of the parties.

[3] The clear terms of the agreement reveal that whatever the character of the property of the parties may have been, it was community property for the purposes of the agreement, and for its disposition according to the terms of the agreement. There is no evidence to support the court's finding to the contrary.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and WHITE, J., concur.

80 Cal.App.2d 229

CALIFORNIA BLDG. CO. OF SAN DIEGO v. HALLE.

Civ. 3624.

District Court of Appeal, Fourth District, California.

June 6, 1947.

Rehearing Denied June 30, 1947.

Hearing Denied July 31, 1947.

1. Landlord and tenant ⇐37

The primary object of an interpretation of lease is to ascertain and carry out intention of parties.

2. Contracts ⇐143

All rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at true effect of instrument. Civ. Code, § 1636.

3. Landlord and tenant ⇐37

Intention of parties to lease should be given effect regardless of technical rules of construction. Civ.Code, 1636; Code Civ.Proc. § 1860.

4. Landlord and tenant ⇐37

Provision of lease that theater building should never be partitioned off between lots covered by lease and those owned by lessee was required to be interpreted in harmony with provision which gave lessor first lien on all rental and other income from demised premises which would include rentals from theater.

5. Landlord and tenant ⇐134(2)

Where lease provided for construction of one theater covering lessor's two lots and lessee's adjoining two lots, that portion constructed on lessee's lots for use as theater should not be divided or partitioned or used separately from the part on lessor's lots, without written consent of lessor, and that main entrance to theater should be constructed and always maintained on lessor's lots, lessee, in view of practical construction by parties, was not entitled to partition off unused stage area located entirely on lessee's lots and convert it into another motion picture theater.

6. Contracts ⇐170(1)

The construction placed upon contract by parties is persuasive and law recognizes that the practical construction made by them is cogent evidence of their intent.

7. Landlord and tenant ⇐134(2)

In action for interpretation of contract providing for erection of one theater building on lessor's two lots and lessee's adjoining two lots, evidence sustained finding that lessee was not entitled to partition off unused stage area located entirely on lessee's lot and convert it into separate motion picture theater.

8. Costs ⇐172

Provision of lease requiring lessee to pay lessor's expenses including reasonable attorney's fees, in case of suit justified allowance of $1,500 attorney's fees against lessee which was not the prevailing party in its action to declare rights under lease.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by California Building Company of San Diego against Nathan Halle to declare rights of parties under a written lease. From an adverse judgment, plaintiff appeals.

Affirmed.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for appellant.

Phil D. Swing, of San Diego, for respondent.

GRIFFIN, Justice.

Action to declare rights of parties under a written lease. Lots E, F, G and H in Block 16 of Horton's Addition in San Diego comprise a rectangular parcel of property having a frontage of 100 feet on Third Avenue, 100 feet on Fourth Avenue and 200 feet on C Street. The defendant and respondent owns lots G and H, which are located at the northwest corner of C Street and Fourth Avenue and have a frontage of 100 feet on each of said streets. These two lots are, under an assigned 99 year lease, let to the plaintiff and appellant California Building Company of San Diego, a corporation. Plaintiff's and lessee's fee-owned contiguous

lots E and F are located at the northeast corner of Third Avenue and C Streets and have a frontage of 100 feet on each of said streets. The entire parcel is improved with a building in which are located stores, offices and a large theatre. The office portion of the building is eight stories in height. There are 17 stores on the street floor, nine of which are located on C Street, four on Fourth and four on Third Avenue. Seventy-three offices and a beauty parlor are located in the seven upper floors. The theatre, having approximately 2014 seats, is located on the ground floor of the building. The public entrance to the theatre and the entrance to the office portion of the building are located on Fourth Avenue, that is, upon the property owned in fee by the defendant, and which is leased to the plaintiff under a 99-year lease. The property line separating the lots owned in fee by the plaintiff from those owned in fee by the defendant crosses the theatre auditorium at approximately its center. The theatre has a stage which is approximately 65 feet in width and approximately 30 feet in depth. This area has a clear height of 70 feet, it being approximately six stories from the stage floor to the roof. Some years ago the stage was used for the purpose of presenting vaudeville and other attractions which required the use of a large stage, but during the past ten years the theatre has presented motion picture shows exclusively, and no use has been made of the stage area except that portion of the front thereof occupied by the motion picture screen and the small amount of space required to accommodate the sound system horns. The unused portion of the stage, which has a cubical volume of approximately 125,000 feet, can be put to valuable use by the plaintiff, but no actual use can ever be made of this area unless, in conformity to safety regulations pertaining to the operation of motion picture theatres, there first be erected a fire wall separating it from the part of the premises actually in use as a motion picture theatre. If the plaintiff is not prohibited by the terms of its lease from remodeling the stage portion and erecting such a fire wall, it proposes to erect such a wall and convert the unused stage area into a motion picture theatre with a seating capacity of 450 persons and exhibiting mainly news reels. This project would require the expenditure of about $50,000, and because of doubt as to the interpretation of certain provisions in the lease, plaintiff advised the defendant of its plans. Defendant claimed and now claims, that the construction of a fire wall and the conversion of the stage space would be a violation of the 99 year lease unless he gives his written consent thereto, which consent he has withheld.

In 1925, the original lessor, Jones, owned lots G and H, and the original lessees, Kass and Ruben, owned lots E and F. The lessees proposed to take a 99-year lease on lessor's lots and build a combination theatre, store and office building on all of them. The lease covers over 27 pages and sets forth the rights and obligations of the several parties. The provisions of the original lease bearing on the present controversy are as follows: Paragraph 6. "The lessees agree that they will, on or before June 1, 1926, in good faith, commence the construction of a Class A fireproof theatre building upon said lots G and H, and upon lots E and F, in said block 16 of Horton's Addition (the latter lots being owned by the lessees in fee), the building to cover substantially the whole of said four lots, to be two or more stories in height * * * *and the ground or street floor of the whole building to be constructed for stores or offices, except such parts thereof as are used for theatre entrances or exits; provided, that the main entrance to the theatre* shall be constructed and always maintained on some portion of said lots G and H, and, provided, further, that no stage entrance or exit, or entrance or exit of similar character shall ever be constructed or maintained on Fourth Street." (Italics ours.)

It is observed that the theatre building was to be constructed on all four lots and that the main entrance to the theatre must be constructed and always maintained on some portion of lots G and H. It is apparent from the language used that the parties contemplated constructing but *one* theatre in the building, the main entrance

of which was to be, as stated, on lots G and H. It further indicates that the ground or street floor of the building was to be constructed for stores or offices, except such parts as were used for the one theatre and its entrance or exits. The building was in fact so constructed and has been so used for approximately 20 years.

Paragraph 18 of the lease, the main one here in dispute, provides:

"Theatre Building Never to be Partitioned Off Between Lots Governed by Lease and Those Owned by Lessee.

"18. The lessees agree so long as the new building to be erected at this time remains, that *the portion thereof to be constructed for use as a theatre,* a part of which is to be located on said lots E and F, and a part on said lots G and H, shall never be divided or partitioned off, or used or occupied separately, that is the part thereof on said lots E and F shall never be divided, partitioned or used separately from the part thereof on said lots G and H, without the written consent of the lessor first obtained." (Italics ours.)

From the language used it will appear that the parties intended and the trial court found that the portion of the building used as "a theatre", located on all four of said lots, should never be divided nor partitioned off nor used nor occupied separately without the written consent of the lessor. It is also again apparent that only one theatre was contemplated in the building since the language is cast in the singular form, and that that theatre, so constructed, will never be divided nor partitioned nor used nor occupied separately.

Paragraph 31 originally provided: "The lessees agree that all rents, and all sums paid out or incurred by the lessor hereunder, together with interest thereon, and costs and attorney fees as herein agreed, shall be, and the same are hereby declared to constitute a first lien upon all rents and other income to accrue during the term of this lease from all improvements at any time or times located on said lots G and H, *including all rents and other income to accrue from that portion of the new building to be constructed at this time, which is to be designed and used for a theatre, notwithstanding that a portion of said theatre will be situated on said lots E and F.* * * * Provided, however, that the lessor shall have no lien for the rents and other sums above mentioned, or for any part thereof, on the fee to said lots E and F, but his lien shall be confined and extend merely to the rents and other income above mentioned * * *." (Italics ours.)

It will appear that under this provision not only is the lessor given a lien upon the rents and other income from that part of the building on his own lots G and H, but also a lien on all "rents and other income to accrue from that portion * * * designed and used for a theatre *notwithstanding that a portion of said theatre will be on said lots E and F.*"

Nine years later, an agreement was executed between one Jones and the plaintiff, as assignee, amending and substituting a new paragraph 31, as well as amending certain other provisions of the original lease. This amendment was made for the purpose of suspending the right of lessor to a lien on the rents, subrentals and other income from the demised premises until a certain trust indenture, executed on December 1, 1934, had been discharged. Paragraph 31, as amended, now contains a sentence that thereafter "lessor shall have no lien for rent or income with respect to lots E and F, but his lien shall be confined "to the subrentals and other income" from all improvements located on said lots G and H. It should be here noted that paragraph 31, as amended, omits the portion of original paragraph 31 containing the sentence "including all rents and other income to accrue from that portion of the new building to be constructed at this time, which is to be designed and used for a theatre, notwithstanding that a portion of said theatre will be situated on said lots E and F." It should likewise be here noted that paragraph 18 of the original lease providing that the "Theatre Building Never to be Partitioned Off Between Lots Covered by Lease and Those Owned by Lessee", was not amended by the later agreement.

Exhibits in evidence and oral testimony show that in order to operate a new

theatre in the building the proposed alterations provide for a partitioning off of the existing theatre so that the new portion would be used and occupied separately from the remaining part, and that the new theatre would have a main entrance entirely off of lots G and H; that the revenue therefrom would not be subject to lessor's lien and such alterations would eliminate 64 seats in the old theatre with a resulting reduction in its revenue.

In construing the lease under the evidence received and the instruments before it, the trial court found that plaintiff desired to make the alterations mentioned for the purpose of constructing a newsreel theatre on lots E and F, and that the building of such additional theatre would eliminate certain existing stores on those lots; that 64 seats, now a part of the present theatre, would also be eliminated as well as its stage, and that if built as proposed, it would create a competing attraction to the present theatre; that the true intent and meaning of the original lease, and as amended, is that lessees would construct and operate only one theatre on the ground floor of the said building; that so long as the building remained, no part of said theatre should be divided or partitioned off or used or occupied separately from the remainder thereof, and that lessor should have a first lien, as security, on all rentals due from improvements on lots G and H.

Plaintiff and appellant contends that the findings are not supported and that the judgment declaring the rights of the parties is erroneous in that it is based on an improper and unwarranted construction and interpretation of the lease; that the lessee is not prevented from making the proposed use of its own property by any provision of the lease, when fairly read and reasonably applied, and argues that the principal consideration to the lessor for the execution of the ground lease was the net rent to be paid by the lessee, and also the construction of a building on the property which became a security for the payment of the rent. It is then pointed out that from the lease, originally, a theatre of any kind or type and of any seating capacity met the lease requirements; that a motion picture show without any stage could have been originally constructed upon the property under the lease; that there was no original obligation for the lessee to construct a stage or use it in connection with the theatre; that for the past ten years the stage has not been used; that the partitioning of it by a fire wall and its use for another theatre is not "the division, partition, or separate use of the part of the building on plaintiff's lots E and F from the part of the building on defendant's lots G and H"; that it is simply another lawful use of plaintiff's own property; and that such restrictions are not favored by law, citing such cases as Farquharson v. Scoble, 38 Cal.App. 680, 683, 177 P. 310, and Fairchild v. Raines, 24 Cal.2d 818, 831, 151 P.2d 260. It is then argued that such restrictions as are indicated should be construed strictly against the defendant and in favor of the plaintiff and many cases are referred to as setting forth this general rule.

It is then argued that defendant's contractual lien accruing after default on all subrents and other income from the improvements located on his property, including the theatre income, does not give defendant the right to veto the proposed or any other lawful use of lessee's own property; that the existence or extent of defendant's rights after default has no bearing whatever on plaintiff's right to convert the stage space to some lawful use, and that considering the community interest and the fundamental principles of the law, plaintiff should be allowed to use this property in the manner that is economically most beneficial to it and the public.

[1-3] In the covenant involved in this case the plaintiff was the promisor. The clause complained of was placed there for some purpose by the parties sought to be bound. The primary object of all interpretation is to ascertain and carry out the intention of the parties. All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument. Section 1636 of the Civil Code provides that a contract must

be so interpreted. The intention of the parties should be given effect regardless of technical rules of construction. Burnett v. Piercy, 149 Cal. 178, 189, 86 P. 603; London & San Francisco Bank v. Parrott, 125 Cal. 472, 58 P. 164, 73 Am.St.Rep. 64; Code Civ.Proc. sec. 1860.

The lessor originally was expressly given a lien, by paragraph 31 of the lease, on all rents and other income to accrue from the theatre, notwithstanding that a portion of said theatre was to be situated on said lots E and F. That provision protected lessor's lien on the future income which might accrue from the *entire* theatre, and prohibited the partitioning off of any part thereof.

Plaintiff concedes that the property line separating the lots owned in fee by the plaintiff from those owned in fee by the defendant crosses the theatre auditorium at approximately its center. Under plaintiff's contention, therefore, if held to be tenable, it would be possible for it to cut in half the theatre capacity, rents and income on which lessor had been given a lien by paragraph 31. We do not believe this to be a proper interpretation of the effect of the amendment of that section. If plaintiff could, under the terms of the agreement, eliminate the use of 64 seats, it could, just as well, eliminate the use of nearly half of the seats and build the partition or wall on the property line and deprive defendant of about one-half of its original security.

There is no question that prior to the amendment of paragraph 31, defendant had a lien upon the entire income from the theatre, as originally constructed. Plaintiff now argues that under the amendment of that paragraph, defendant now has only a lien on that part of the income of the theatre actually received from that portion located on lots G and H. A technical construction of the amendment might so indicate. Just how much of the box office proceeds defendant would be entitled to claim under his lien under this construction seems indeterminable to us for many apparent reasons. What portion of the income was derived from seats located on lots E and F, as distinguished from those located on lots G and H, and what portion the moving picture screen and horns, located on lots E and F, contributed to the entertainment furnished by the projector situated on lots G and H would be impossible, mathematically, to calculate. Indubitably, it was not the intention of the parties that defendant's right to a lien on the proceeds and income of the theatre should attach only to such an uncertain division of its entire income.

[4] Paragraph 18 should be interpreted in harmony with paragraph 31, which gave defendant a first lien on all rentals and other income from the demised premises located on lots G and H, which would include the rentals from said theatre. Paragraph 18 of the lease must have been placed there for some definite reason. It provides that "Theatre Building Never to be Partitioned Off Between Lots Covered by Lease and Those Owned by Lessee." Since this provision of the original lease was never amended, the parties may have anticipated the very same alteration now contemplated, which might result in a competing theatre operating in the same building. If plaintiff's construction of the lease should prevail, a financial failure of one or the other or both of the picture theatres might cause the annual rental of $15,000 per year, payable quarterly and guaranteed by plaintiff to defendant, to become insecure. The mere fact that the stage portion and back-stage facilities of this theatre have not been used for the presentation of dramas or other stage shows in recent years has no particular bearing upon the question whether the defendant's consent should be obtained before making the contemplated improvements and eliminating these facilities. It is obviously impossible for the plaintiff to say that there will never be any public demand for such entertainment, nor any further use for the large stage.

The trial court was justified in deciding that it was not the intention of the parties that the lessee might cut off and eliminate this stage and its facilities, and permanently convert the true theatre which the lessees were required to and did build, into two "movie houses", without the consent of the lessor.

[5] Moreover, the suggested alterations would, without the lessor's consent, violate the other provisions of the lease, as already mentioned. Not only did the lease provide for the erection and use of *one theatre* but it provided that so long as the building to be erected should remain the portion "constructed for use as a theatre", it should not be "divided or partitioned" in a certain manner, and that "the main entrance to the theatre" should be constructed and always maintained on lots G and H. The agreement provides for one theatre, with its main entrance always to be kept on the lessor's lots, and the reasonable inferences from these provisions would forbid the use of any other theatre with another "main entrance" on the other lots, so long as that building remained.

[6] For twenty years the parties have occupied and used the building in harmony with the interpretation placed upon the lease by the trial court. In 1942, plaintiff attempted to obtain defendant's consent to the alteration. The claimed right of plaintiff, under the lease, to make the alteration without the lessor's consent was not pressed until this action was filed in September, 1945. The construction placed upon the contract by the parties is persuasive and the law recognizes that the practical construction made by them is cogent evidence of their intent. Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706; Johnston v. Landucci, 21 Cal.2d 63, 70, 130 P.2d 405, 148 A.L.R. 1355.

[7] Plaintiff brought this action and alleged that there is "doubt as to the interpretation" of certain provisions of the lease. The trial court received evidence on that subject. From the facts established, that court was entitled to adopt such inferences as arose therefrom and which appeared reasonable to it, and to determine the intent of the parties in accordance with the written instrument. It adopted defendant's and rejected plaintiff's interpretation. The evidence and inferences justifiably drawn therefrom support the trial court's findings and judgment entered herein. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 430, 132 P.2d 457; Estate of Rule, 25 Cal.2d 1, 10, 152 P.2d 1003, 155 A.L.R. 1319; Stevenson v. County of San Diego, 26 Cal.2d 842, 844, 161 P.2d 553; Estate of Hotaling, 72 Cal.App.2d 848, 852, 165 P.2d 681.

[8] Lastly, plaintiff strenuously opposes the trial court's allowance of $1,500 attorneys' fees claimed due to defendant under the provisions of the agreement in the lease. Paragraph 30 thereof provides as follows: "Lessee to Pay Lessor's Expenses in Case of Suit. * * * Should the lessor be made a party, *without his fault,* to any litigation brought by or against the lessee * * * or because of the failure or refusal of the lessees to perform or observe the covenants and conditions of this lease on their part * * * or should the lessor be compelled to employ an agent or attorney * * * to enforce the performance or observance of any of the covenants or conditions of this lease on the part of the lessees * * * then, and in each and every event, the lessees agree to pay the reasonable cost thereof, including a reasonable fee for the services so rendered * * *." It is the argument of counsel for plaintiff that since the trial court's judgment, in interpreting the lease, must be reversed by this court on the main issue, the allowance of attorney's fees cannot stand since such a determination would establish the fact that defendant wrongfully objected to the action proposed to be taken by plaintiff, and therefore it could not then be said that defendant was made a party *"without his fault"*. The argument of counsel loses its force since the judgment of the trial court has been sustained by this court. The provisions of the lease providing for allowance of reasonable attorneys' fees to defendant under the circumstances and findings here related justify the judgment rendered as to this item.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

80 Cal.App.2d 70

FOLEY v. COWAN et al.

Civ. 15619.

District Court of Appeal, Second District, Division 3, California.

May 28, 1947.

1. Specific performance ⇐94

Where tenant, exercising option under lease to purchase leased premises, was told by landlord and at bank, acting as landlord's collection agent, that landlord would inform tenant when taxes, payable by tenant, were due, tenant was willing and able at all times to pay taxes, and landlord never demanded payment thereof by tenant after she paid landlord amount of one year's tax bill, landlord could not urge tenant's failure to pay taxes as breach of contract by cross-complaint in tenant's action for specific performance of landlord's contract to convey premises.

2. Specific performance ⇐94

Where tenant, after being notified of expiration of insurance policy, taken out by landlord, on leased realty, reinsured it, received no other notice or demand respecting insurance, and was willing and able at all times to bear expense thereof, landlord could not complain that tenant was at fault in failing to carry insurance on realty as excuse for landlord's refusal to convey realty to tenant on her exercise of option under lease to purchase it.

3. Specific performance ⇐101

Where landlord, having knowledge of tenant's subletting of leased premises, continued to accept payments under tenant's agreement to purchase premises pursuant to option given her by lease, such subletting did not constitute breach of agreement of which landlord could take advantage in tenant's action for specific performance of landlord's contract to convey realty to tenant.

4. Specific performance ⇐117, 123

In action for specific performance of contract, plaintiff must allege and prove facts from which court may determine that contract was based on adequate consideration and just and reasonable as to party to be charged, and such matters, if in issue, must be covered by findings to justify decree enforcing agreement. Civ.Code, § 3391.

5. Specific performance ⇐114(1)

Facts which must be proved to establish right to specific performance of contract must also be alleged.

6. Pleading ⇐8(1)

Facts, not mere conclusions, should be alleged to establish right to specific performance of contract.

7. Pleading ⇐8(4, 7)

Allegations that consideration for agreement sought to be specifically enforced was adequate and that agreement was just and reasonable are mere conclusions and inadequate as substitute for allegations of fact.

8. Specific performance ⇐114(2)

In action for specific performance of agreement to sell realty, adequacy of consideration should be pleaded by alleging fair and reasonable value of property and price agreed to be paid therefor.

9. Specific performance ⇐117

In action for specific performance of contract to sell realty, defendants' denial "generally and specifically of each and every allegation contained in" paragraph of complaint, alleging that agreed purchase price was fair and reasonable value of property, was insufficient to make issue as to such value.

10. Vendor and purchaser ⇐13

A consideration for agreement to sell realty need not amount to full value of property to be adequate.

11. Pleading ⇐129(2)

In action for specific performance of landlord's agreement in lease to sell leased realty to tenant, value of property, as alleged in complaint, was admitted, in absence of sufficient denial in answer.

12. Pleading ⇐8(7)

A mere allegation that agreement to sell realty is just and reasonable is insufficient to warrant specific performance thereof, but facts showing that it would

not be inequitable to enforce agreement must be alleged.

13. Pleading ⇐9

Where complaint for specific performance of agreement to sell realty alleges facts satisfactorily showing agreement to be just and reasonable, allegation of conclusion to that effect is unnecessary.

14. Specific performance ⇐114(2)

A complaint for specific performance, alleging facts entitling plaintiff to decree as showing justness and reasonableness of agreement sought to be enforced is sufficient on such point.

15. Specific performance ⇐123

In action for specific performance of landlord's agreement to sell leased realty to tenant, facts pleaded in complaint, shown by evidence, and found by court established justness and reasonableness of agreement as to landlord so that findings were not inadequate.

16. Appeal and error ⇐1071(6)

A judgment should not be reversed for trial court's failure to make finding which clearly would necessarily have been adverse to appellant.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Helen M. Foley against S. B. Cowan and another for specific performance of a contract to convey a house and lot to plaintiff, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ernest W. Pitney, of Los Angeles, for appellants.

William E. Empey, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

By the judgment herein, from which defendant appeals, he was directed to convey to plaintiff a house and lot upon payment of the balance of the agreed purchase price, under a written agreement in the form of a lease from month to month, with an option to purchase for $2,650, with interest on deferred payments at six per cent. The rental was $30 per month, plus taxes and assessments upon the property. It provided: "When the said Party of the Second Part shall have paid in the sum of and equal to $500.00, plus interest at the rate of 6% per annum, payable monthly on the agreed option price from the date hereof, and all taxes and installments of bonds or assessments that become due during the term of this tenancy, together with insurance premiums sufficient to insure the premises in a sum of not less than $2,000.00, then the said Party of the First Part will execute a deed to Helen M. Foley, said deed to be subject to: a first trust deed or a first and a second trust deed for the balance of the principal payable thirty dollars a month all due in three years." The agreement contained a provision that failure of plaintiff to pay the rent at the time it fell due or to keep and perform her obligations as stated would render the instrument "null and void" and entitle defendant to reenter the premises and remove all persons therefrom, without notice and without legal liability. There was also a provision that the agreement should become "null and void" and that plaintiff's "interest and right" thereunder would terminate if she assigned the agreement or sublet the premises without the written consent of defendant. Plaintiff was the sole witness at the trial. The facts were developed by her testimony and certain written memoranda. It was established that she had paid the installments of $30 per month until she had paid in more than $800 and interest; that she exercised her option to purchase and offered to pay the balance of about $1,800, but that defendant refused to give a deed. Plaintiff deposited in escrow $3,000 to be used in the purchase and defendant deposited a deed but withdrew it for some undisclosed reason.

As excuses for his refusal to give a deed, defendant asserted at the trial (1) that plaintiff had not paid the taxes on the property; (2) that she had not carried insurance on it, and (3) that she had sublet the premises without his written consent. He claimed he had notified plaintiff by letter that he had elected to terminate the contract because of her alleged defaults. These con-

tentions of defendant were shown by the evidence to be without merit.

[1] With reference to the taxes, it was conceded by plaintiff that she had paid them only for the year 1941–42. The property was assessed to defendant and he received the tax bills. He sent the 1941–42 bill to plaintiff, she promptly interviewed him about it and paid him the amount of the bill. She testified that defendant then told her he would send future tax bills to her, but that he had never done so. Plaintiff's payments were made to a bank which acted as defendant's collection agent; she inquired at the bank as to where she should go to find out about taxes and was told to pay no attention to it, that when the taxes were due, Mr. Cowan would let her know. She was at all times willing and able to pay the taxes. Defendant never made demand upon plainiff for payment of taxes after 1941–42 and under the circumstances could not justly urge her failure to pay them as a breach of her agreement.

[2] As to the insurance, plaintiff admitted that she did not take out any until 1944, at which time she insured the property for $3,000, with loss payable to defendant as his interest should appear. Defendant already had the property insured by a policy expiring in 1943. Plaintiff was notified of the expiration of the policy, inquired of defendant's wife as to how the insurance had been carried, and reinsured it. No other notice was given or demand made upon plaintiff with respect to the insurance; she was at all times willing and able to bear the expense of it. Upon these facts defendant could not justly have claimed that plaintiff was at fault in the matter of the insurance.

[3] Plaintiff allowed other persons to live in the dwelling house, upon condition that they pay the water, light and gas bills, while she lived in what was described as a room in the rear of the premises. She testified that this matter was discussed with defendant and that he consented to it, saying, "It is all right if you have people come in and stay with you to help you, but don't you move off the place," and when she showed him the little room she was living in he said, "You have got a lot of spunk to live in there." Not only did defendant make no claim of breach of the contract by plaintiff, but he encouraged her to make improvements on the house, which was in a bad state of repair, and plaintiff did make extensive improvements at a cost of over $1,400, many of them with the knowledge of defendant. Since defendant had knowledge of the subletting, and continued to accept payments under the agreement, subletting of the premises did not constitute a breach of the agreement of which he could take advantage. Defendant pleaded that he had sent a letter to plaintiff purporting to terminate the agreement, but it was proved that the letter was never delivered to plaintiff, was returned to defendant by mail and was in the possession of his counsel at the time of trial. Defendant made no claim to plaintiff that the contract had been breached until she offered to pay for the property and demanded a deed.

[4] Defendant's final point is that the judgment is without support in the pleadings, the proof or the findings. The contention is that plaintiff failed to allege and prove and the court failed to make a finding that the agreement was founded upon an adequate consideration and was just and reasonable as to defendant. It is the law in this jurisdiction that in an action for specific performance plaintiff must allege and prove facts from which the court may determine that the contract was based upon an adequate consideration and was just and reasonable as to the party to be charged, and also that where these matters are in issue they must be covered by findings in order to justify a decree enforcing the agreement. Civil Code, sec. 3391; 23 Cal. Jur. 438 and 493; Eichholtz v. Nicoll, 66 Cal.App.2d 67, 69, 151 P.2d 664. We are of the opinion that defendant's contention is without merit.

[5-7] The Supreme Court first declared in Bruck v. Tucker, 42 Cal. 346, that the facts which are necessary to be proved to establish a right to specific performance must also be alleged, and in speaking of that case, Mr. Justice Temple said, in Stiles v. Cain, 134 Cal. 170, 172, 66 P. 231, 232: "The case cited also holds that the party

seeking such relief must show, both by averment and proof, that the contract is, as to the defendant, fair and just. That the evidence must show such a case cannot be doubted, and this case distinctly holds that what must be proven on that subject must also be averred. This does not mean that it must be alleged in haec verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor in the respects mentioned, must appear from a proper statement of facts." Ever since Stiles v. Cain it has been the accepted rule that facts, and not mere conclusions, should be alleged. Allegations that the consideration for the agreement was adequate and that the agreement was just and reasonable have been declared to be mere conclusions, and inadequate as a substitute for allegations of fact. In Joyce v. Tomasini, 168 Cal. 234, 142 P. 67, 68, a complaint which alleged " 'that said agreement, and the terms and conditions thereof, aforesaid, were and are, in all respects, just, fair, and reasonable between the parties thereto' " was fatally defective and insufficient to support a judgment of specific performance. In Miller v. Gusta, 103 Cal. App. 32, 283 P. 946, allegations that the contract was fair and equitable and that the consideration was adequate were held fatally defective, citing Salisbury v. Yawger, 184 Cal. 783, 795, 195 P. 682; Walker v. Clark, 80 Cal.App. 520, 252 P. 334; and Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198.

[8-11] In an action for specific performance of an agreement to sell real property, the proper way to plead adequacy of the consideration is to allege the fair and reasonable value of the property and the price agreed to be paid therefor. White v. Sage, 149 Cal. 613, 87 P. 193; Williams v. Foss, 69 Cal.App. 705, 231 P. 766; Walter G. Reese Co. v. House, 162 Cal. 740, 124 P. 442; Boro v. Ruzich, 58 Cal. App.2d 535, 540, 137 P.2d 51. The complaint in the instant case alleged that the sum of $2,600 "is and at all times since the execution of the agreement has been a fair and reasonable value of the property." This allegation was one covered by denial "generally and specifically of each and every allegation contained in said paragraph," etc. There was no allegation in the answer as to the value of the property, and the attempted denial was not sufficient to make an issue as to value. The denial that $2,600 was the fair and reasonable value was not the equivalent of an allegation of value substantially in excess of the sum agreed to be paid. It would have been a truthful denial if the purchase price was slightly below the fair and reasonable value, but this is not sufficient. A consideration, to be adequate, need not amount to the full value of the property. Schader v. White, 173 Cal. 441, 446, 160 P. 557; Haddock v. Knapp, 171 Cal. 59, 62, 151 P. 1140; O'Hara v. Wattson, 172 Cal. 525, 157 P. 608; Williams v. Rush, 134 Cal.App. 554, 559, 25 P.2d 888; Estate of Cheda, 58 Cal.App. 433, 440, 441, 209 P. 70. The value as alleged in the complaint, not being sufficiently denied, was admitted. The trial judge evidently considered the denial to be a nullity, for in summing up the evidence he stated: "You admit the fair value of the property and there is no evidence to the contrary," and counsel for defendant made no reply. Although there was no proof or finding as to the value of the property, none was required, since there was no issue as to value.

[12-14] The mere allegation that the agreement was just and reasonable would not have been sufficient. Facts must be alleged from which it will appear that it would not be inequitable to enforce the agreement. A complaint would be insufficient if it alleged that the agreement was just and reasonable and also alleged facts from which it appeared that it was a harsh, inequitable or unconscionable agreement. And it necessarily follows that if facts were alleged which satisfactorily showed the agreement to be just and reasonable, the allegation of a conclusion to that effect would add nothing and would be wholly unnecessary. A complaint for specific performance is sufficient upon the point in question if it alleges facts, proof of which would entitle the plaintiff to a decree of specific performance. O'Hara v. Wattson, supra, 172 Cal. 525, 157 P. 608; Magee v.

Magee, 174 Cal. 276, 162 P. 1023; Wolf v. Donahue, 206 Cal. 213, 273 P. 547. In the present case, the consideration being adequate, the question whether the agreement was just and reasonable as to defendant was to be determined solely from a consideration of the agreement, and principally from the terms and conditions upon which the purchase price was to be paid. The agreement was set out in full in the complaint. We are concerned only with the terms of the so-called option. Plaintiff's status as a tenant ended with her election to purchase the property, and it is the purchase agreement only which she is seeking to enforce.

[15, 16] All questions as to the sufficiency of the complaint, the evidence and the findings with respect to the justness and reasonableness of the contract will find an answer in its major provisions, which were the following: The down payment on a purchase was to be not less than $500, plus 6% interest on $2,650 from the date of the agreement, June 25, 1941, plus taxes and insurance. The balance was to be secured by trust deed payable $30 a month including interest, all due in three years; the purchaser agreed to keep the property in good condition of repair and preservation and there were the usual provisions making time the essence of the agreement and providing for its termination upon the buyer's default. The rights of the seller were fully protected by other specific provisions and the agreement was in customary form. There were findings that the agreement was executed as alleged and that plaintiff had performed or offered to perform all of her obligations under it and had tendered the full amount of principal and interest and all other amounts due or payable under the agreement. The facts thus pleaded and found admit only of a conclusion that the agreement was just and reasonable as to the defendant. The findings therefore are not inadequate. A judgment should not be reversed for the failure of the court to make a finding, if it clearly appears that the finding, if made, would necessarily have been adverse to the appellant. Staudigl v. Harper, 76 Cal.App.2d 439, 173 P.2d 343; Nicolds v. Storch, 67 Cal.App.2d 8, 19, 153 P.2d 561. The rule is too well settled to require citation of additional supporting authorities.

The case is one which made a strong appeal for a decree requiring defendant to comply with his agreement.

The judgment is affirmed.

WOOD, J., and KINCAID, Justice pro tem., concur.



80 Cal.App.2d 102

SHELLEY v. BIXBY et al.

Civ. 15397.

District Court of Appeal, Second District, Division 3, California.
May 29, 1947.

Rehearing Denied June 13, 1947.

1. Attorney and client ⇐148(2)

Where contract for employment of attorneys was indefinite and ambiguous, contract could not be construed as an immediate assignment to attorneys of one-fourth of clients' interests in litigated trusts regardless of kind, amount or results of attorneys' services, but indicated intent that attorneys' compensation was dependent upon whether any money was secured from trusts by reason of their services.

2. Attorney and client ⇐30

Where plaintiff and two other attorneys undertook employment by defendants as copartners in a special partnership for that purpose, defendants were entitled to have combined legal talents of three attorneys applied in their behalf so that, regardless of right of other two attorneys as plaintiff's partners or associates to bind him by cancellation of employment contract, upon their cancellation of contract and withdrawal from employment, defendants were not required to accept legal talents of plaintiff alone and plaintiff could not assert that defendants wrongfully prevented him from performing the contract.

3. Attorney and client ⇐166(1)

Evidence authorized finding that clients had valid cause in expressing dissatisfaction with representation by three attorneys who had formed a special partnership for particular litigation, expressing a desire to terminate contract and in securing a cancellation thereof by two of the three attorneys.

4. Attorney and client ⇐166(4)

While mere fact that attorney was not successful in litigation does not warrant conclusion that litigation was not prosecuted with proper skill or ability, such fact may be considered in connection with other factors in determining whether attorney did use proper skill or ability.

5. Attorney and client ⇐166(4)

In action by attorney to recover for legal services, evidence warranted finding for clients that attorney failed to exercise proper professional skill or ability.

6. Attorney and client ⇐166(4)

In action by attorney to recover, under one count, on a contingency contract and to recover under second count for reasonable value of legal services rendered, evidence sustained finding for clients that services rendered were without value.

7. Appeal and error ⇐110

An order denying a motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by W. Frank Shelley against Elizabeth Irving Bixby and Lillian Odisho Bajon to recover for legal services rendered. From a judgment for defendants and from an order denying plaintiff's motion for new trial, plaintiff appeals.

Judgment affirmed and appeal from order dismissed.

Arthur E. Briggs and Charles E. McGinnis, both of Los Angeles, for appellant.

William P. Boland, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff, W. Frank Shelley, an attorney at law, appeals from a judgment in favor of the defendants. Under one cause of action he sought to recover fees allegedly due under a written contract whereby defendants employed him and two other attorneys to render legal services. Under another cause of action he sought to recover the reasonable value of legal services allegedly rendered.

On December 21, 1936, the defendants Elizabeth Irving Bixby and Lillian Odisho Bajon, as parties of the first part, and W. Frank Shelley, George D. Higgins and Franklin P. Bull, attorneys at law, as parties of the second part, entered into a written contract, prepared by said attorneys, whereby the first parties employed said attorneys "to represent them" and "attend to their legal matters pertaining to their interest" in the estate of Fanny Bixby Spencer, deceased. The contract also provided that for said services so rendered by said attorneys the first parties would pay to said attorneys one-fourth of any moneys secured by the first parties from the estate. The recitals in the contract, under the "Whereas" clauses (except the second one which is unintelligible), were to the effect that the first parties were beneficiaries under the will of said deceased; that they were dissatisfied with a decree of the court, and desired to have the matter of their rights as beneficiaries under the will "and the trust established thereunder further litigated and determined"; that the second parties were attorneys at law; that the first parties were desirous of employing said attorneys to represent them in all matters "touching their interest" in said estate as the same may appear under the will, or under the trust established by the will, or under "the attempted trust established by the decree of the Court"; and that the attorneys were willing to accept the employment and give it their best endeavors. (The contract, except for the signatures, is shown in the footnote.)[1]

Mr. Higgins was a plaintiff herein, but before the trial he settled his claim for $250

[1] "Agreement

"This agreement, made and entered into at the city of Los Angeles, County of Los Angeles, State of California, on the 21st day of December, 1936, by and between Elizabeth Irving Bixby and Lillian

and dismissed the action with prejudice as to himself. Mr. Bull was offered a promissory note for $250 in payment for services rendered by him, but he refused to accept it and wrote upon the face thereof as follows: "I hereby refuse to accept this note, you are under no obligation, as you received no services which resulted in any benefit to you. I thank you. Franklin P. Bull." Upon stipulation at the beginning of the trial, the trustee in the re-opened bankruptcy estate of W. Frank Shelley (which had been re-opened at the bankrupt's request) was added as a party plaintiff. The trustee has not appealed. The amount sought as attorneys' fees was $123,333.33⅓, being two-thirds of one-fourth of the alleged total value of defendants' interests in the trusts.

For approximately three years before the contract was made the defendants had been engaged in litigation wherein they were attempting to set aside two certain trusts affecting their interests under the will of Fanny Bixby Spencer, deceased. Under one of the trusts, made December 22, 1930 (referred to as the "private trust"), the defendants and the other residuary legatees in the Spencer estate assigned to the Security-First National Bank their interests in all property they might receive under said will, and the bank delivered to them its declaration of trust in exchange therefor. The other trust (referred to as

Odisho Bajon, of the County of Los Angeles, State of California, parties of the first part, and W. Frank Shelley, George D. Higgins and Franklin P. Bull, of the same place, parties of the second part.

"Witnesseth

"That, Whereas, the parties of the first part and each of them are beneficiaries under the last will and testament of Fanny Bixby Spencer, deceased, by the terms of which will two trust– were created in favor of minors, not exceeding $55.000.00 for both, the residue to seven legatees in equal shares, except one life estate.

"And Whereas said executors, their attorneys and The Security-First National Bank of Los Angeles, a corporation, in its various capacities, especially as Trustee under the said will and under the decree of the Court, setting aside the trust provided for in the will and the provisions for the residuary legatees. and making a new trust and putting all the property bequeathed to the residuary legatees into said new trust:

"And Whereas said parties of the first part are dissatisfied with said decree, and are desirous of having the matter of their interest and rights as beneficiaries under the will of the deceased and the trust as established thereunder further litigated and determined according to the law as laid down by statutes of the State and the Constitution of the United States;

"And Whereas said W. Frank Shelley, George D. Higgins and Franklin P. Bull, the parties of the second part, are and each of them is and attorneys-at-law, duly authorized to practice law in all the Court– of the State of California (both Federal and State);

"And Whereas said parties of the first part are desirous of employing said parties of the second part to represent them in all matters touching their interest in said Estate of Fanny Bixby Spencer, deceased, as the same may appear under the will of the deceased or the trust established by said will or the attempted trust established by the decree of the Court;

"And Whereas said parties of the second part are willing to accept said employment and agree to devote the necessary time and give to the said employment their very best endeavors;

"Now This Agreement Witnesseth: That the parties of the first part do hereby employ the parties of the second part to represent them and each of them and attend to their legal matters pertaining to their interest in said estate.

"It Is Therefore Mutually Agreed that for said services so rendered by the parties of the second part, said parties of the first part will pay to said parties of the second part one-fourth of any and all moneys secured by them or either of them from said Estate. It is agreed that whatever moneys are received by the parties of the first part from said estate, one-fourth thereof shall be the property of the parties of the second part.

"The parties of the first part further agree to pay the costs and expenses incurred in any and all litigation connected with said matter, and that they will reimburse from said Estate the parties of the second part for any payment by them of necessary expenses in and about said litigation or matter pertaining to said estate.

"In Witness Whereof the said parties have hereunto set their hands this 22nd day of December, 1936."

the "court trust") was imposed upon the residual assets of the Spencer estate, which included the interests of defendants, by the decree of distribution in said estate on February 3, 1933, and the same bank was the trustee.

Prior to making the contract the defendants herein had commenced an action against the bank, as trustee of both trusts, to terminate the trusts. The judgment of the trial court therein denied relief to plaintiffs therein (defendants herein), and upon appeal therefrom the judgment was affirmed by the Supreme Court of this State on September 18, 1936. Bixby v. Security-First Nat. Bank, 7 Cal.2d 424, 60 P.2d 862.

The court herein found that said attorneys had independent offices and were not associated together as a firm, but undertook the employment as a special partnership or joint venture; that prior to making the contract the defendants explained to plaintiff Shelley and the other two attorneys the proceedings which had theretofore been taken by them in the litigation to free their interests from the trusts, and particularly the decision of the Supreme Court affirming the adverse judgment of the trial court; that said plaintiff represented to defendants that there were grounds to seek a review in the Supreme Court of the United States of the decision of the Supreme Court of this State, and also that defendants could obtain relief from the decree of distribution "by bringing" an action in the Federal Court asking relief upon the ground that the decree of distribution was unconscionable and upon other grounds; that defendants entered into the contract in reliance upon the representations of plaintiff Shelley and the other attorneys; that it was the intent of the parties to said contract that the compensation to be paid to the second parties was to be payable only from money which said attorneys would free from the terms of the trusts; that it is not true that it was the intention of the parties that the percentage to be paid to the second parties was intended as or operated as an immediate assignment of such interest as compensation for services of the attorneys, but that said contract was a contingency contract and the stipulated percentage therein was to become due to the attorneys only when and if the litigation to free assets of the first parties from the trusts was successful and then only to the extent that it was successful; that after the making of the contract said attorneys appeared in behalf of the defendants in litigation in the superior court of Orange County, in the District Court of Appeal, and in the District Court of the United States, but in each instance of such appearances a judgment or order adverse to defendants was entered and they were denied relief in all such actions, motions or proceedings; that said attorneys failed to prosecute with proper professional skill or ability the various proceedings had and taken on behalf of defendants; that an appeal to the District Court of Appeal was dismissed, on respondent's motion therein, for failure of said attorneys to state any ground of appeal in appellants' opening brief; that no grounds appear for a review of the decision of the State Supreme Court by the United States Supreme Court; that plaintiff Shelley, long after the time had expired in which such review by the United States Supreme Court could have been secured if there had been any legal grounds for such review, continued to represent to defendants that he was working on an appeal to the United States Supreme Court, and procured their signatures to documents in preparation of a record on such appeal; that said attorneys commenced an action in the Federal District Court in an attempt to review the matters decided by the Supreme Court of this State, and the Federal Court gave judgment for the defendants therein upon a demurrer and a motion to strike; that all objections made by the attorneys to an account of the trustee in the estate of Fanny Bixby Spencer, deceased, in the superior court of Orange County were overruled; that before said objections were heard, said attorneys charged the trial judge with prejudice, and upon a hearing the charges were "overruled"; that "the services rendered by said attorneys, and each of them, were without value to the defendants, and failed to secure for them, relief in any form or any matter or thing of value for or to said defendants, or either of them, and failed to release from the terms of said

Trusts, or either of them, any money or property whatsoever."

The court also found that about July 30, 1937, the defendants wrote to said attorneys expressing dissatisfaction with their representation of defendants and expressing a desire to terminate the contract; that as a result of negotiations thereafter attorneys Higgins and Bull on behalf of, and as members of, said special partnership agreed to cancel said contract and to accept a note of defendants for $250 in full payment for all services theretofore rendered under the contract; that a formal cancellation of the contract was signed by Higgins and Bull on January 13, 1938, and they withdrew as attorneys for defendants, and the note in favor of Mr. Higgins was delivered to him, but Mr. Bull refused to accept the note tendered to him by defendants and he wrote across the face thereof the words hereinbefore quoted (to the effect that the defendants were under no obligation because the services resulted in no benefit to them); that plaintiff Shelley was tendered a note upon the same terms as the notes which were tendered to the other attorneys, but he refused to accept it; that on February 11, 1938, on motion of defendants, he was removed as attorney for defendants; that good cause appears for writing said letter of July 30, 1937, and reasonable grounds appear for the request to terminate the contract, and defendants were fully justified in securing the cancellation of the contract.

The court also found that neither of the trusts was set aside or modified in any manner prior to the termination of said contract by reason of any proceedings in court commenced by said attorneys, and that neither of said defendants received any money or property from either of said trusts, prior to the termination of the contract, by reason of any action of any kind commenced or carried on by said attorneys or in any manner whatsoever.

The court found further that plaintiff Shelley, on his voluntary petition, was adjudicated a bankrupt on September 14, 1937, and was discharged in bankruptcy on July 5, 1938.

It was stipulated that the defendants first received money from the trusts about March 31, 1939, and that the amount then received by each was $304.80. Thereafter each defendant received various payments in cash aggregating $1,254, and also 503⅓ shares of the Jotham Bixby Company and 6⁵⁷⁄₆₆ shares of the Alamitos Land Company. The record does not show the value of the shares.

The court trust provided that certain monthly payments were to be made to certain beneficiaries, and an annual payment to one of them, until a certain amount had been paid or until a sum of money had accumulated in the hands of the trustee equal to 125% of all future payments that might become due to those certain beneficiaries under the trust. The trustee of the court trust continued to make those payments from the time the trust was created in 1933 until March, 1939, at which time it had accumulated sufficient cash on hand to create the 125% fund, which fund amounted to $20,225. Upon the hearing of the trustee's fifth account, rendered in March, 1939, the court ordered that the balance of the assets in the court trust, after retaining the 125% fund, be distributed to the private trust.

The private trust, which was made by all the seven residuary legatees in the Spencer estate, provided that it might be modified by the agreement of the parties. After plaintiff Shelley had been removed as attorney for these defendants, the parties to the private trust agreed to and did modify it so that it provided that the trustee might resign and new trustees be appointed and that distribution might be made from time to time. On March 31, 1939, about 14 months after Mr. Shelley had been removed as attorney for defendants, the bank resigned as trustee of the private trust and five of the beneficiaries, including these defendants, were appointed trustees. The new trustees then distributed to each of the beneficiaries the sum of $304.80, above mentioned. Later they distributed to each of the beneficiaries 503⅓ shares of the Jotham Bixby Company and 6⁵⁷⁄₆₆ shares of the Alamitos Land Company. [From the 125% fund retained in the

court trust each beneficiary received at later dates additional sums which aggregated the $1,254 above mentioned.]

[1] Appellant contends that the court erred in finding that his right to compensation was contingent upon the results of the litigation and services of the attorneys. He argues that the court should have found that the contract operated as an immediate assignment to the attorneys, at the time the contract was made, of one-fourth of the interests of the defendants in the trusts as compensation for such services as might thereafter be rendered by them. His argument is based upon the provision in the contract that, "It is agreed that whatever moneys are received by the parties of the first part from said estate one-fourth thereof shall be the property of the parties of the second part." The sentence preceding that one is to the effect that for the services so rendered by the second parties (the attorneys) the first parties would pay to the attorneys "one-fourth of any and all moneys secured by them or either of them from said Estate." These two sentences when considered together indicate that it was the intention of the parties that the attorneys' compensation was dependent upon whether any money was secured from the trusts by reason of the services of the attorneys. The contract does not state specifically what services were to be rendered by the attorneys, but it recites generally that the first parties (defendants here) were desirous of having their rights under the will and the trust "further litigated and determined." The only statement therein indicating an attempt to be specific as to what was to be done by the attorneys was the fatuitous recital that the defendants desired that their rights be litigated "according to the law as laid down by statutes of the State and the Constitution of the United States." The contract was indefinite and ambiguous. The circumstances prevailing at the time the contract was made do not furnish any reasonable basis for appellant's contention that the contract was an immediate assignment to the attorneys of one-fourth of defendants' interests in the trusts, regardless of the kind, amount or results of their services. At the time the contract was made the defendants had had litigation for three years endeavoring to obtain relief from the provisions of the trust, and they had been unsuccessful in all respects in the litigation,—the Supreme Court of the State had decided the issue adversely to them and the decision had become final, and it was obvious that no federal question was involved. It would have been most unreasonable for the defendants to assign one-fourth, or any substantial portion, of their extensive interests in the trusts for the mere purpose of engaging in further litigation when the prospect of success was so extremely poor, and regardless of the results of the litigation and the time it might continue. Under appellant's contention, that it was an immediate assignment, he would be entitled to a fourth of defendants' interests if after some litigation, however meager and unsuccessful, the defendants should eventually receive money from the trusts solely by reason of the provisions of the trusts. Appellant alleged in his complaint that at the time the contract was made the defendants were unable to pay any attorney fees and "That it was, therefore, necessary to employ attorneys upon a *contingent basis.*" (Italics added.) The statement written by Mr. Bull on the note which was tendered to him, to the effect that there was no obligation since the services were of no benefit, shows that he did not consider the contract to be an immediate assignment, but on the contrary that he considered that compensation under it was contingent upon benefits obtained. When the whole contract and the circumstances surrounding the making of it are considered it must be concluded that the contract was not an outright and immediate assignment or any assignment of one-fourth of defendants' interests in the trusts. The trial court did not err in determining that it was a contingency contract and that the compensation to be paid to the attorneys was to be payable only from money which the attorneys would free from the terms of the trust.

At the trial there was uncertainty on the part of appellant as to the theory upon which he sought to recover. The first cause of action in the complaint appears to be based on the theory that the contract was for a contingent fee and that he was en-

titled to damages, in the amount of one-fourth of defendants' interests, because he had been wrongfully discharged and was thereby prevented from performing the services, which he could have performed. His counsel (not present counsel) contended that it was not a contingency contract, but was an immediate assignment to the attorneys. Also his counsel contended that his claim to a portion of defendants' interests was by reason of an equitable lien. Early in the trial his counsel said, concerning the second cause of action to recover the reasonable value of services, that he did not think that quantum meruit was a proper cause of action. Near the close of the case he said in effect that he had not elected to abandon the quantum meruit cause of action. Also at the trial there was confusion on the part of appellant as to the date which he considered to be the date he was discharged. In his complaint he alleged that he was discharged on December 15, 1938. His counsel contended that the discharge occurred on July 30, 1937. In his deposition appellant testified that the contract and employment were never terminated.

As to appellant's theory of the case, it is clear, however, that he did not seek to recover upon the basis that he had performed the contract. He did not claim that he had done anything which resulted in benefit to defendants, except as to one matter and that was he had prepared and filed an affidavit, signed by one of the defendants, concerning the bank trustee, which affidavit his counsel at the trial characterized as "vicious" and "libelous." Appellant testified that he believed that the bank trustee made the settlement by reason of his efforts particularly in the matter of the affidavit. Irrespective of the various theories of the case mentioned at the trial, it appears that his theory of the case is that he is entitled to recover because the defendants wrongfully discharged him and thereby prevented him from performing the contract.

[2] As to the date of termination of the contract, the court found that Mr. Bull and Mr. Higgins signed a formal cancellation of it on January 13, 1938, and the court concluded that the contract was terminated by agreement of the parties on that date. Apparently the reasoning of the court in arriving at that conclusion was (1) that since plaintiff Shelley was adjudicated a bankrupt on September 14, 1937, and since the three attorneys undertook the employment under the contract as a special copartnership, that the partnership was dissolved by plaintiff Shelley's bankruptcy (Civ. Code sec. 2425) and that the two non-bankrupt partners had the right to wind up the partnership affairs (Civ. Code, sec. 2431); and (2) that the two attorneys, as members of the copartnership comprised of the three attorneys, had a right to agree upon a termination of the contract which would be binding upon appellant irrespective of appellant's bankruptcy. Appellant argues that the matter of his bankruptcy is immaterial because he was discharged as attorney for defendants on July 30, 1937 (when the letter was written by defendants), which was before he was adjudicated a bankrupt. By reason of the conclusions herein as to other points on this appeal, it is not necessary to determine whether the said two attorneys could terminate the contract by reason of the bankruptcy. The finding that the three attorneys undertook the employment as copartners is supported by the evidence. Appellant testified that the three attorneys represented defendants as associate counsel, that they were working together, and that they were acting collectively. Under the contract the defendants employed the three attorneys as a group and defendants were entitled to have the combined legal talents of the three attorneys applied in their behalf. On January 13, 1938, Mr. Bull and Mr. Higgins wrote the following across the face of the contract: "Los Angeles, Calif. January 13, 1938 We, the undersigned do hereby cancel and release the makers hereof from any liability on this Contract. Franklin P. Bull George D. Higgins." Regardless of whether those two attorneys had the right as partners or associates of plaintiff Shelley to bind him by such cancellation, the result of such act by them was that thereafter they were not attorneys for defendants in association with Mr. Shelley or at all. If the cancellation of the contract by them did not bind him, the result was that thereafter he was the only attorney for defend-

ants. When the two attorneys withdrew from the contract the defendants were not required to accept the legal talents of plaintiff Shelley alone in lieu of the combined legal talents of the three attorneys. Presumably the three attorneys were selected in the first instance by reason of special capabilities of each one in different phases of the law. There may have been many good and sufficient reasons why the defendants would not be satisfied to depend on plaintiff Shelley's legal ability alone. As above indicated, he is not seeking to recover fees on the basis that he had performed the contract, but on the theory that the three attorneys had had a contract with the defendants which the defendants should have permitted him to perform alone, after the two other attorneys had cancelled the contract at least insofar as they themselves were concerned. It is not necessary to decide whether the cancellation of the contract by the two attorneys was binding as a cancellation on behalf of appellant. The cancellation by them, at least insofar as they themselves were concerned, so changed the contract for representation of defendants that appellant is not in a position to assert that defendants wrongfully prevented him from performing the contract.

[3] The findings of the court, that there was good cause for having written the letter of July 30, 1937, that there were reasonable grounds for the request in the letter to terminate the contract, and that defendants were fully justified in making the request and securing the cancellation of the contract which thereafter took place, are supported by the evidence. The said letter stated, among other things, in referring to the contract that "We are accordingly hereby terminating it." That the evidence is sufficient to support these findings is indicated in the discussion hereinafter made regarding the finding that appellant did not use proper professional skill or ability.

[4, 5] Appellant contends that the finding that he failed to prosecute with proper professional skill or ability the various proceedings had and taken on behalf of defendants is not supported by the evidence. This contention is not sustained. All the actions and proceedings were in all respects unsuccessful and of no benefit to defendants. The mere fact, however, that he was not successful in the litigation would not warrant a conclusion that it was not prosecuted with proper skill or ability, but that fact is to be considered in connection with various other factors in determining whether he used proper skill or ability. The trial judge had before him as evidence the original files in the actions and proceedings which were taken on behalf of defendants. From a consideration of those files, including a consideration of the kind of action or proceeding taken and the object to be accomplished by it, the composition of the documents prepared by appellant, and the results obtained, the trial court was in a position to determine the fact, upon substantial evidence, whether appellant exercised proper professional skill or ability. His opening brief in the District Court of Appeal case did not state any ground of appeal, and for that reason his appeal was dismissed. The decision of the State Supreme Court was final before the contract was made, and no federal question was involved, and he represented that he could appeal to the United States Supreme Court. His petition to the State Supreme Court for permission to appeal to the United States Supreme Court was denied. Justice Sutherland of the United States Supreme Court denied his purported application to appeal to that Court on April 14, 1937, and as late as November, 1937, about a year after the State Supreme Court decision had become final, he was continuing to try to appeal to the United States Supreme Court. His action in the Federal District Court was a collateral attack upon the judgment of the State Supreme Court, and the Federal Court sustained a demurrer to his complaint and gave judgment against his clients. All his objections in the superior court of Orange County to the account of the trustee were useless, and his charges of prejudice of the trial judge were unfounded. The finding to the effect that appellant did not use proper professional skill or ability cannot be disturbed. The defendants had good and suf-

ficient cause to terminate the contract and were justified in securing the cancellation of it.

[6] The finding that the services rendered by each of the attorneys were without value to the defendants and failed to secure any relief for them is sustained by the evidence. By reason of the conclusions herein it is not necessary to decide the other contentions of appellant. Likewise it is not necessary to decide the contention of defendants to the effect that the suspension of appellant from the practice of law from July 24, 1938, to October 22, 1938 (which was after he had been removed as attorney for defendants), prevents his recovery herein.

[7] The judgment is affirmed. The appeal from the order denying his motion for a new trial is dismissed, such order not being appealable.

SHINN, Acting P. J., KINCAID, J. pro tem., concur.



80 Cal.App.2d 239

ENGLE v. ENGLE.

Civ. 15633.

District Court of Appeal, Second District, Division 3, California.

June 9, 1947.

As Modified July 1, 1947.

Divorce ⇐150(2), 184(12)

Where husband, in open court, immediately after granting of interlocutory divorce decree to wife, requested findings of specific acts of cruelty of which he was adjudged guilty, objected in writing to proposed general findings in same words as allegations of complaint promptly after service thereof on him, and evidence as to husband's cruelty was conflicting, he was entitled to such specific findings and court's failure to make them was prejudicial error.

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge pro tem.

Suit by Ruth M. Engle against Frank T. Engle for divorce. From an interlocutory decree granting plaintiff a divorce, defendant appeals.

Reversed

Keller & Smith, of Alhambra, for appellant.

H. S. Farrell, of Alhambra, for respondent.

WOOD, Justice.

Defendant appeals from an interlocutory decree of divorce granted to plaintiff. He asserts that the evidence was insufficient to support the decree and that the court erred in failing to make specific findings.

Plaintiff alleged in her complaint "That for more than one year last past the defendant, Frank T. Engle, has treated this plaintiff in an extremely cruel and inhuman manner and he has thereby caused her to suffer and she does suffer great and grievous mental and physical suffering and anguish, and by reason thereof she can no longer live with said defendant as his wife." She did not plead specific acts constituting cruelty.

Plaintiff testified that she was a school teacher; that during several years of their marriage, including the year preceding their separation in 1944, defendant was an habitual drinker of intoxicating liquor; that he became intoxicated frequently and when he was under the influence of alcohol he used profanity toward her, called her abusive names, and at times called her such names in the presence of neighbors; that during a period of three weeks he would not let her have the keys to the automobile which she had been using to go to and from the school where she was a teacher. Her testimony was corroborated by her two daughters.

Defendant testified that he drank beer frequently; that he did not drink whiskey, but occasionally before meals he drank an appetizer consisting of a little liquor with lemon in it; that he was never intoxicated;

that he never called her abusive names or cursed her; that he did not remember telling her she could not use the automobile.

A witness, called by defendant, testified that she had been employed by the parties as a housekeeper, part time, for about six months in 1937; that she never saw defendant drink intoxicating liquor and never saw him intoxicated; that she never saw him drink beer; that she never heard him swear at plaintiff; that she never saw him abuse her.

A witness, called by defendant, testified that she had known the parties about nine years; that she had lived next door to them; that she had been in their home about once a month in 1944; that during the year preceding the trial (trial was on November 19, 1945) defendant had been living in a house at the rear of her house; that she had never seen him intoxicated, and had never seen him mistreat plaintiff.

The trial judge announced his decision in open court when the case was submitted to him on November 19, 1945. He said: "Interlocutory decree granted; property found to be the separate property of the respective parties." Counsel for defendant then said: "May we have findings as to the specific acts of cruelty?" Counsel for plaintiff then said: "All right." The judge then said, "Yes." Counsel for plaintiff said: "I will prepare findings."

The findings were dated and filed January 4, 1946, and as to the matter of cruelty, the findings were in the same words as the allegations of the complaint concerning cruelty hereinbefore quoted.

It therefore appears that the findings were in general terms, and were not specific as requested by defendant. The proposed findings of fact, which were later signed and filed, were prepared by counsel for plaintiff and were mailed to counsel for defendant on November 19, 1945. Counsel for defendant filed objections to the proposed findings with the county clerk on November 21, 1945, the objections being predicated on the fact that the findings were not in accordance with his request for specific findings but were findings which followed the general language of the complaint. It appears from defendant's brief [no brief was filed by plaintiff] that counsel for defendant did not receive any notice of a date when findings would be settled or when a ruling would be made as to the objections; that he received a notice from the clerk of the court, signed by E. Gibson (apparently received soon after January 10, 1946), stating as follows: "Mr. Keller [counsel for defendant] I informed Judge Doyle that your Objections had been received in November and mislaid. He instructed me to file same which I did today, January 10, 1946." The findings of fact and interlocutory decree were signed and filed on January 4, 1946. In the original file is the letter which counsel for defendant sent to the court when the objections were sent for filing, and at the bottom of it is the following notation: "Objections inadvertently mislaid and overlooked and were not presented to Judge Doyle until January 10, 1946, at which time he instructed the Clerk to file same. E. G." It appears also from the brief that counsel for defendant wrote a letter to the judge on January 20, 1946, stating in substance the matters hereinabove stated regarding the filing of objections, and that under the circumstances of the objections being mislaid he would appreciate the advice of the judge as to the matter of having a settlement of the findings. It also appears that no reply was made to that letter.

It is clear that immediately after the decision was made the defendant in open court requested findings as to the specific acts of cruelty, and that he did not thereafter waive such findings, but objected in writing to the proposed general findings promptly after they were served on him. The evidence presented by the parties as to asserted acts of extreme cruelty was conflicting in practically all respects. In the circumstances here the defendant was entitled to specific findings as to the acts of cruelty, and it was prejudicial error not to make them. See Bilger v. Bilger, 54 Cal. App.2d 739, 742, 129 P.2d 752; and Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 171 P.2d 34.

The interlocutory decree is reversed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.



80 Cal.App.2d 206

CITY OF SAN DIEGO v. WALTON et al.

Civ. 3627.

District Court of Appeal, Fourth District, California.

June 5, 1947.

Rehearing Denied June 30, 1947.

1. Continuance ⇐53
Trial ⇐6(3)

The appearance of counsel for both parties on date prior to day on which case was actually set, at which time they sought and obtained continuance to a day certain, had the same effect as though they had actually appeared on the day of trial and obtained continuance at that time, and no further notice of the date of trial, written or oral, was necessary.

2. Eminent domain ⇐219

In condemnation proceeding, where due written notice of trial had been given originally, and subsequent continuance was had at request of the parties, who were present in court and had actual notice of date to which case was continued, no further written notice of time of trial was required. Code Civ.Proc. § 594.

3. Eminent domain ⇐219

In condemnation proceedings by city, where counsel for defendants had actual notice of date to which case had been continued, and on that date the case came on regularly for trial, jury was in attendance, plaintiff's attorneys were present but neither defendants nor their attorneys were present although three of their witnesses did appear, and plaintiff's right to trial within statutory year was being jeopardized by actions of counsel for defendants, trial court was justified in proceeding to trial. Code Civ.Proc. § 1249.

4. Appeal and error ⇐110, 782, 870(6)

Errors claimed in motion for new trial were reviewable on appeal from judgment, and order denying such motion was not an appealable order, and attempted appeal therefrom would be dismissed.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by the City against Elizabeth Walton and others, for condemnation of certain properties. From a judgment for plaintiff fixing value of certain property, and from an order refusing to vacate the judgment, and an order denying a motion for new trial, Devere S. Dudley and Beulah L. Dudley appeal.

Affirmed.

Laurence B. Martin and Chauncey E. Snow, both of Los Angeles, for appellants.

J. F. DuPaul, City Atty., Morris S. Levenson, Asst. City Atty., and Thomas J. Fanning, Deputy City Atty., all of San Diego, for respondent.

GRIFFIN, Justice.

This is an action by plaintiff and respondent City of San Diego, for condemnation of certain properties in Mission Beach, included in a vast and extensive contemplated public improvement. Defendants and appellants Devere S. Dudley and Beulah L. Dudley, husband and wife, owned certain lots within the district. This action was filed and summons issued on January 30, 1945. Defendants were served on February 10, 1945. They answered on September 13, 1945, and only disputed the question of value of the property.

Section 1249 of the Code of Civil Procedure provides that for the purpose of assessing compensation and damages, the right accrues as of the date of issuance of summons, and its actual value as of that date is the measure of compensation, and if the case is not tried within one year after the date of commencement of the action, with certain exceptions, the compensation shall be deemed to have accrued *at the date of trial.*

On February 19, 1945, there began, by means of numerous long distance telephone

calls, telegrams and letters, a successive number of requests by the attorneys for the defendants for further time to answer and for continuances on the representation that the matter might be settled without trial. These requests were successively granted by attorneys for plaintiff and an offer in price of $6,500, by the City to defendants, was suggested on May 20, 1945, but later defendants refused to accept the offer. Further time to answer was granted on various occasions thereafter. Plaintiff's counsel, during all this time, stressed the fact that the rights of plaintiff to present evidence of valuation as of the date of issuance of summons would be jeopardized if the case was not tried before January 31, 1946, within the year.

According to the record before us, the case was set for trial in department 2 for November 5, 1945. A copy of a written notice of trial was mailed to defendants' attorneys in Los Angeles on October 3, 1945, and the original was returned and filed on January 30, 1946. On October 29, 1945, defendants' counsel phoned plaintiff's counsel and asked for a continuance until a later date and suggested November 12, 1945. Plaintiff's counsel objected and stated that he did not want to be placed in a position where the case would not go to trial within the year; that if defendants' counsel would co-operate in this respect, instead of letting the case go off calendar, he would tentatively agree to have the case continued to November 13, 1945, or some acceptable date. Defendants' counsel then agreed that he would waive a jury trial. Pursuant to this conversation, the case was continued to December 13, 1945, and ultimately continued to December 17, 1945, for trial, and a written stipulation for waiver of a jury trial was filed. On December 10, 1945, defendants' counsel filed a motion to set aside such waiver and reinstate a jury. The motion was heard before another judge and granted. The case remained set for trial for December 17, 1945, in Department 2. At the request of defendants' counsel, the case was again continued to January 7, 1946, over objections of plaintiff's counsel, who now alleges that defendants' counsel then agreed to proceed to trial within the year. On January 4, 1946, three days before trial, one of plaintiff's witnesses became seriously ill. Plaintiff's attorney phoned defendants' attorney explaining the situation and Mr. Martin, one of defendants' counsel, agreed to stipulate to a continuance so that a jury would not needlessly be in attendance on January 7th. Plaintiff again stressed the necessity of an early trial within the year and suggested that the trial be continued at least 10 days. Pursuant to their conversation Mr. Martin and plaintiff's attorney, Mr. Fanning, appeared in Department 2 on January 4, 1946, and the following constitutes a brief resume of the colloquy between the court and counsel as gleaned from the reporter's notes:

"The Court: I understand Counsel are here in a case that comes on Monday.

"Mr. Fanning: Yes.

"The Court: What is the point?

"Mr. Fanning: It is a condemnation action, Your Honor, and the City is the plaintiff in the action. We have two witnesses. One of our essential witnesses, Mr. Charles Shattuck, is in Los Angeles. That is his residence, and we just received word now that he has been suddenly confined to his bed; * * * Mr. Martin, one of the attorneys for the defendants in the trial, is here and is willing to stipulate *to a continuance* on this short notice. However, he has informed me that he would like to consult his witnesses before another date is set, and he will be able to make that determination tonight * * *

"Mr. Martin: * * * We are here and we are advised the trial would proceed Monday. As a result I had one of the appraisers here today, and another one is en route. I can head them off, and I wouldn't want to place the City at a disadvantage, because I know this witness is an important one.

"The Court: Well, in the case of sickness, we are obliged to *grant continuances.*

"Mr. Martin: That is right. My problem is to determine the date that my appraisers can be available * * *

"The Court: What you want to do is *continue* it *to a time certain,* is that the idea?

"Mr. Martin: That is right. It will be tomorrow until I can decide what time certain will be convenient for my appraisers, and I can advise the Court then and we can try and agree on the date.

"The Court: What do you want me to do about it?

"Mr. Martin: We would like to have a *continuance granted* at this time, so the jury can be notified.

"The Court: On Counsel's stipulation that a *continuance may be granted*, the matter will be stricken off calendar and the time for its further consideration will be reset hereafter.

"Mr. Martin: Your Honor, may we have it for consideration tomorrow morning?

"Mr. Fanning: If the Court please, both parties have tried to conclude this action, and we have met with a certain amount of misfortune, and it has been delayed. On the 31st of January the year will have run from the date of the issuance of the summons, and I don't know, but I believe that would have an effect on the appraisals of the defendants as well as an effect on our appraisals. It would change the date when the appraised value of the property would be determined.

"The Court: Well, if you are coming in tomorrow morning, I wish you would come in as early as nine o'clock.

"Mr. Fanning: Thank you, Your Honor.

"Mr. Martin: That is quite all right, Your Honor." (Italics ours.)

On the next morning Mr. Martin told the City Attorney that he could arrange to go to trial prior to January 30, 1946, the last day within the year, but that one of his witnesses would not be available until February 1st, and that February 1st would be the first agreeable day of trial for him, but that he would prefer February 4th, being Monday. Plaintiff's attorney agreed to continue the trial to February 4th if defendants' counsel would stipulate that the damages were to be calculated as of the date of issuance of summons. Mr. Martin refused. No court reporter was present the next morning, Saturday, January 5th, but the minutes of the court, apparently dictated by the judge himself, reflect the following: "The plaintiff City of San Diego by Thomas J. Fanning, Esq., one of its attorneys and the defendants Devere S. Dudley and Beulah L. Dudley by Laurence B. Martin, Esq., one of their attorneys, having yesterday to wit, on January 4, 1946, informed the Court that by reason of the illness of one of plaintiff's witnesses they were stipulating that the above entitled cause heretofore set to be tried on January 7, 1946, might be *continued* and that they would on January 5, 1946, appear before the Court and inform the Court as to the date to which it would suit their convenience that such *continuance* should be made; and said parties by said attorneys at this time appearing and stating to the Court that they are unable to agree on the date to which the trial of said cause shall be continued, and said Laurence B. Martin having with respect to said matter filed certain affidavits; it is now ordered by the Court in the presence of said counsel for respective parties and over the objection of said Laurence B. Martin that the trial of said *cause be so continued* that instead of being tried on January 7, 1946, as heretofore ordered the same shall be tried in Department 2 of this court on January 30, 1946, at 10:00 a. m., of said day, such trial not to be concluded however before February 1, 1946, if defendants are not able to produce all of their witnesses before said last-mentioned date." (Italics ours.)

Counsel for plaintiff now claims that Mr. Martin later that day told him that he had subpoenaed three witnesses, three city councilmen, for the trial on January 7, 1946, and asked if he would assure him that these witnesses would be present on January 30, 1946. Mr. Martin denies this claim. Nevertheless, on January 23, 1946, defendants' counsel caused subpoenaes to be served on these three witnesses ordering them to appear on January 30, 1946, in Department 2, as witnesses for defendants. Return was made as to only one of these witnesses.

On January 30, 1946, at 10 a. m., the case came on regularly for trial and the jury was in attendance. Plaintiff's attorneys were present. Neither defendants nor their attorneys were present in court, although their three witnesses did appear. The court recessed until 2 p. m. The clerk of

the court called counsel for defendants on the phone during the noon hour and notified them of the facts. The clerk was told by counsel for defendants that they had received no "written notice of trial." Thereafter the matter proceeded to trial. A jury was empaneled and witnesses were sworn and examined as to valuation, etc. On February 2, 1946, a verdict was rendered for plaintiff and it fixed the value of the property at $7,000. On February 18, 1946, defendants' attorney Mr. Martin, moved to vacate the judgment, based upon the record indicated, and his affidavit stating that according to agreement with counsel for plaintiff, he appeared with them on January 4, 1946, in Department 2, and stated that he was not going to oppose "the motion to continue" and asked that the new date of trial be fixed until he was able to determine when his appraisers would be available. He also submitted a copy of his own calendar showing nearly all dates filled except January 29th to February 5th; that he suggested February 4, 1946, when his appraisers could be present and that they would testify that the property was worth $50,000. His affidavit as to the time when the appraisers could be present was supported by an affidavit of one of the appraisers. Counsel for defendants does not deny that he was present in Department 2 when the case was continued for trial to January 30, nor that he did not have actual knowledge of the trial date. He makes the technical argument that neither defendants nor their attorneys ever had "written notice of the new trial date", i. e., January 30, 1946, and alleges that they were not present on January 7, 1946, the actual date the trial was previously set; that since the trial court, on January 4, 1946, ordered the cause to be "stricken off calendar" and tried on January 30, 1946, over their objection, and since they were not present on January 7th, a new written notice of trial was necessary, and was a jurisdictional requirement under sections 594 and 1010 of the Code of Civil Procedure and Rule IX of the Rules of the Judicial Council. In this connection it is also argued that the mere presence of counsel at the time the cause was set for trial does not eliminate the necessity of written notice, citing Lapique v. Kelley, 82 Cal.App. 586, 256 P. 229; Hurley v. Lake County, 113 Cal.App. 291, 298 P. 123; Cahill v. Verdier, 54 Cal.App. 465, 202 P. 154; and Hagenkamp v. Equitable Life Assurance Society, 29 Cal.App. 713, 156 P. 520. The trial court denied the pending motions.

The trial judge, in explaining his words as used in the minute entry of January 4, 1946, that the matter "will be stricken off calendar and the time for its further consideration will be reset hereafter", remarked that the court did use that language in disposing of the *motion* for continuance; that when the proceedings of that day and the day following are considered in their fullness, they show that what was done was in substance a continuance, and that counsel for defendants so understood it; *that the case* was continued to January 30, 1946; that counsel for both sides were present and each referred to it as a continuance and both stipulated that a continuance might be had but disagreed as to a date. We agree with the learned trial court's interpretation of the effect of the entire proceedings, notwithstanding the unhappily worded minute entry. There is no question that a day certain was fixed for the trial of the action and defendants' counsel had actual notice thereof. Whether, in addition to such actual notice, counsel for plaintiff was also required, under the law, to give five days written notice will now be considered.

[1] Defendants' counsel were originally notified in writing as to the date of trial. Several continuances were had to a day certain, thereafter, at their request. They were fully aware that the case was to be tried on January 7, 1946, but appeared on January 4th to seek a continuance by stipulation. To hold that they might now take advantage of the fact that they were not present on January 7, 1946, the date set for the trial of the action, would be but a mechanical view of the law. For all intents and purposes, the appearance of counsel for both parties on a date prior to the day on which the case was actually set, at which time they sought and obtained a continuance to a day certain, would have the same legal effect as though they actually had appeared on the day of trial and obtained the continuance at that time.

We do not consider this contention meritorious.

Since the action of the trial court on January 4th and January 5th was in effect merely granting a motion for a continuance of the case to a day certain, no further notice, written or oral, was necessary.

In Capital National Bank v. Smith, 62 Cal.App.2d 328, 338, 144 P.2d 665, citing Estate of Bell, 58 Cal.App.2d 333, 336, 136 P.2d 804; Langdon v. Blackburn, 109 Cal. 19, 28, 41 P. 814; Abels v. Frey, 126 Cal. App. 48, 14 P.2d 594; and 11 B Cal.Jur. p. 573, sec. 1118, it was stated [62 Cal.App. 2d 328, 144 P.2d 671]: "After notice has been properly given in the first instance, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing".

Defendants contend the cases cited are not in point because this quotation was originally taken from Estate of Bell, supra, which involved a probate proceeding and that under sec. 1205 of the Probate Code it is specifically provided that the court may continue or postpone any hearing and "no further notice of the continued or postponed hearing is required unless ordered by the court", and also argue that such code provision does not apply to a condemnation proceeding. In this connection it should also be noted that the judgment as entered recites that competent and satisfactory evidence was submitted showing that defendants were duly notified more than five days prior to the time of trial.

[2] When due written notice has been given and a subsequent continuance had, at the request of the parties, who were present in court and had actual notice of the date to which the case was continued, the rule stated above to this extent has application to a condemnation proceeding. There was a substantial compliance with section 594 of the Code of Civil Procedure and Rule IX of the Rules of the Judicial Council, and no further written notice of time of trial was required. Canty v. Pierce & Anderson, 173 Cal. 205, 159 P. 582; Sheldon v. Landwehr, 159 Cal. 778, 116 P. 44; Horstmyer v. Trial Board of the City of Sacramento, 21 Cal.App.2d 533, 69 P.2d 1021; Granger v. Sherriff, 133 Cal. 416, 65 P. 873.

[3, 4] The trial court was justified in proceeding to trial under the circumstances of this case. Plaintiff's right to a trial within the year was being jeopardized by actions of counsel for defendants as indicated by the trial judge in disposing of the motions here involved. He first read from the syllabus of Canty v. Pierce & Anderson, supra, as follows: "Where an attorney has knowledge long in advance that a case is in fact set for trial on a certain date, there is no necessity for giving any formal notice such as is contemplated by section 594 of the Code of Civil Procedure; and where he is in no sense taken by surprise, but is fully advised of the desire of the other side to proceed with the trial upon the date set, and of the fact that no further continuance will be consented to, if he has not made sufficient preparation, it is his own neglect, * * *"

Continuing, he said: "I don't see any reason why that was not and is not good law. I have no doubt in Los Angeles they follow a cautious practice as any court would do, of course, where somebody's rights were not jeopardized by doing so. I would have preferred to do the same thing. But here was a case where the City had substantial rights for feeling that if it went over into February, the City would forfeit an actual right. The situation from the standpoint of the defendants, if I may be frank, struck me as an effort to obtain a technical advantage by getting the case over into February in some manner or other, and I didn't feel that it was the duty of the Court to further that effort. It seemed to me that the appearance of Counsel at the time amounted and ought to amount in law to a waiver of any notice of trial under section 594 other than such as resulted from the presence of Counsel and the discussion had in Counsel's presence, or any notice of trial under the Judicial Council rule."

There were sufficient reasons to show why plaintiff would have been prejudiced had the trial been continued again, and beyond the year. Counsel have shown no dis-

position to rightly and lawfully relieve plaintiff from such prejudice if a new trial was granted. We find ourselves in the same position in reference to a reversal of the judgment. The errors claimed in the motion for a new trial are reviewable on appeal from the judgment and the order denying such a motion is not an appealable order. The attempted appeal therefrom is dismissed. Regoli v. Stevenson, 179 Cal. 257, 176 P. 158. Since the trial court had jurisdiction to proceed, we are unable to find any prejudicial error or any justifiable reason to order a reversal of the judgment or order refusing to vacate the judgment.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.



80 Cal.App.2d 144

BUSCH v. TRUITT.

Civ. 15612.

District Court of Appeal, Second District, Division 1, California.

June 3, 1947.

Hearing Denied July 31, 1947.

1. Executors and administrators ⇐453(4), 454

A judgment on a money claim against the representative of an estate establishes the claim, but no execution may issue thereon, and proper mode of procedure is to file a certified transcript of the judgment in the administration proceedings. Probate Code, § 730.

2. Executors and administrators ⇐454

Where action was brought against administratrix to have a trust declared in certain stock and to recover the stock or its value, a judgment ordering defendant to deliver the stock, or in case of nondelivery that plaintiff recover $5520 from defendant as the value thereof, was a judgment on a "claim for money" within statute prohibiting execution upon such judgment. Probate Code, § 730.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim for Money".

3. Judgment ⇐881

Where action was brought against administratrix to have a trust declared in certain stock and to recover the stock or its value, and a judgment was entered ordering defendant to deliver the stock, or in case of nondelivery that plaintiff recover $5,520 from defendant as the value thereof, creditor was not required to accept, in satisfaction of the judgment, certain other shares of stock issued by successor corporation, together with an interest in an escrow agreement, acquired by administratrix in the course of a series of transactions which culminated in dissolution of both corporations.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa and Carl A. Stutsman, Judges.

Action by George J. Busch against Rae Truitt, as administratrix of the estate of Charles C. Truitt, deceased, for the recovery of certain stock or its value. Judgment was entered for plaintiff. From an order denying defendant's motion to discharge a writ of execution, and from an order denying defendant's motion for satisfaction of judgment, defendant appeals.

Order denying motion to discharge writ of execution reversed; order denying motion for satisfaction of judgment affirmed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

MacDonald, Wallace, Cashin & Arrington, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from two orders made after judgment, namely, an order denying the defendant's motion to discharge a writ of execution; and a subsequent order denying defendant's motion for satisfaction of judgment. Two questions are involved. The first relates to the validity of an execution issued upon what is claimed to be "a judgment rendered against an executor or administrator, upon any claim for money, against the estate." Probate Code, § 730.

The second question concerns a defendant's right to tender in satisfaction of a judgment, something other than the stock described in such judgment.

In reference to the first question, Section 730 of the Probate Code, quoted above, provides that such a judgment "conclusively establishes the validity of the claim * * * and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." This section contains the further provision that "No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment."

The complaint herein, contained two causes of action against the appellant as administratrix of the Estate of Charles C. Truitt, deceased. The first cause of action alleged that the deceased, by virtue of a certain writing, held 1380 shares of stock of Dried Food Products, a California corporation, in trust for the plaintiff. The second count alleged that plaintiff had filed a creditor's claim in the Truitt estate for the said stock. The complaint prayed for judgment "that the Estate * * * holds in trust for the plaintiff" the stock in question; and "that plaintiff have judgment for the recovery of said stock or its value on November 16, 1942, in the sum of $5,520.00."

At the trial, Judge Stutsman rendered judgment "that plaintiff do have and recover of and from the defendant, Rae Truitt, as Administratrix of the Estate of Charles C. Truitt, Deceased, 1380 shares of the capital stock the Dried Food Products Company, a Corporation, and that said defendant is hereby ordered to transfer and deliver certificates representing said 1380 shares of stock to the plaintiff forthwith, *or in case that said 1380 shares are not delivered forthwith then that plaintiff do have and recover of and from the defendant * * * $5,520.00 dollars, the value thereof, together with interest as provided by law.*" (Italics added.) On appeal, this judgment was reversed by the District Court of Appeal, — Cal.App.2d —, 160 P.2d 925. After a hearing in the Supreme Court, the judgment of the trial court was affirmed. 27 Cal.2d 889, 163 P. 2d 739.

After the judgment became final, demand was made that appellant deliver up the stock according to the terms of the judgment; the identical stock, however, was never delivered or tendered due to the fact that the corporation had then been dissolved, as will hereinafter be more fully set forth. Respondent then took out an execution to enforce payment of the money part of the judgment, namely $5,520, representing the value of the stock. In the Law and Motion Department of the Superior Court, Judge Paonessa then denied appellant's motion to discharge the writ of execution, such motion being based upon the ground that, under Section 730 of the Probate Code previously referred to, the execution was invalid. Thereafter, Judge Stutsman, who had rendered the original judgment, denied a further motion by appellant asking the court to order satisfaction of the judgment on the ground that appellant had tendered the "proceeds" of the stock described in the judgment. The present appeal questions the propriety of both orders.

The record discloses that the Dried Foods Products Company, previously engaged in the manufacture of dried eggs, had, prior to March 31, 1941, licensed its patents to Armour & Company. Thereafter Dried Foods Products Company carried on no active business, and assigned the Armour contract, its only asset, to another company known as "Food Products Corporation," the Armour contract also being the sole asset of the latter corporation. It is likewise to be noted that July, 1942 the only asset of the Dried Food Products Company was all of the stock of Food Products Corporation. Subsequently, Dried Food Products Company distributed this asset to its stockholders, each shareholder in Dried Food Products receiving a fractional amount of stock in Food Products Corporation. Thereafter, Food Products Corporation distributed its only asset, the Armour contract, to its shareholders. The Armour agreement was placed in escrow at the Citizens National Bank which collected the

royalties and distributed these proceeds to the aforesaid owners of fractional interests in the agreement. Both the Dried Food Products Company and Food Products Corporation were legally dissolved on December 30, 1944, which date, it should be noted, was after the rendition of judgment by Judge Stutsman on June 20, 1944, but before the affirmance of such judgment by the Supreme Court on November 27, 1945.

It further appears that after the judgment had become final, and on December 29, 1945, appellant delivered to respondent's attorney the sum of $2,011.32 representing dividends received by appellant, with interest; that appellant tendered to respondent, not the stock of Dried Food Products Company as ordered by the judgment, but what appellant denominates as the "proceeds" of such stock, namely, 161.7386 shares of Food Products Corporation stock and an interest of 0.54767% of the Armour agreement which was in escrow at the Citizens National Bank. Respondent refused to accept these "proceeds" in satisfaction of the judgment, and demanded that, since it was impossible for appellant to deliver the identical stock specified in the judgment, appellant should pay the value thereof as ordered by such judgment, the sum of $5,520. Thereafter occurred the issuance of execution, and the two motions in reference thereto, as hereinbefore related.

It is appellant's contention that the first order, refusing to discharge the execution, "was improper because by it the Respondent was permitted to execute upon the assets of the estate of a decedent upon a judgment rendered against an administratrix upon a claim for money against the estate of her intestate," in violation of section 730 of the Probate Code hereinbefore mentioned. Appellant likewise contends that the second order denying a motion for satisfaction of the judgment, "was improper because the Appellant offered to perform and did tender the stock in the form she held it at the time the judgment became final."

The respondent's brief answers these contentions by affirming that "Appellant was required to deliver 1,380 shares of the stock described in the judgment forthwith. This she did not do," and that "When delivery of the stock became impossible, Respondent was entitled to recover the money judgment." It is further argued that "The judgment was rendered in an action to establish title to the stock and was not wholly on a claim against the estate." Respondent also contends that "Appellant has cited no authority which permits her to deliver different property than that ordered delivered by the judgment".

[1] In reference to the validity of the execution issued against the estate of Charles C. Truitt, deceased, the applicable rule is stated in 11B Cal.Jur. 349, as follows: "The property in the custody of the probate court is not subject to levy or forced sale, and any execution issued and sale thereunder are void. The statute (Probate Code, Section 730) is express that no execution shall issue upon a judgment against a representative on a money claim, nor shall such a judgment be a lien. * * * A judgment on a money claim against the representative is an establishment of the claim, and the mode of procedure is to file a certified transcript of the judgment in the administration proceedings." See also, 11A Cal.Jur. 873; Smith v. Reed, 52 Cal. 345; Estate of Wiley, 138 Cal. 301, 71 P. 441.

Hollyfield v. Geibel, 20 Cal.App.2d 142, 148, 66 P.2d 755, 758, cited by respondent in support of the contention that the judgment in the present action "was not wholly on a claim against the estate," and hence that execution thereon was proper, is not factually comparable to the instant case. In the Hollyfield opinion, the court said: "It is true that a judgment which is rendered against an executor upon a mere claim for money against the estate of a decedent does not establish a lien for the satisfaction of the judgment against the property of the estate. * * * In the present case, however, the judgment which was rendered in the suit to quiet title was not founded on a claim for a mere money judgment against the estate. It was a suit to establish title to a sum of money which the court specifically found did not

belong to the estate. In that suit the court granted the plaintiff a lien on the real property in the custody of the executor of the estate to secure payment of the specified sum of money belonging to plaintiff to which the estate had no title or right of possession. Under such circumstances, the court of equity had a right to require the payment of that sum of money to the owner thereof, without providing that it should be paid to her 'in due course of administration of the estate' ".

[2] In the instant litigation the action was not one to quiet title to a sum of money, but to declare a trust in 1,380 shares of stock. The lower court did not find that there was a specific sum of money which did not belong to the estate, as it did in the Hollyfield case; nor did the judgment herein grant any lien to secure payment of any such specified sum. The terms of the judgment against appellant were that respondent "do have and recover * * * 1380 shares of the capital stock of the Dried Food Products Company, * * * and that said defendant is hereby ordered to transfer and deliver certificates representing said 1380 shares of stock to the plaintiff forthwith, or in case that said 1380 shares of stock are not delivered forthwith then that plaintiff do have and recover * * * the sum of * * * $5,520.00, the value thereof, together with interest as provided by law." The judgment further provided that respondent recover $1,817.00 with interest, representing dividends on the stock received by appellant, which latter sum has been paid.

The part of the judgment here in question, providing "that plaintiff do have and recover" the sum of $5,520 representing the value of stock which appellant could not deliver, can be considered as nothing other than a mere "judgment rendered against an executor or administrator, upon any claim for money, against the estate of his testator or intestate," in the language of Section 730 of the Probate Code. This being so, the matter comes squarely within the express proviso of that section which says, "No execution shall issue upon the judgment." It was therefore error for the court to deny appellant's motion to discharge the writ of execution. The law provides other machinery than that of an execution, for the enforcement of a judgment against an estate; the judgment in question, conclusively established "the validity of the claim for the amount of the judgment," as provided by Section 730, but accomplished nothing more than that. Under such judgment respondent's only right was to require the appellant to pay, "in due course of administration, the amount ascertained to be due."

[3] The appeal from the order denying defendant's motion for satisfaction of judgment, based upon appellant's contention that "In all fairness Appellant should have the right to satisfy the judgment by delivering to the Respondent the exact proceeds of the stock held at the time the judgment was rendered," must be resolved against such contention. The judgment herein was in no sense ambiguous, nor did it give appellant any option other than the one expressly provided for; appellant was ordered to deliver "forthwith," 1380 shares of stock in "Dried Food Products Company," or in case such stock was not delivered forthwith, then respondent was to recover the value thereof, namely $5,520. Appellant did not deliver the specified stock "forthwith" or at all, but as is pointed out in respondent's brief, "She chose to retain it, to vote to dissolve the corporation, and to join some sort of a trust thereafter"; later tendering in satisfaction of the judgment something alleged to be the "proceeds" of the stock.

Unknown to the law is appellant's proposition that "she attempted to carry out the spirit of the judgment by tendering the exact proceeds of the 1380 shares and should not be penalized by something over which she had no control, to-wit: the dissolution of the holding company in the interim." The appellant, admittedly, "has no quarrel with Respondent's argument that where a judgment in a claim and delivery action directs delivery of personal property or its value to the plaintiff, the plaintiff is entitled to the value if the personal property is lost or destroyed," but seeks to distinguish the present case by

affirming that "this is a case where the personal property was not lost or destroyed, but was tendered to the respondent in the form it was held by appellant at the time the judgment became final." Appellant has cited no authority permitting a delivery of property different from that ordered in the judgment. To so hold in the present case would establish a dangerous precedent giving every judgment debtor the right to interpret a judgment in whatever manner seemed most favorable to the debtor's interests. Such a doctrine would tend to destroy the long recognized integrity of civil judgments.

The order denying appellant's motion to discharge the writ of execution is therefore reversed; the second order appealed from, denying the motion for satisfaction of judgment, is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



80 Cal.App.2d 173

Ex parte HARRIS.

Cr. 2474.

District Court of Appeal, First District, Division 1, California.

June 5, 1947.

1. Criminal law ⇐1211

Where accused, on cross-examination by way of impeachment, admitted prior felony convictions and prison confinements therefor, but neither information nor judgment mentioned prior convictions of accused, in fixing sentence, accused was to be considered a first offender only. Vehicle Code, § 503; Pen. Code, §§ 3020, 3024, (c, e).

2. Indictment and Information ⇐114

The indictment or complaint must allege prior conviction in order to subject an accused to enhanced punishment for a second or subsequent offense. Pen. Code, § 3024 (e).

3. Pardon ⇐6

The fact that section 3024 provides that only prior convictions which can be considered in increase in term of imprisonment are those charged and included in judgment, and that section 3045, providing for limitation of parole for prior convictions, contains no such provision indicates that legislature did not intend that for parole purposes, only prior convictions proved in court be considered. Pen. Code, § 3024, 3045.

4. Pardon ⇐1

Parole is not a matter of right, but a matter of grace. Pen. Code, § 3045.

5. Pardon ⇐7

In determining fitness of a man as a parole risk his life history, his habits, his previous associates, and his crime record may be considered by the parole authority. Pen. Code, § 3045.

6. Pardon ⇐7

In considering whether a person is to be admitted to parole, and the rules, regulations or restrictions he is to be placed under if admitted to parole, even minor convictions and convictions under which he did not serve time in any institution, none of which could have been included in charge in court, should be considered. Pen. Code, § 3045.

7. Pardon ⇐6

Where neither information nor judgment mentioned prior convictions of prisoner but he had served two prior sentences for felony convictions, he was a second termer for parole purposes. Pen. Code, § 3045.

8. Pardon ⇐6

Resolution of Adult Authority whereby prisoner, who had served previous sentences for felonies but whose prior convictions for felonies were not charged in information nor mentioned in judgment, would automatically appear for both sentence and parole consideration 18 months after commitment and six months before he would be eligible for parole, was fair and reasonable. Pen. Code, §§ 3024, 3041, 3045.

9. Pardon ⇐6

Parole authority must determine length of sentence and consider parole before expiration of period in which prisoner may be paroled. Pen. Code, §§ 3041, 3045.

10. Pardon ⇐2

In ascertaining what is a reasonable interpretation of parole statutes, some consideration must be given to number and complexity of problems faced by the parole authority in determining the ever-increasing number of cases coming before it. Pen. Code, §§ 3041, 3045.

11. Criminal law ⇐1208(9)

An indeterminate sentence is in legal effect a sentence for the maximum term.

12. Habeas corpus ⇐25(1)
Pardon ⇐6

Where maximum sentence for offense for which prisoner was convicted was five years, prisoner, who had been convicted of prior felonies and who had not served two years of term was not eligible for parole, and he was not entitled to relief in habeas corpus proceeding though Adult Authority had not held hearing for purpose of fixing time of sentence and considering parole. Vehicle Code, § 503; Pen. Code, §§ 3041, 3045.

Appeal from Superior Court, Marin County.

Habeas Corpus proceeding by Donald Harris against the Adult Authority of California and Clinton T. Duffy, Warden and others. Writ discharged and petitioner remanded to custody.

Donald Harris, in pro. per.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondents.

BRAY, Justice.

The question involved here is whether Resolution No. 83 adopted by the Adult Authority, in its application to petitioner's situation, is a reasonable exercise of the power given to it by the Legislature, and whether petitioner shall be considered as a first termer or second termer for certain purposes.

Petitioner is presently confined in San Quentin Prison. On July 19, 1946, he was received there under sentence of imprisonment for the crime of violating section 503 of the Vehicle Code (auto conversion). This section prescribes punishment in the state prison for not less than one nor more than five years. Neither in the information nor judgment is any mention made of any prior convictions of the petitioner. At his trial, on cross-examination by the district attorney by way of impeachment, petitioner admitted two prior felony convictions and prison confinements therefor. Because of these, the Adult Authority classified him as a second termer, and under their Resolution No. 83 his term of imprisonment will not be fixed, nor parole considered, until at least 18 months after his commitment.

Petitioner, fearing that he would be classified as a second rather than a first termer, heretofore appealed from the judgment in his case. People v. Harris, 78 Cal. App.2d 293, 177 P.2d 817. "His only ground urged on the appeal is that, since during the trial he admitted two prior convictions, he believes that the prison authorities will consider him a two-term offender and will not consider an application for parole until he has served two calendar years." 78 Cal.App.2d at page 293, 177 P. 2d at page 817. After holding that this is not a question that can be raised on appeal, the court went on to say (78 Cal.App. 2d at page 293, 177 P.2d at page 817): "If, when the time arrives when appellant is entitled to apply for parole, his application is rejected on the grounds herein stated appellant has an adequate remedy by habeas corpus to determine his status."

Section 3020 of the Penal Code provides: "In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the board may determine and redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State."

Section 3024 of the Penal Code provides: "The following shall be the minimum term

of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence: * * * (c) For a person previously convicted of a felony either in this State or elsewhere * * * five years; * * * (e) Such minimum penalties shall apply only when such * * * previous conviction of a felony as above specified *has been charged and admitted or found to be true in the manner provided by law* * * *." (Emphasis added.)

[1] Under these sections of the Penal Code, it appears clearly that in the matter of fixing sentence petitioner must be considered a first offender only. His prior convictions were not "charged and admitted or found to be true in the manner provided by law."

[2] What is meant in section 3024, subd. (e), by the language that prior convictions must be "charged and admitted or found to be true in the manner provided by law" readily appears from an examination of the authorities. The general rule is that, unless controlled by statute, in order to subject an accused to enhanced punishment for a second or subsequent offense, it is necessary to allege in the written accusation the fact of prior conviction. 58 A.L.R. 64; 82 A.L.R. 366; 116 A.L.R. 229; 132 A.L.R. 107; 139 A.L.R. 689. Section 1168 of the Penal Code, subd. 2(e), before it was recodified into section 3024, had practically the identical language. In construing the former section in People v. Lesterjette, 40 Cal.App.2d 327, 104 P.2d 844, 845, the court quotes from Cavassa v. Off, 206 Cal. 307, 313, 274 P. 523, as follows: "It is well established in this state, where a prior conviction is relied upon for the purpose of empowering a court to inflict an increased penalty upon a defendant, that the indictment or complaint must allege the prior conviction, and upon the trial, unless admitted, such prior conviction must be proven by competent evidence." The court then goes on to say at page 330 of 40 Cal. App.2d, at page 845 of 104 P.2d: "When, therefore, the finding appears in the judgment, the board of prison terms and paroles is thereby authorized to assume, in fixing the added penalty therefor, that the fact that the prisoner was armed with a deadly weapon at the time of the commission of his offense was properly pleaded and competently proved." The court was dealing with the deadly weapon section of the act which is one of the situations which along with prior conviction causes an increase in penalty. There are a number of cases in California supporting the rule quoted in the Cavassa case, supra, among them, the following: People v. Ratner, 67 Cal.App.2d Supp. 902, 153 P.2d 790; People v. Fewkes, 214 Cal. 423, 6 P.2d 250; People v. Coleman, 145 Cal. 609, 79 P. 283.

The court in our case treated the petitioner as a first offender as it did not include any prior conviction in its judgment. That he must thenceforth be treated as such so far as his term of imprisonment is concerned is established by People v. Schneider, 36 Cal.App.2d 292, 98 P.2d 215, 217. There the court said: "Appellant further contends that the evidence is insufficient to prove the prior convictions. Regardless, however, of the question of proof, it is apparent that the matter of the prior convictions cannot operate to appellant's prejudice for the reason that the clerk's and the reporter's transcripts alike show that in pronouncing judgment the trial court ignored entirely the matter of prior convictions and sentenced appellant merely as a first offender, and therefore he must be treated as such. People v. Noland, 30 Cal.App.2d 386, 86 P.2d 363; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812."

It hardly could be contended that an admission of prior convictions by the petitioner under cross-examination for purposes of impeaching his testimony constitutes "found to be true in the manner provided by law." The section provides two situations in which prior convictions may be used to increase the penalty for a later crime: (1) where the prior conviction is charged and admitted; and (2) where it is charged and found to be true in the manner provided by law. In the second situation it must be established by proof to the jury or court after issue framed. In both situations it must be charged in the informa-

tion or indictment and found in the judgment. People v. Dawson, 210 Cal. 366, 373, 292 P. 267.

For purposes of term of sentence petitioner therefore must be considered a first termer. The attorney general agrees with this conclusion.

The question then arises as to whether the position taken by the Adult Authority as to the time when he is to have the length of his term of imprisonment determined and his parole considered is reasonable and proper. Resolution No. 83 of the Adult Authority provides (so far as relevant here), "That it shall be the policy of the Adult Authority to order the initial calendar appearances of men in the State prisons according to the following procedure: * * * men who have served previous sentences as provided in Penal Code Section 3045; * * * 18 calendar months from date of commitment."

Section 3045 of the Penal Code provides: "No prisoner who has served a previous sentence in a State prison in this or any other State * * * may be paroled until he has served at least two calendar years." Petitioner is in this category unless it should be held that this section only applies when, as under section 3024 of the Penal Code applying to terms of imprisonment, only prior convictions which have been charged and included in the judgment can be considered. But section 3045 has no such provision. Nor is there any similar provision in any of the sections applying to parole.

Section 3041 of the Penal Code provides: "In any case the matter of parole may be determined by the board at any time after the expiration of six months from and after the actual commencement of such imprisonment."

Section 3041, as to paroles, like section 3020, as to terms of imprisonment, fixes no definite time for the hearing other than "after the expiration of six months."

If petitioner, although considered a first termer for length of sentence, is a second termer for consideration of parole, we have a situation in which it is possible for him to receive a minimum sentence of one year only, but not be eligible for parole for two years. While this is possible, it is not probable, except under most unusual circumstances, that the Adult Authority would give a second termer a sentence of less than the two years when he would first be eligible for parole. This situation is important in considering the 18 months rule provided by Resolution No. 83.

[3-6] That prior convictions of prisoners who for good reasons must be considered as first termers, need not be charged and included in the judgment is obvious from a comparison of sections 3024 and 3045. The very fact that section 3024 provides that the only prior convictions which can be considered in increase of term of imprisonment are those charged and included in the judgment, and that section 3045 providing for limitation of parole for prior convictions contains no such provision, indicates that the Legislature never intended that for parole purposes, only prior convictions proved in court could be considered. Parole is not a matter of right, but a matter of grace. In determining the fitness of a man as a parole risk, many things may be considered by the parole authority. Among these are his life history, his habits, his previous associates, and of the greatest importance, his crime record. It would not be reasonable to hold that in determining whether or not a man is a good parole risk, the authority is precluded from considering prior convictions which were not included in the charge against him in the court which convicted him of his last offense. In considering whether a person is to be admitted to parole, and the rules, regulations or restriction he is to be placed under if admitted to parole, even misdemeanor convictions and convictions under which the person did not serve time in any institution, none of which could have been included in the charge in court, may and should be considered.

[7, 8] Being a first termer for length of imprisonment and a second termer for purposes of parole, when must the Adult Authority act in determining both imprisonment and parole? The statutes fix no time other than the minimum of six months. There is no case in California on the ques-

tion of the time of considering term of imprisonment, but on the question of time of considering parole the case of Roberts v. Duffy, 167 Cal. 629, 140 P. 260, in holding invalid a rule of the then prison board requiring all prisoners to serve half time before being eligible to parole, held in effect that the prisoner had a right to apply for parole and have his application determined (but not necessarily granted) at the expiration of the time when he would be eligible for parole. Under Resolution No. 83 prisoners in the same class as petitioner automatically appear for both sentence and parole consideration 18 months after commitment and 6 months before they are eligible for parole. Certainly, at least as to parole consideration, this is eminently fair and reasonable.

It is also reasonable as to the time for fixing terms. While, as pointed out before, the minimum term in the case of a prisoner such as petitioner is one year, the likelihood of his being given a term of less than two years is extremely remote. If there are circumstances justifying the minimum sentence, they can be called to the attention of the authority before the 18 months when the prisoner would automatically come before the authority. Resolution No. 83 states: "Provided, however, that an earlier initial calendar appearance may be ordered for any inmate whenever the Adult Authority so decides * * *." As a matter of fact, such an application was made by petitioner and denied. No circumstances were presented to the authority which would justify the imposition of the minimum term only, petitioner relying principally upon his claim that for all purposes, even parole, he must be considered a first termer.

To require that a hearing for both parole and term should be held at the end of the year would unreasonably restrict the authority in the matter of parole. One of the matters entering into the prisoner's eligibility to parole is his conduct while in prison, "his character or disposition as chastened by prison discipline." Roberts v. Duffy, supra, at page 635 of 167 Cal., at page 262 of 140 P. It is not unreasonable for the authority to require that a prisoner who cannot be paroled for two years, must be under observation for 18 months before his parole status is determined. Having his sentence determined at the end of one year instead of six months later under the schedule fixed by Resolution No. 83, would gain nothing for petitioner, as the refusal of the authority heretofore to fix his term and time of parole shows that he will have to serve at least the two years required before parole could be granted.

[9] Moreover, to hold that in cases like this the authority must by the end of the minimum year hold a hearing for the purpose of fixing term and then later hold another hearing to consider parole would cause an unnecessary duplication of work and effort. While the statute does not fix the time within which the authority must act, it is quite clear that by necessary implication, the authority must determine the length of sentence and consider parole, before the expiration of the period in which the prisoner may be paroled—in this case, two years.

[10] In determining what is a reasonable interpretation of the statutes some consideration must be given to the number and complexity of the problems faced by the authority in determining the ever-increasing number of cases coming before them. In the month of March, 1947, the record discloses 759 separate actions by the authority, in which personal interviews with 456 inmates were involved. While, of course, no prisoner should be deprived of any rights, nor delayed in securing any rights, because of pressure of business of the authority, yet where the prisoner is in no way being penalized or injured, the volume of business to be taken care of must be considered in determining what is a reasonable time in which the authority should act. Under Resolution No. 83 a man serving his first term who has no prior convictions comes before the authority for both sentence and parole six months after his commitment, and practically six months before it is possible to release him. No inmate is required to make application for these purposes; his application comes on automatically six months before he is

eligible to parole in whatever group the law places him.

The procedure established in Resolution No. 83 is reasonable and fair and no substantial right of any inmate is jeopardized by it.

[11, 12] Respondent claims that the questions raised here cannot properly be raised in an application for a writ of habeas corpus, citing In re Weintraub, 61 Cal. App.2d 666, 143 P.2d 936. While that case so holds, habeas corpus has been used for similar purposes in In re McVickers, 29 Cal.2d 264, 176 P.2d 40; In re Seeley, 29 Cal.2d 294, 176 P.2d 24; In re Galloway, 78 Cal.App.2d 880, 178 P.2d 469, and other cases. It is not necessary for us to determine this question for the following reasons: The maximum penalty in the statute under which petitioner was convicted is 5 years (Sec. 503, Vehicle Code). "* * * the indeterminate sentence is in legal effect a sentence for the maximum term." In re Lee, 177 Cal. 690, 171 P. 958, 959. In view of our determination herein, petitioner is not entitled to complain unless the Adult Authority, prior to the expiration of two years from his commitment, fails to fix his term and consider him for parole. Whether or not on such consideration he shall be granted parole is a matter entirely within the discretion of the Adult Authority. Roberts v. Duffy, supra. As this time has not expired, petitioner is not entitled to any relief. Should the authority not so act within the stated time, petitioner will have his remedy by mandamus, as set forth in the Roberts case.

Our conclusions are, first, that so far as length of sentence is concerned, petitioner is to be considered as a first termer only; secondly, that in determining parole the authority has the right to take into consideration his prior convictions; thirdly, that the time of sentence and of considering parole set forth in Resolution No. 83 is reasonable and fair. Therefore the writ is discharged and petitioner remanded to custody.

PETERS, P. J., and WARD, J., concur.

80 Cal.App.2d 453

MANN v. SHIPLEY.

Civ. 15597.

District Court of Appeal, Second District, Division 3, California.

June 18, 1947.

Hearing Denied Aug. 14, 1947.

1. Landlord and tenant ⇐164(1)

An apartment owner had duty to maintain portions of building which remained under her control for use of tenants and their guests, such as entrance to building and hallways, in a reasonably safe condition, but such duty would not extend to roof of building, which was not maintained for use of guests or even of tenants except when they were doing their washing.

2. Landlord and tenant ⇐169(6, 8)

Evidence supported finding that apartment owner did not extend invitation to tenant's guest and her infant daughter to go upon roof of apartment building, and hence, owner could not be held liable for death of guest's infant daughter when she fell from the roof through a screen ventilating shaft.

3. Appeal and error ⇐979(2)

An order granting new trial for insufficiency of evidence may not be reversed except for manifest abuse of discretion.

4. New trial ⇐70

Granting a new trial for insufficiency of evidence is not an abuse of discretion if evidence is such as would support a verdict for moving party.

5. Landlord and tenant ⇐169(11)

Evidence presented question for jury as to whether tenant's guest was guilty of contributory negligence in failing to maintain closer supervision of her two and one half year old daughter when on roof of apartment building, so as to preclude recovery from apartment owner for child's death when she fell from roof through a screened ventilating shaft.

6. New trial ⇐72

On motion for new trial on ground of insufficiency of evidence, trial court had duty to weigh evidence and to determine whether in light of evidence the verdict was a just one.

7. Appeal and error ⇐1015(3)

Appellate court has no more power to interfere with a decision of trial judge as to weight of evidence as determined by him on a motion for new trial than it has to review determinations of fact of a jury.

Appeal from the Superior Court, Los Angeles County; Stanley Murray, Judge pro tem.

Action by Albert Mann against Adelle Shipley to recover for alleged wrongful death of plaintiff's two and one half year old daughter who fell from roof of defendant's apartment house through a screened ventilating shaft. From order granting defendant's motion for a new trial, after verdict of $6,000 had been returned in favor of plaintiff the plaintiff appeals.

Affirmed.

A. J. O'Connor, George J. Hider and Birger Tingloff, all of Los Angeles, for appellant.

Forrest A. Betts and Walter Ely, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Plaintiff brought this action for the alleged wrongful death of his two-and-one-half-year-old daughter, who fell from the roof of defendant's apartment house through a screened ventilating shaft. Defendant's answer denied negligence and pleaded contributory negligence of the child's mother, plaintiff's wife, in allowing the child to play on the roof. The action was tried to a jury and a verdict of $6,000 was returned in favor of plaintiff. On defendant's motion a new trial was ordered on the ground of insufficiency of evidence and that the verdict was contrary to law, and plaintiff appeals from that order.

The apartment building was owned by defendant, and a Mrs. Kostelnik was one of the tenants. Mrs. Mann was employed in the check room, and Mrs. Kostelnik as cashier, at a night club, and they were friends of long standing. Mrs. Mann visit-

ed Mrs. Kostelnik at the apartment house about three times a week. Children were not allowed to live there, and Mrs. Kostelnik's twelve-year-old-son was only allowed to visit her after she obtained permission for him to do so. The written permission that was required stated that children allowed in the apartments were not permitted to loiter in the hallways or elsewhere about the premises, other than in the apartment where they were visiting. Mrs. Mann was familiar with this practice, having been so informed by Mrs. Kostelnik.

On the day of the accident, after the arrival of Mrs. Mann and her daughter, Mrs. Kostelnik started up to the laundry room near the roof to do her laundry, and Mrs. Mann changed her clothing and removed most of the clothing of the child. She testified that Mrs. Kostelnik invited her to go to the roof to sun bathe and that she went there with her daughter; that the daughter stepped outside and her mother brought her back and put on her shoes; she had only looked out upon the roof through the doorway prior to the time the child fell into the air shaft; the child was playing up and down the steps leading to the roof and out on a board walk on top of the roof; Mrs. Kostelnik was washing clothes in the laundry room, which was close to the doorway leading to the roof; Mrs. Mann was standing in the doorway talking to Mrs. Kostelnik and watching her child; at the outer edges of the roof there was nothing other than a coping some six inches high; the air shaft was but a few feet away from the doorway, and the board walk on which the child was playing was but a few inches from the air shaft; there was a coping around the shaft, some three inches high, and also a wooden railing with a single rail approximately 30 inches above the coping; the child reached for the railing, her mother saw her and reached for her too late to catch her as she fell through the shaft. Mrs. Mann testified that she had never seen an air shaft and did not know what they were. Mrs. Kostelnik testified that she went up near the roof to do her washing, had done one tub of clothes and hung them out on the roof and then returned to her apartment and asked Mrs. Mann to come upstairs and sit on the steps with her daughter so they could get some sun; that she then returned to the washroom and after Mrs. Mann and the daughter came up she asked Mrs. Mann the time of day, and that the accident happened immediately afterward. Mrs. Kostelnik also testified that she did not tell Mrs. Mann she could go on the roof or take her daughter there; that she, Mrs. Kostelnik, knew that it was forbidden; that there was a sign on the door leading to the roof, reading as follows: "Only those who do some clothes washing are permitted on the roof, others please keep off. Order of the Owner." In a written statement three days after the accident Mrs. Mann said that the door to the roof was closed when she came to it. The sign was on the inside of the door and visible to one approaching on the stairs.

The issues in the case were whether defendant was guilty of a breach of duty which she owed guests of her tenants in the apartment house and whether Mrs. Mann was guilty of contributory negligence in allowing her child to go upon the roof.

That the poorly guarded air shafts created a condition on the roof which was dangerous for small children cannot be questioned, but it does not necessarily follow that defendant was guilty of negligence in allowing that condition to exist. Mrs. Kostelnik knew of the condition. Children were not allowed in the apartments except by special permission, and then were required to be kept in the apartments where they were visiting. None but adults were allowed to use the roof and then only for necessary purposes. There was a warning sign to this effect upon the door opening onto the roof. Mrs. Mann and her daughter were not invitees of defendant. They had been invited to the stairway leading to the roof by Mrs. Kostelnik, but according to the latter, had not been invited to go onto the roof, but only onto the steps at the entrance to the roof, where they would be in the sun. An invitation for Mrs. Mann to go onto the roof, either with or without her daughter, would have been contrary to rules established by defendant and the warning which she had caused to be placed on the door. Mrs. Kostelnik had no implied authority to allow her guests to use the

roof in violation of the rules established by defendant.

[1-4] Unless Mrs. Mann was an invitee of defendant upon the roof of the building, the latter owed her no duty to maintain the premises in a reasonably safe condition. It would have been defendant's duty to maintain portions of the building which remained under her control for the use of tenants and their guests, such as the entrance to the building and the hallways, in a reasonably safe condition, but this duty would not extend to the roof of the building, which was not maintained for the use of guests of tenants, where Mrs. Mann had not been invited to go, and where not even tenants were permitted unless they were doing their washing. From the testimony of Mrs. Mann that she stayed in the doorway and endeavored to keep her child there, and from the testimony of Mrs. Kostelnik, it could have been believed that Mrs. Kostelnik did not extend an invitation to Mrs. Mann to go upon the roof. The trial judge could also have believed that Mrs. Mann knew that her daughter was allowed upon the premises only upon the condition that she be kept in the apartment where she was visiting, and also that she did not understand that she had an invitation, even from Mrs. Kostelnik, to go upon the roof or to allow her child there. It was the duty of the court, upon motion for a new trial, to determine whether the implied finding of the jury that Mrs. Mann and her child were invitees upon the roof was in accordance with the weight of the evidence. One implication of the order granting the motion was that there was an absence of sufficient proof upon that point. From a review of the evidence we are satisfied that a determination by the jury that no such invitation was extended would have found support in the evidence, and in view of that conclusion we would not be justified in disturbing the order. An order granting a new trial for insufficiency of the evidence may not be reversed except for manifest abuse of discretion. It is well established that it is not an abuse of discretion to grant a new trial for insufficiency of the evidence if the evidence is such as would support a verdict for the moving party. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465; Williams v. Field Transportation Co., 28 Cal.2d 696, 171 P.2d 722; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338.

[5] An independent ground for affirmance of the order is that a determination by the jury that Mrs. Mann was guilty of contributory negligence in caring for her child would not have been unsupported by the evidence. The dangerous condition, due to the poorly guarded air shafts, was patent. Mrs. Mann observed the condition and she realized also that it would be dangerous to allow her child to go upon the roof for the reason that the edges of the roof were unguarded. While Mrs. Mann did not recognize the openings as air shafts, she realized that they were places of danger, especially so to a young child. It was clearly a question for the jury whether she exercised ordinary care in not maintaining closer supervision of her daughter. As we have said, a finding that she failed to exercise proper supervision would not have been unjustified.

[6, 7] It was the duty of the court to weigh the evidence and to determine whether in the light of the evidence the verdict was a just one. Having reached the conclusion that the verdict was unsupported, it was equally the duty of the court to grant defendant's motion. It is no more within the power of this court to interfere with a decision of a trial judge as to the weight of the evidence as determined by him on a motion for a new trial, than it is to review the determinations of fact of a jury.

Since the order is sustainable for the reasons stated, it is unnecessary to consider other grounds urged by defendant in support of the order.

The order and judgment are affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.

80 Cal.App.2d 498

PEOPLE v. PYLE.

Cr. 1999.

District Court of Appeal, Third District, California.

June 20, 1947.

1. Infants ⇐20

Testimony of complaining witness, who was defendant's eleven year old daughter, was not so inherently improbable that it would not support conviction of committing lascivious acts upon body of child, especially where such testimony was in part corroborated by complaining witness' brother, a boy age 13 years. Pen.Code, § 288.

2. Infants ⇐20

Corroboration of complaining witness' testimony was not essential to a conviction of committing lewd or lascivious act upon body of child. Pen.Code, § 288.

3. Infants ⇐20

Evidence supported conviction of committing lewd or lascivious act upon body of 11 year old child, who was defendant's daughter. Pen.Code, § 288.

Appeal from Superior Court, Sacramento, Raymond T. Coughlin, Judge.

Leland Pyle was convicted on both counts of information which charged violation of section 288 of the Penal Code, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Fred N. Howser, Atty Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant was convicted on both counts of an information filed in the Superior Court of the County of Sacramento which charged violations of section 288 of the Penal Code, on two different dates in October, 1946. The victim of the offenses is the daughter of defendant and was, at the date thereof, aged eleven years.

On this appeal from the judgment of conviction appellant contends that the evidence is insufficient to support the verdict, that it was not sufficiently corroborated, and that the testimony of the child, the complaining witness, is inherently improbable.

[1, 2] We find no merit in these contentions. The child's testimony as to the acts of her father constituting the offenses was clear, direct, and convincing. There was nothing inherently improbable in her statements. See People v. Jackson, 63 Cal.App. 2d 586, 593, 147 P.2d 94; People v. Carlson, 73 Cal.App.2d 933, 937, 167 P.2d 812. Corroboration of her testimony was not essential to a conviction. People v. Carlson, supra, 73 Cal.App. at page 936, 167 P.2d 812; People v. Smittcamp, 70 Cal.App.2d 741, 749, 161 P.2d 983. Furthermore, it was in part corroborated by her brother, a boy aged thirteen years.

The testimony adduced by the prosecution was uncontradicted except by defendant himself, who denied committing the acts to which the girl testified. The conflict was a matter for the jury to resolve.

[3] It is unnecessary to relate the testimony of the child. It will suffice to say that it amply supports the allegations of the information. The acts which she said were committed upon her by her father are clearly within the prohibition of section 288, supra, and are similar to those committed by the defendants in other cases in which they were held to constitute violations of the section. See People v. Pollock, 61 Cal. App.2d 213, 142 P.2d 328; People v. Lanham, 137 Cal.App. 737, 740, 31 P.2d 410.

We find no error in the record before us, and the judgment is, therefore, affirmed.

PEEK and THOMPSON, JJ., concur.

30 Cal.2d 54

JOHNSTON v. LONG et al.

L. A. 19900.

Supreme Court of California, In Bank.

May 6, 1947.

As Modified on Denial of Rehearing June 4, 1947.

1. Executors and administrators ⇐119

An executor is liable for any tort committed by him in administration of estate, and such rule is not confined to cases in which executor carries on operations that are outside scope of his authority.

2. Executors and administrators ⇐119

An executor is personally liable for torts committed by employees of business operated by executor pursuant to statute permitting court to authorize executor to continue operation of deceased's business. Probate Code, § 572.

3. Trusts ⇐235

Under respondeat superior doctrine, in absence of statutory change, torts committed by employees of a trustee in course of administration of trust estate subject trustee to personal liability.

4. Executors and administrators ⇐119
Trusts ⇐235

The rule of personal liability of a trustee or executor for torts of his agents in course of administration of estate is generally qualified by giving executor or trustee a right of reimbursement against assets of estate when he is personally without fault.

5. Executors and administrators ⇐93(1), 119

Where executor carries on decedent's business with proper authorization, contractual obligations properly incurred are chargeable against the estate and tort liability, where executor is not personally at fault, should ultimately be borne by the estate. Probate Code, § 572.

6. Executors and administrators ⇐119

Where executor carries on decedent's business with proper authorization, the executor rather than the estate is primarily liable for torts of agents of estate, under respondeat superior doctrine, but the executor has right of reimbursement out of assets of estate if executor is not personally at fault. Probate Code, § 572.

7. Executors and administrators ⇐93(1)

Under broad power granted to Probate Court by statute permitting court to authorize executor to continue operation of decedent's business, the court may require, as a condition to right to continue decedent's business, executor to insure against any tort liability arising out of conduct of business, with premiums for insurance payable out of assets of estate as proper expense of business. Probate Code, § 572.

8. Executors and administrators ⇐513(12)

Where executor has been discharged and estate distributed, executor is no longer subject to suit in his representative capacity.

9. Executors and administrators ⇐513(12)

After executor has been discharged, his connection with estate is severed and judgment against him does not bind estate.

10. Executors and administrators ⇐119

Where executor carried on decedent's business with proper authorization, the closing of the estate and discharge of executor did not cut off his personal liability for torts of himself and agents in course of administration. Probate Code, § 572.

11. Negligence ⇐134(3)

In action for injuries sustained when overhead garage door in falling shut cut off end of plaintiff's nose, evidence supported determination that status of plaintiff who was opening door to deliver gasoline was that of a business invitee and that he had right to open door.

12. Negligence ⇐134(5)

In action by invitee for injuries inflicted by overhead garage door in falling shut, evidence of negligence of garage employees as to repair of door and in failure to use reasonable care to discover a condition that involved an unreasonable risk of harm to those using door supported verdict for invitee. Probate Code, § 572.

13. Trial ⇐296(3)

In negligence action, instruction regarding defendant's duty to use ordinary care and diligence was not objectionable because of failure to mention status of plaintiff, where other instructions made it clear that the instruction complained of was given with reference to defendant's duty to a business invitee.

14. Executors and administrators ⇐451(3)

In personal injury action against executor who had been authorized to conduct decedent's business, instruction which referred to defendant as proprietor of business was not erroneous, since, as executor authorized to run business, he was liable as a proprietor.

15. Executors and administrators ⇐455

In action against executor by invitee for injuries inflicted by overhead garage door in falling shut, instruction that if executor through agents requested another to repair door and if executor paid therefor, law imputed to executor knowledge of condition and necessity for repair, was at most irrelevant and was not prejudicial, since defendant, as an executor authorized to run decedent's business, was liable for negligence of employees of estate in regard to condition of door.

16. Trial ⇐260(3, 8)

In action by invitee for injuries inflicted by overhead garage door in falling shut, refusal to give defendant's instruction regarding scope of invitation and as to burden of proof thereon was not error in view of instructions given.

17. Executors and administrators ⇐451(4)

In personal injury action against executor who had been authorized to conduct decedent's business, verdict against defendant "an individual acting as executor of the estate" was against defendant individually and quoted phrase was merely descriptive, so that verdict could be modified by eliminating the description. Probate Code, § 572.

18. New trial ⇐143(4)

In personal injury action against executor who had been authorized to conduct decedent's business, where verdict was returned against defendant "an individual acting as executor of the estate", verdict could not be impeached by statement of foreman and affidavit of another juror that jury understood verdict was against defendant in representative capacity. Probate Code, § 572.

19. New trial ⇐143(1)

Verdict may be impeached by jury only by showing that it was arrived at by chance.

20. Executors and administrators ⇐451(1)

In personal injury action against executor individually, where plaintiff's theory was that executor was not individually responsible and that estate would ultimately have burden of any judgment against executor but that theory was not presented to jury, it could not be relied on to show that jury was prejudiced against defendant.

21. Appeal and error ⇐207

Where defendant made no objection to statements of plaintiff's counsel at time they were made and answered them on their merits, defendant waived any right to claim that they constituted misconduct.

22. Appeal and error ⇐207

If statements of plaintiff's counsel in presence of jury panel were prejudicial, defendant should have called trial court's attention thereto by proper objection at time they were made, thus giving trial court opportunity to avoid any possible claim of prejudice by discharging jury panel and having jury selected from new panel that had not heard remarks.

23. Executors and administrators ⇐455

In action against executor individually on tort liability incurred by him in conducting decedent's business, erroneous ruling of trial judge that defendant was subject to suit in his representative capacity as executor did not prejudice defendant in view of court's instructions. Probate Code, § 572.

24. Appeal and error ⇐1004(1)

Reviewing court should not interfere with jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by facts that it shocks court's sense of justice and raises a presumption that it was result of passion and prejudice.

25. Appeal and error ⇐1004(1)

The amount of verdict must be viewed in light of evidence before trial court.

26. Appeal and error ⇐1004(3)

Where trial court, in denying motion for new trial, found that verdict was not excessive, trial court's decision added weight to jury's award.

27. Appeal and error ⇐1004(3)

A reviewing court does not ordinarily substitute its judgment for that of jury and trial court which have evaluated in terms of damages the pain, humiliation, disfigurement and loss of earning capacity suffered by plaintiff.

28. Damages ⇐132(1)

Verdict for $87,575 including $73,000 general damages to salesman and truck driver for loss of end of nose for which he had undergone 31 operations for purpose of alleviating disfigurement and for which he faced additional operations was not excessive.

29. Damages ⇐43

Expenses incurred for restorative surgery by plaintiff who had end of nose cut off through negligence of defendant was properly allowed as an element of damages.

EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Personal injury action by Harold R. Johnston against Ralph C. Long and A. J. Verheyen individually and as executors of the estate of C. A. Gray also known as Charles Arthur Gray, deceased, and others. A demurrer filed by defendant, J. O. Miller, trustee was sustained without leave to amend. A. J. Verheyen, the coexecutor, died before trial and the action was dismissed as to him. From an adverse judgment, Ralph C. Long, individually and as executor of the estate of C. A. Gray, deceased, appeals.

Affirmed.

Prior opinion of District Court of Appeal, 171 P.2d 538.

Jennings & Belcher, of Los Angeles, and Monroe & McInnis, of San Diego, for appellants.

Forrest A. Betts, of Los Angeles, and Wm. H. Macomber, of San Diego, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment entered in favor of plaintiff for damages for personal injuries sustained by the latter when an overhead door fell on him as he was entering a garage of the C. A. Gray automobile agency in San Diego. The garage was owned and operated by C. A. Gray during his lifetime. At the time of the accident it was operated as part of his estate according to the terms of his will and pursuant to section 572 of the Probate Code by Ralph C. Long and A. J. Verheyen as executors. In accordance with the wishes of the decedent as expressed in the will, the actual operation of the business was left in the hands of John Berger, who had been manager of the business during decedent's last illness. Plaintiff's injuries occurred when he was opening the door to make a delivery of gasoline before the premises were opened for business. The door was of the overhead type, operated by means of counterweights connected to the door by a wire cable. While plaintiff was opening the door the cable pulled from its fastening, and the door in falling shut cut off the end of plaintiff's nose.

Eight months after the accident occurred, the assets of the estate were distributed to J. O. Miller, as trustee, the estate was closed and the executors were discharged. Four months later plaintiff brought this

action naming as defendants, J. O. Miller, the trustee; the San Diego Planing Mill Company, the company that had installed the door and put in a new cable before the accident; and Long and Verheyen, both as individuals and as executors of the estate of C. A. Gray. A demurrer filed by Miller, the trustee, was sustained without leave to amend. A demurrer was also sustained in favor of the San Diego Planing Mill and judgment was entered for that defendant but, on appeal, the ruling and judgment were reversed. (Johnston v. Long, 56 Cal.App. 2d 834, 133 P.2d 409.) Demurrers filed by defendant Long were overruled. A. J. Verheyen, the coexecutor, died before the trial, and the action was dismissed as to him. Defendant, at the opening of the trial, objected to the introduction of any testimony against him in his representative capacity, but the objection was overruled and the case went to trial against Long, as an individual, Long, as an executor, and the San Diego Planing Mill Company. Throughout the Trial, Long also made several motions that the case be dismissed as to him in his capacity as executor, including motions for nonsuit and directed verdict, but all such motions were denied.

The jury returned a verdict for $87,575 "against defendant Ralph C. Long, an individual acting as executor of the estate of C. A. Gray, deceased," and a special verdict in favor of the defendant planing mill that there was no negligence on its part or on the part of its employee who had repaired the door. Defendant Long appeals on the grounds that an executor may not be sued in his representative capacity after the estate has been closed, the assets distributed, and he has been discharged as executor; that the verdict is indefinite and uncertain in that it does not disclose whether the jury intended to find against Long as an individual or against him as an executor; that after an estate has been closed and the executor discharged, the executor may not be held personally liable for the negligence of an employee in a business conducted by the executor pursuant to section 572 of the Probate Code; and that the manner in which the trial was conducted and the issues presented to the jury so prejudiced the defendant as to deprive him of a fair trial on the issue of his personal liability.

[1, 2] A basic issue in this case is whether an executor is personally liable for torts committed by employees of a business operated by him pursuant to section 572 of the Probate Code. An executor has always been liable for any torts committed by him in the administration of the estate. (Eustace v. Jahns, 38 Cal. 3, 21; see Nickals v. Stanley, 146 Cal. 724, 727, 81 P. 117; Rapaport v. Forer, 20 Cal.App.2d 271, 278, 66 P.2d 1242, cases collected 44 A.L.R. 637, 640.) Before the 1929 Amendment, St.1929, p. 157, to section 1581 of the Code of Civil Procedure (now section 572 of the Probate Code), if an executor elected to carry on decedent's business without authorization in the will (see Estate of Ward, 127 Cal.App. 347, 353, 15 P.2d 901), he did so at his own risk and his liability for anything that occurred in the course of conducting the business was a personal one, with no right of reimbursement from the estate. Estate of Burke, 198 Cal. 163, 166, 244 P. 340, 44 A.L.R. 1341.

Section 572 of the Probate Code provides: "After notice to all persons interested in an estate, given in such manner as may be directed by the court or a judge thereof, the court may authorize the executor or administrator to continue the operation of the decedent's business to such an extent and subject to such restrictions as may seem to the court to be for the best interest of the estate and those interested therein."

Defendant contends that since an executor authorized under this section to operate a decedent's business no longer does so at his own risk, he is not liable for torts committed in the course of business operations when he is free from fault, and that to construe the section otherwise would impose too heavy a burden on executors who must operate businesses. This contention overlooks not only the fact that the executor is not required to operate the business, but must petition the court for permission to do so, but the fact that the rule as to the personal liability of an executor for torts committed during the course of his admin-

istration is not confined to cases in which the executor carries on operations that are outside the scope of his authority. (See Nickals v. Stanley, supra; Rapaport v. Forer, supra; 44 A.L.R. 637, 640.) Personal liability for torts committed during operations that are otherwise within the proper scope of the executor's authority is not a new burden. There is nothing in section 572 to indicate that any change in the rule as to personal liability was intended. The principal effect of the 1929 amendment was to provide an authorization, should the will fail to provide one, for the executor to carry on the decedent's business. Estate of Ward, supra; Estate of King, 19 Cal.2d 354, 359, 121 P.2d 716.

Defendant also contends that the rule of respondeat superior cannot be applied against an administrator or executor who gains no personal advantage from the operation of a decedent's business. In making this contention, defendant relies on Campbell v. Bradbury, 179 Cal. 364, 371, 176 P. 685 and Fetting v. Winch, 54 Ore. 600, 607, 104 P. 722, 38 L.R.A.,N.S., 379, 21 Ann.Cas. 352. In Campbell v. Bradbury, this court held that an incompetent under guardianship was responsible for the negligent operation of an elevator in a building operated under the control of the guardian and rejected expressly any analogy to the liability of executors in similar situations. A judgment imposing liability on an incompetent to be paid out of assets controlled by a guardian is clearly distinguishable from a judgment imposing liability on an estate. The incompetent is a person and would still be liable after the discharge or removal of the guardian, but the estate is not even a legal person and after distribution of the assets and discharge of the executor it no longer exists. The court in the Campbell case had some one before it upon whom the liability could be imposed, and there is some justification for avoiding circuity of action by imposing the liability initially on the party that would ultimately bear it even if the guardian were personally liable. The answer to this problem by the Oregon court in Fetting v. Winch, supra, solves nothing except that a plaintiff would have no right of recovery, no matter how just his case. In the Fetting case, although the estate was still open, the court held that the executor could be held in neither his individual nor his representative capacity. He was not individually liable because not personally negligent, and the estate was not liable because it could not commit a tort.

With regard to obligations incurred in the operation of businesses under section 572, it has been held that while the administration continues, contractual obligations are properly chargeable against the estate but do not become liens on the assets of the estate. Estate of Allen, 42 Cal.App.2d 346, 348, 108 P.2d 973; Estate of Smith, 16 Cal.App.2d 239, 241, 60 P.2d 574. Defendant relies, however, on California Employment Stabilization Commission v. Hansen, 69 Cal.App. 2d 767, 770, 160 P.2d 173, in which the court stated that the obligations incurred in managing the decedent's business pursuant to section 572 are charges against the estate and that after a final decree of distribution the executor is not liable for contributions under the Unemployment Insurance Act when the claimant has failed to file a creditor's claim against the estate. Not only was that case concerned with the construction of the Unemployment Insurance Act, but there was no issue of fault on the part of the executor. Nor is it applicable if the plaintiff has no provable and liquidated claim against either the executor or the estate at the time the estate is closed.

[3] Under the doctrine of respondeat superior, except where the rule may have been changed by statute, torts committed by employees of a trustee in the course of administration of the trust estate subject the trustee to personal liability. (Rest. Trusts, sec. 264, comment (b); cases collected, Vol. 3, Part 2, Bogert, Trusts and Trustees, § 731, p. 532; 2 Scott on Trusts, § 264; 43 Harv.L.Rev. 1122, 1124.) Most cases have recognized that the same rules determine the personal liability of an executor for torts committed in the course of administration. (See Kirchner v. Muller, 280 N.Y. 23, 28, 19 N.E.2d 665, 127 A.L.R. 681; Clauson v. Stull, 331 Pa. 101, 103, 200 A. 593; cases collected 43 Dick.L.Rev. 143; 44 A.L.R. 637, 640; Vol. 3, Part 2, Bogert, op. cit. supra, § 731, p. 533.) Ex-

cept for the Oregon case of Fetting v. Winch, supra, the cases hold that the doctrine of respondeat superior is applicable to an executor and that he is personally liable for the torts of employees. (Fischer v. McNeely, 110 Wash. 283, 284, 188 P. 478, 14 A.L.R. 369; Guatti-McQuade Co. v. Flynn, 79 Misc. 430, 431, 140 N.Y.S. 135; Kalua v. Camarinos, 11 Haw. 557, 558; see Bogert, loc.cit. supra.)

[4] The rule of personal liability of a trustee or executor for the torts of his agents in the course of administration is now generally qualified by giving the executor or trustee a right to reimbursement against the assets of the estate when he is personally without fault. (Rest.Trusts, sec. 247; cases collected Vol. 3, Part 2, Bogert, op. cit. supra, § 734; Scott, op. cit. supra, sec. 247; 44 A.L.R. 637, 676.) The Restatement also provides that when the claim against the trustee is uncollectible because his personal assets are insufficient, the plaintiff may reach the trust assets to the extent that the trustee would have had a right of reimbursement. (Rest.Trusts, § 268; see also, Scott on Trusts, § 268; Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee, 22 Col.L.Rev. 527.) A few cases have gone further and allowed the trustee to be sued in his representative capacity in order to avoid circuity of action. (In re Raybould, 1900, 1 Ch. 199, 201; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 234, 280 S.W. 499, 44 A.L.R. 627; contra, Kirchner v. Muller, supra.) None of these authorities, however, holds that the trustee is absolved from personal liability (see Stone, loc. cit. supra), and it is clear that any right of action that the plaintiff has against the estate is purely a derivative one.

[5] When the executor carries on the decedent's business with proper authorization, there is no doubt that contractual obligations properly incurred are chargeable against the estate and that tort liability, where the executor is not personally at fault, should ultimately be borne by the estate. If section 572 has any effect on the question of tort liability of the estate, the purpose of that section as well as the purpose of any authorization in the will for the carrying on of the business may be fully carried out by applying the rules of the Restatement of Trusts in regard to such liability as well as the representative's right of reimbursement out of the assets of the estate.

[6, 7] It has been contended, however, that the doctrine of respondeat superior should apply directly against the executor in his representative capacity and not subject him to personal liability when he is without fault. Although this precise question has never previously been decided by the California courts, there are good reasons for not departing from the general rule. To hold the estate rather than the executor primarily liable for the torts of the agents of the estate, it would be necessary to apply the rules governing the liabilities of a corporate officer and to abandon those governing a trustee, which have heretofore been held applicable to executors. It is clear that an officer of a corporation is not liable under the doctrine of respondeat superior for the torts of corporate employees except where the officer is at fault. The liability falls upon the corporation. Unlike a corporation, however, an estate is not a legal or corporate entity (Tanner v. Best, 40 Cal.App.2d 442, 444, 104 P.2d 1084), and cannot be a principal. Nor can the executor properly be regarded as the agent of the heirs or distributees, for his authority is derived from the will, and the control that is exercised over him is the control exercised by the probate court. (Eustace v. Jahns, 38 Cal. 3, 22.) His position is more nearly that of a trustee or of the decedent himself than that of an agent. The employees are thus regarded as his employees and his liability for their actions should be that of any employer. (Kalua v. Camarinos, 11 Haw. 557, 558.)

Moreover, even if it be assumed possible by some procedure to hold the estate directly liable for the torts of employees without any right against the executor personally, where the executor is not personally at fault, there are practical objections to such a procedure. Under the existing system of administration such a procedure would not afford the heirs adequate protection. The only method available

for reaching the assets of the estate is an action against the executor in his representative capacity. (Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 99, 141 P. 922, 52 L.R.A.,N.S., 1152, Ann.Cas. 1915D, 742; Tanner v. Best, supra.) If the plaintiff could recover directly from the estate in an action against the executor in his representative capacity, the heirs would have no assurance that the question of the personal fault of the executor would be properly tried. It would not be to the interest of either the plaintiff, who would be attempting to recover out of the assets of the estate, or the defendant, whose interest as an individual and as an executor would be in conflict (see Kirchner v. Muller, 280 N.Y. 23, 28, 19 N.E.2d 665, 127 A.L.R. 681), to show personal fault on the part of the executor. Under the general rule that the executor is personally liable for the torts committed by him or his agents in the course of administration, the plaintiff may recover a judgment against the executor personally and the question of the executor's fault is determined in the probate court, where the interest of the heirs may properly be protected. (See Atkinson on Wills, 611.)

It is contended that this application of the respondeat superior doctrine may have harsh results if the executor is not able to recover against the estate and his own property is subject to execution under the judgment. Ordinarily, if the executor is without fault he is protected by his right of reimbursement out of the assets of the estate. Moreover, this application of the doctrine of respondeat superior is no harsher than its usual application to a principal who may gain no profit from the actions of his agent (Silva v. Provideuce Hospital, 14 Cal.2d 762, 775, 97 P.2d 798) and there is no estate from which he can get reimbursement. The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business. (See Smith, Frolic and Detour, 23 Col.L.Rev. 444, 456 et seq.) Under the broad power granted to the probate court under section 572 of the Probate Code, the court may require, as a condition to the right to continue decedent's business, the executor to insure against any tort liability arising out of the conduct of the business, with the premiums for such insurance payable out of the assets of the estate as a proper expense of the business.

[8, 9] In the present case, even if there were either a direct or derivative right against the executor in his representative capacity, defendant Long could not be held liable in that capacity, for he was no longer an executor and there was no estate for him to represent at the time of the suit. The purpose of such a suit is to reach the assets of the estate under the executor's control. Golden Gate Undertaking Co. v. Taylor, supra; see Sterret v. Barker, 119 Cal. 492, 494, 51 P. 695. Where the executor has been discharged and the estate distributed, the executor is therefore no longer subject to suit in his representative capacity. (Union Savings Bank v. De Laveaga, 150 Cal. 395, 398, 89 P. 84. There would be no purpose in such a suit, for the executor has no assets of the estate under his control. Similarly, after an executor has been removed, his connection with the estate is severed and a judgment against him does not bind the estate. More v. More, 127 Cal. 460, 462, 59 P. 823.

[10] In this case, therefore, the plaintiff could proceed directly against the assets of the estate only by suing the distributee. This action was originally instituted against the distributee as well as against the executors, but a demurrer was sustained without leave to amend, and a judgment, which has now become final, was entered in favor of the distributee. Since the distributee is not a party to this appeal, it cannot be decided in this case whether the executor has a right of indemnity against the distributee to the extent of the assets distributed. (See Rest.Trusts, §§ 249(2) and 279 for the Restatement rules as to the trustee's right of indemnity after distribution and the derivative rights of a tort plaintiff.) The suggestion that a plaintiff should have only a direct right against the distributee after an estate has been closed and the assets distributed is completely unsupported by authority. Moreover, such a rule would impose a consider-

able burden on the plaintiff in a case in which the assets are widely distributed among many legatees, who may all be residents of other jurisdictions and have no property within this state. There are not, therefore, sufficient reasons for deviating from the general rule of personal liability of the executor for the torts of himself and his agents in the course of administration, and it is clear that in closing the estate an executor does not thereby cut off his personal liability for such torts.

[11] Although defendant Long could have been held personally liable for the injuries sustained by the plaintiff in this case, the question remains whether he was denied a fair trial on the issue of his personal liability. The theory of the plaintiff's case against defendant was that he was a business invitee on the premises operated by the defendant and that the falling of the door was caused either by the negligence of an employee of the garage in repairing the door or by the failure of the garage employees to discover a dangerous condition that might have been discovered by reasonable inspection. Although there was some conflict in the evidence as to plaintiff's right to be on the premises at the time of the accident and as to his right to operate the door, there was substantial evidence to support the conclusion that his status was that of a business invitee and that he had the right to open the door.

[12] The basis for the theory that the accident occurred because of the negligence of an employee in repairing the door was the failure of an employee named Budhi, the building superintendent, to have a nut welded on the end of the wire cable. The cable was replaced shortly before the accident (the exact date was never established), by a carpenter employed by the codefendant, the San Diego Planing Mill Company. This carpenter, who had also originally installed the door, testified that he did not tie the end of the wire cable to prevent it from unwinding, as required by the instructions that came with the original hardware. There was, therefore, sufficient evidence to warrant an inference that the cable became disconnected because of unwinding of the cable. The carpenter testified that he did not tie the cable because at the time of the original installation Budhi had had a nut welded to the end of the cable, and on replacing the cable the carpenter understood that this welding was to be done again. There was evidence to the effect that such welding tended to weaken the cable and that, for this reason, it was not done on similar doors in San Diego. Budhi testified that he did not have anything done to the door because the carpenter informed him that it was unnecessary. This testimony was corroborated by another witness. There was therefore sufficient evidence upon which the jury might have concluded that the accident was caused by the negligence of the employees of either of the defendants or of neither. (See Johnston v. Long, 56 Cal.App.2d 834, 837, 133 P.2d 409, for the law of the case as to the liability of the defendant planing mill.)

The other ground on which defendant may have been held liable was the failure on the part of the garage employees to use reasonable care to discover a condition that involved an unreasonable risk of harm to those using the door. (Rest., Torts, § 343; Barbieri v. Law, 209 Cal. 429, 433, 287 P. 464.) The ends of the cable were not properly tied, and the evidence was sufficient to warrant an inference that this condition was the cause of the cable's becoming unfastened. Although there was evidence that the accident might not have happened had plaintiff opened the door in a proper manner, the questions of causation and of contributory negligence were submitted to the jury under proper instructions, and there is substantial evidence that a reasonable inspection would have disclosed a condition involving an unreasonable risk of harm to anyone operating the door.

[13] Defendant contends that the court erred in giving the following instruction:

"It was the duty of the defendant Ralph C. Long, to use ordinary care and diligence in keeping in repair the mechanism and appliances maintained by said defendant for the use of the passageway, and if you find from a consideration of all of the evidence that the accident resulting in the injuries to plaintiff occurred by reason of a defect in said mechanism, or appliances, and find that such defect either was known or, by

the exercise of reasonable care, should have been known to the defendant Ralph C. Long, prior to the happening of the accident then you will find said Ralph C. Long to have been negligent with reference thereto, and if you further find that, without negligence on the part of plaintiff, such negligence was a proximate cause of the accident in question, your verdict will be in favor of the plaintiff and against the defendant Ralph C. Long."

It is defendant's position that since this instruction does not mention the status of the plaintiff, the jury was instructed that as a matter of law Long was liable whether or not the jury concluded that plaintiff was an invitee. There is no merit whatever in this contention, for the instruction complained of was read to the jury along with the instructions on the question of plaintiff's status. The paragraph immediately preceding the foregoing quotation makes it clear that the instruction complained of was given to the jury with reference to defendant's duty to a business invitee. Two sentences above the matter quoted the court stated, "you are instructed that *where one as an invitee* is lawfully using an entry or passageway, he is not required to employ any extraordinary degree of care or circumspection for the ascertainment of whether or not the entry or passageway is safe." (Italics added.) The sentence immediately preceding the challenged instruction explains that a business invitee, if not himself negligent, has a right to rely on the presumption that the passageway is maintained in a proper and safe condition. The instruction complained of then goes on to explain the defendant's duty to such an invitee.

Following the paragraph complained of, the trial court again referred to the duties of the defendant to an invitee. The next paragraph makes clear what the jury was told by these instructions. It reads as follows:

"You will note that there are two questions to consider in connection with whether plaintiff received injuries as a result of lack of care on the part of the proprietor or proprietors of said building. The first question is with reference to his status upon the premises and *he must prove that he was an invitee in order to establish that he was a person toward whom reasonable care must be exercised. It is then to be determined whether it has been established that* the proprietor of said premises failed to use ordinary care or negligently failed to use ordinary care and whether such negligence was the proximate cause of plaintiff's injuries." (Italics added.)

[14] Defendant also contends that the court held as a matter of law that defendant was the proprietor of the business. The instructions continue, however, as follows: "It is, therefore, an essential element of plaintiff's cause of action against the defendant, Ralph C. Long, to *establish* by a preponderance of the evidence that the defendant, Ralph C. Long, was a proprietor of said building." (Italics added.) Following this instruction there is an instruction that Long is not liable as an executor. The rule of respondeat superior is then explained to the jury. There was clearly no error in referring to defendant as a proprietor of the business, for, as an executor authorized to run the business, he was liable as the proprietor.

[15] The second instruction complained of by defendant reads as follows: "You are instructed that if the defendant Ralph C. Long by and through his officers or agents, requested the defendant Planing Mill Company to repair the door, *and if the evidence establishes that said Long paid therefor,* then the law imputes to said Long knowledge of the condition and necessity of repair." (Italics added.) Petitioner contends that by this instruction, the trial court, in effect, "instructed the jury, as a matter of law, that if a bill was rendered for the repairs upon the door and was paid by Long then full knowledge of the condition was imputed to Long as a matter of law." The instruction, however, merely informed the jury that Long was liable for the acts of his agents under the doctrine of respondeat superior and that their knowledge of the condition of the door at the time of the repairs was imput-

ed to him. By paying the bill for the repairs, Long merely ratified the agency in getting the repairs done. In any event, defendant Long, as an executor of the estate authorized to run the business, was liable for the negligence of the employees of the estate in regard to the condition of the door. Whether or not he paid the bill himself was therefore immaterial. For this reason the instruction was at most irrelevant and could not have been prejudicial.

[16] Defendant also contends that the court erred in refusing to give the following instruction requested by defendant Long:

"In considering the question of whether a person entering the premises of another is an invitee, you are instructed that a person entering premises or having authority to enter premises for business purposes becomes an invitee in the premises to the extent reasonably necessary for carrying on the business purposes. The fact, however, that a person is such an invitee does not make him an invitee to all parts of the premises, nor does it make him an invitee for the purpose of using any and all appliances that may be on the premises. In such instance he is an invitee only to the extent reasonably to be expected in connection with the business purposes for which he is invited to enter the premises. Such invitation implies the right to enter such portions of the premises and to make use of such appliances therefor as are reasonably to be expected in connection with the purpose of the invitation but no further."

Defendant makes the following concession in his opening brief: "It has been at all times conceded that for the purpose of delivering gasoline he [plaintiff] was an invitee." Defendant's only claim of error, therefore, is that the jury was not properly instructed as to the scope of the invitation and as to the burden of proof thereon. The questions of fact for the jury, as heretofore stated, involved plaintiff's right to be on the premises at the time of the accident and his right to operate the door. The instructions given by the trial court presented these issues to the jury, and the jury was properly instructed in regard to the burden of proof. Therefore the trial court did not err in refusing defendant's requested instruction.

The court instructed the jury as to the status of an invitee in the following terms:

"One who goes upon the premises of another as a business visitor at the express or implied invitation of the owner or occupant, and in connection with some mutual business interest with the occupant or with the latter's own business, is called in law an invitee. *You are to determine whether the plaintiff Johnson was or was not an invitee upon the premises* and for the use thereof, *at the time and place* of the happening of the accident." (Italics added.)

The court also instructed the jury with respect to the duty of a proprietor to a business invitee and then stated, "You will note that there are two questions to consider in connection with whether plaintiff received injuries as a result of lack of care on the part of the proprietor or proprietors of said building. The first question is with reference to his status upon the premises and *he must prove* that he was an invitee in order to establish that he was a person toward whom reasonable care must be exercised." (Italics added.) The jury was properly instructed as to the meaning of the requirement that the plaintiff must prove the material elements of his case.

The jury was further instructed "that where without negligence on his part a person is injured while *lawfully* using an entry or passageway upon which he is a business invitee, and where such injuries thus received come as a proximate result of any negligence on the part of the party charged with the maintenance of such entry or passageway, the injured party is entitled to recover.

"Toward an invitee, he who extended the invitation, express or implied, is obligated to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee *in the reasonable pursuit of a purpose embraced within the invitation.*" (Italics added.)

The jury was instructed in effect that it was a question of fact for it to determine whether plaintiff had a right to operate the door, i.e. whether plaintiff was lawfully using the doorway in the reasonable pursuit of the purpose embraced within the invitation. It was explained to the jury that plaintiff had alleged "that with the knowledge and acquiescence of defendants and for the purpose of making * * * deliveries of gasoline he was accustomed to enter the garage building through a large overhead lift type of door." The jury was instructed that defendant Long denied this and other allegations of plaintiff. They were also told that the co-defendant planing mill claimed that the automobile company "did not at any time, invite the plaintiff or other persons than its own servants, employees and agents to use said door, or any apparatus connected therewith. * * *"

The instruction requested by defendant Long would have presented the last issue more clearly to the jury, but since the issues referred to in that instruction were adequately presented to the jury in other instructions, it was not error to refuse defendant's instruction.

Although there was sufficient evidence to sustain a judgment against defendant Long personally, the evidence was conflicting, and the question remains whether there were any errors committed during the course of the trial that may have prejudiced defendant by leading the jury to reach its verdict on some ground other than the evidence. Defendant contends that the court erred in submitting to the jury a form of verdict that was bound to be confusing and in ruling on the right to sue defendant as executor after the estate was closed, and that the effect of these errors was to cause the jurors to believe that by returning a verdict "against defendant Ralph C. Long, an individual acting as executor of the estate of C. A. Gray, deceased," they were imposing a liability upon the defendant that would ultimately be borne by the estate and not by Long as an individual.

[17-19] The verdict in question was submitted to the jury at plaintiff's request, and it was the only form of verdict submitted with regard to the liability of defendant Long. The trial court refused defendant's request to have the verdict clarified by the jury. Defendant contends that this was error on the ground that the verdict is too vague and uncertain to support a judgment against defendant Long. The verdict, however, is "against defendant Ralph C. Long" and the phrase "an individual acting as executor of the estate of C. A. Gray, deceased" is on its face merely descriptive. The verdict may be modified by eliminating this description. (See St. Mary's Hospital v. Perry, 152 Cal. 338, 340, 92 P. 864; Kirchner v. Muller, 280 N.Y. 23, 28, 19 N.E.2d 665, 127 A.L.R. 681.) Defendant invoked a statement made by the foreman of the jury and an affidavit of another juror, to show that the jury understood that the verdict was given against Long in his representative capacity. A verdict may be impeached by the jury, however, only by a showing that it was arrived at by chance. (Toomes v. Nunes, 24 Cal.App.2d 395, 399, 75 P.2d 94; Saltzman v. Sunset Tel. etc. Co., 125 Cal. 501, 505, 58 P. 169; see 23 Cal. L.Rev. 218.)

[20] Defendant contends that it is apparent from the record that the jurors were confused by the form of the verdict and that certain other alleged errors during the trial led them to return a verdict in the belief that it was against the estate and that liability thereunder would be borne by the distributee and not by Long. Defendant's claim of prejudice is based on an analogy to the prejudice involved in informing a jury that a defendant in a personal injury action carries liability insurance.

It cannot be disputed that there was considerable confusion on the part of counsel for both parties and on the part of the trial judge as to the nature of the liability of an

executor for the torts of an employee of an estate, particularly when the estate is closed before the action is brought. It does not follow, however, that the confusion was communicated to the jury, for most of the discussion of the nature of Long's liability occurred in the absence of the jury.

The theory of plaintiff's right to sue Long in a representative capacity presented at the trial was that although the estate had been closed, Long was liable as an individual acting as an executor, a vague status that apparently includes his capacity both as an individual and as an executor. It was contended that the verdict and judgment should describe both capacities because defendant Long had a right of reimbursement out of the assets of the estate and that if it was error so to describe defendant Long, this court, on appeal, should modify the judgment in accord with its view of the law. "We must sue the executor and we must sue him as an individual but we do not sue him as Long. We sue him as Ralph C. Long, the individual, who is the executor." It was claimed that this was necessary because "he is not individually responsible" and the estate will ultimately have the burden of any judgment against him. This theory, however, was not presented to the jury, and it cannot therefore be relied on to show that the jury was prejudiced against defendant Long.

The record indicates, however, that in the presence of the jury panel but before any of the prospective jurors were impaneled, plaintiff's counsel made certain statements that should not have been made in the jury's presence. In reply to a question by defendant's counsel as to whether plaintiff considered the action against Long as one against him personally, counsel for plaintiff stated that the situation is, "That you sue the executor individually and that under—at least the dictum of the cases that we have, and certainly under the just rule—that obligation of the individual is transferred to the estate, eventually." In answer to a question by the trial court as to whether the plaintiff had attempted to charge the executors (Long and Verheyen) "with liability as individuals in a capacity other than as executors of the estate," counsel replied that he didn't know. "But I am only trying to say that the business is operated by them and that under the law we do just what your Honor has said, strange as it might be, we sue them individually because they are running the business and apparently the circuitous approach is this: That if they incur this liability, and they have incurred it not because of any misfeasance of their own, they are entitled to recover from the estate." At the time these statements were made defendant Long made no objection that they were prejudicial but merely questioned the correctness of plaintiff's view of the law that the liability was directly or indirectly that of the estate.

[21, 22] Defendant claims that the statements constituted misconduct of counsel and urges this alleged misconduct as a ground for reversal, having called the trial court's attention to the prejudicial character of the statements in an affidavit in support of his motion for a new trial. Since defendant made no objection to the statements at the time they were made and answered them on their merits, he waived any right to claim that they constituted misconduct. If the statements were prejudicial, defendant should have called the trial court's attention thereto by a proper objection at the time they were made, thus giving the trial court an opportunity to avoid any possible claim of prejudice by discharging the jury panel and having the jury selected from a new panel that had not heard the remarks. (See Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 787, 117 P.2d 850; Estate of Golden, 4 Cal.2d 300, 309, 48 P.2d 962; cases collected 108 A.L.R. 756, 757.) Nor can defendant rely on these statements to show that any error committed during the subsequent course of the trial resulted in prejudice. Since defendant's counsel was willing at the time to discuss in the presence of the jury panel the question of the nature of the executor's liability, he contributed to any prejudice that may have resulted from this discussion. In any event, this discussion took place before the impaneling of the jury, and those members of the panel who later became jurors in this case had not yet been advised of the nature of the case they were to decide. It is doubtful whether they followed the remarks of counsel. Moreover,

at the close of the trial, the jurors were instructed that they were not to consider any statements of counsel occurring during the course of the trial.

[23] The defendant also contends that the error committed by the trial judge in ruling that Long was subject to suit in a representative capacity contributed to the alleged confusion arising from the form of the verdict. After the jury was impaneled and at the commencement of the trial of the case, defendant Long objected to the introduction of any testimony against him in a representative capacity. The trial court overruled the objection. This ruling was made in the jury's presence, but there was no discussion at that time of the nature of Long's liability. The matter was subsequently discussed in the absence of the jury, and the trial judge again ruled that Long could be sued as an executor. The same ruling was made on defendant's motion for a directed verdict, but the jury was not present and could not have been prejudiced by the ruling.

The only basis for the claim that the rulings in question constituted prejudicial error is the fact that after the first ruling defendant Long thereafter defended the case in both capacities. It is true that this served to call the jury's attention to the fact that defendant Long had been an executor of the estate, but obviously it was necessary for the jury to be informed of this fact, for the very basis of the case against Long was that he had been one of the executors at the time the injury occurred. Even if it be assumed that the effect of the erroneous ruling of the trial court was to place an added and unnecessary burden on defendant Long to defend the case in a non-existent capacity, it does not follow that the jury assumed that any judgment against Long would have to be paid by the estate that he was supposed to represent. If the jury made this assumption it was in the face of a clear and correct instruction to the contrary. The trial court instructed the jury as follows: "You are further instructed that under the laws of the State of California no action may be maintained against the estate of C. A. Gray or against the defendant, Ralph C. Long, in his capacity as an Executor of said estate. As to the defendant, Long, the action which is submitted to you for determination is against him as an individual. The two defendants, therefore, involved in this action are Ralph C. Long and San Diego Planing Mill, a corporation."

At another point in the instructions the court reminded the jurors that they were not concerned with the liability of the estate or of Long as an executor. They were informed that their attention had been "called to the fact that the estate of C. A. Gray, deceased, is not, under the law of this state, answerable to the plaintiff in this action. An executor of an estate who operates a business is answerable, if at all, as an individual." In view of these instructions, it cannot be assumed that the jury believed that the judgment was against Long in any capacity other than as an individual or that any liability that might result from their verdict would be borne by any one but Long.

Defendant contends, however, that these correct instructions may not be relied on to sustain the jury's verdict because the jurors were also instructed that if the codefendant planing mill was negligent and this negligence combined with the negligence, if any, "of the defendant Ralph C. Long, as an individual and executor, to proximately cause said injury * * *, then your verdict will be in favor of the plaintiff and against all defendants." This instruction, by itself might be understood as informing the jury that Long could be held liable as an executor and as an individual, but in view of the instruction that he could not be sued as an executor and that the only defendants involved in the action were Ralph C. Long and San Diego Planing Mill, it may not be assumed that the jury so interpreted this instruction. When the three instructions are considered together, it is apparent that the jury was correctly instructed that the two defendants in this case were Long as an individual and the codefendant planing mill; that neither the estate nor Long as an executor was subject to suit; that if a verdict were returned against Long it would be because he was answerable for the accident as an individual; and that if the negligence of an employee of the planing mill com-

bined with the negligence of an employee of the estate to cause the accident, then both Long as an individual and the planing mill would be liable. Whether or not the confusion among counsel and the trial court as to the nature of the tort liability of an executor after his discharge was unavoidable, it is apparent from the record that aside from the statements of plaintiff's counsel in the presence of the jury panel, which were waived by defendant, there was nothing presented to the jurors that may be used to show that the erroneous ruling and the form of the verdict resulted in confusing them to such an extent that they returned a verdict based on prejudice rather than upon the evidence before them.

[24-26] Defendant contends that the jury's verdict awarding plaintiff $87,575 is plainly excessive in view of the fact that about $73,000 of that sum constituted general damages. The verdict is undoubtedly high. Nevertheless, it is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice. (Zibbell v. Southern Pacific Co., 160 Cal. 237, 255, 116 P. 513.) The amount of the verdict must be viewed in the light of the evidence before the trial court. (Zibbell v. Southern Pacific Co., supra, 160 Cal. at page 254, 116 P. 513.) The trial court, in denying a motion for new trial, found that the verdict was not excessive. This decision lends weight to the jury's award. (Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 585, 203 P. 768; McSweeney v. East Bay Transit Co., 60 Cal.App.2d 807, 814, 141 P.2d 787.) There is considerable support in the evidence for the trial court's approval of the amount awarded.

It would accomplish no purpose to recite all the evidence relating to plaintiff's injuries. It may be noted, however, that for a period of over four years he has undergone 31 operations for the purpose of alleviating his disfigurement and he faces additional operations. The accident rendered him so unsightly that it would be unreasonable to expect him to forego restorative surgery. His doctors were highly qualified in plastic surgery, and they informed the jury at length of the steps already taken to repair, in slight measure, the damage to his appearance. The operations were complicated and painful. Many of the operations consisted of the raising of pedicles from various parts of his body and attaching them first to parts of his face and then to his nose. This procedure was repeatedly unsuccessful, each attempt requiring new removals of substantial amounts of skin and flesh. For over four years plaintiff has spent a large part of his time in the hospital. It is difficult to predict how many remaining operations may be necessary.

[27, 28] Defendant concedes that plaintiff is "very considerably disfigured" and the likelihood is that he always will be. Since plaintiff is a salesman as well as a truck driver, he has suffered a substantial loss in earning capacity. A reviewing court does not ordinarily substitute its judgment for that of the jury and trial court, which have evaluated in terms of damages the pain, humiliation, disfigurement, and loss of earning capacity suffered by a plaintiff. (Kelley v. Hodge Transportation System, 197 Cal. 598, 610, 242 P. 76.) In view of the extensive testimony concerning plaintiff's medical history and the uncertainty of his future restoration, we conclude that the trial court did not err in its refusal to grant a new trial or to reduce the award on the ground of excessive damages.

[29] Defendant, in reliance upon Karr v. Parks, 44 Cal. 46, also contends that the cost of plastic surgery was improperly allowed as a measure of damages. In the Karr case, decided in 1872, plaintiff sued to recover for services rendered and expenses incurred in the cure of wounds inflicted upon his infant daughter. Much of the expense was the result of surgical treatment for the removal of an unsightly disfigurement caused by the injury. This court held that any restoration undertaken by plaintiff was voluntary and could not be an element of damages in an action on his behalf. There were indications in the case that the infant had previously obtained a

recovery based on the continuance of her deformity.

Any expressions in the Karr case to the effect that an injured party is not entitled to damages in the form of expenses incurred for restorative surgery made necessary by the negligence of defendant must be disapproved. (See, Rest. Torts, sec. 924(c).) Present day standards no longer regard plastic surgery as a strange or foreign art. Indeed, there may be occasions when an injured person would be required to undergo plastic surgery to mitigate damages. (Goodwin v. Giovenelli, 117 Conn. 103, 167 A. 87.) In the present case it was essential for plaintiff to undergo some restorative surgery because of the impairment of his breathing caused by the accident. It was also necessary to take steps to expedite the healing of the wound, which was retarded by a lack of blood supply to the injured member.

The judgment is affirmed.

GIBSON, C. J., and SHENK, and CARTER, JJ., concur.

EDMONDS, Justice (dissenting).

As I read the record, the form of the verdict, combined with the erroneous rulings requiring Long to defend as executor, was bound to lead to confusion and undoubtedly gave the jury the impression that the judgment would ultimately be paid by the estate and not by him.

I agree that the court could modify the verdict by regarding certain terms as descriptive, but it is quite certain that the jury did not so regard them. The verdict may not be impeached, but when its form is considered in connection with the other errors throughout the trial, there is a clear record showing that although it read against Long, in effect, the jurors believed it to be an award of damages against the estate for which Long would be indemnified.

The statements of plaintiff's counsel, made in the presence of the jury, that the liability was directly or indirectly that of the estate, should not be disregarded in determining whether the other errors committed during the course of the trial were prejudicial. At the time those statements were made, the trial judge had not yet ruled upon the question as to whether Long was properly sued in his representative capacity. Shortly thereafter, Long objected to the introduction of any testimony against him in a representative capacity. The objection was overruled in the presence of the jury. Subsequently, the matter was argued by counsel in the absence of the jury. Long then called attention to the prejudicial effect of a ruling requiring him to defend before the jury in the dual capacity of an individual and an executor. But the court decided that he could be sued as an executor, evidently upon the theory of his liability in some form of "individual representative capacity". This is evident from the trial judge's statement that, although probably the estate was not liable, Long could be sued as an executor and should be described as an individual and as an executor in order to protect any right of recovery out of the assets of the estate. This discussion did not take place in the jurors' presence, but they were aware of the ruling upon the motion to the effect that Long was properly sued as an executor. The effect of this erroneous ruling was to force Long to defend as executor.

The prejudicial effect of these errors, according to the plaintiff, was cured by a correct instruction that no action could be maintained against the estate or against Long in his capacity as executor and that Long was liable only personally. The effect of that instruction must be considered, however, in connection with the directly contrary rulings of the trial court. The jurors knew that the suit was prosecuted against Long in his capacity as an executor and he had defended in that capacity. The instruction is entirely inconsistent with the only form of verdict submitted to the jury providing for a recovery against Long. Moreover, the instructions themselves were inconsistent, for the court also instructed the jury that if the codefendant planing mill was negligent, and its negligence combined with the negligence, if any, "of the defend- and Ralph C. Long, as an individual and executor, to proximately cause said injury * * *, then your verdict will be in favor of the plaintiff and against all defendants."

Unquestionably it was necessary for the jury to be informed of Long's service as an executor of the Gray estate, but there is no basis for an assumption, from that fact alone, that the executor would have a right of indemnity, or that the liability was directly or indirectly that of the estate. Nor was it necessary to submit to the jury a confusing form of verdict.

The plaintiff takes the position that the errors were unavoidable because of the unsettled state of the law on the liability of an executor. The basis of his contention is that neither the plaintiff nor the trial judge knew the nature of the executor's liability after the estate was closed because the question has not previously been decided by this court. However, the unsettled state of the law on any point which confused the plaintiff and caused the trial court to commit error does not preclude Long from complaining of the prejudicial effect of that error.

Moreover, even if it be assumed that the question of the liability of the executor in his representative capacity was so unsettled that it could not be determined by a trial court and was properly left for initial determination on appeal, there was no necessity to submit to the jury a form of verdict that, together with the ruling of the trial court, would reasonably be understood by the jury as imposing some form of liability against the estate. The least that could have been done to mitigate the confusion and prejudice in the minds of the jurors was to submit to them a verdict that could be understood only as imposing liability against the executor personally. Certainly the jury could have been instructed, clearly and without conflict, that any award of damages against Long was his personal obligation and not that of the estate, either directly or indirectly. In that event, if it were later determined upon appeal that the liability could be imposed against the estate, no prejudice would have resulted to the plaintiff, because the ability to pay a judgment has no relation to the question as to who is at fault.

The prejudicial character of the errors in this case is analogous to the prejudice involved in allowing a jury to be informed that a defendant in a personal injury action carries liability insurance. (Schlenker v. Egloff, 133 Cal.App. 393, 398, 24 P.2d 224; see, Pierce v. United Gas & Electric Co., 161 Cal. 176, 188, 118 P. 700; cases collected, 56 A.L.R. 1418; 105 A.L.R. 1319.) There is the same probability that the jury would be more inclined to find a verdict against Long if it believed he would be indemnified than if it understood that he would have to bear the burden alone. (See, Brown v. Yocum, 113 Cal.App. 621, 625, 298 P. 845.) Although there was no showing of bad faith, the errors, in so far as they impressed the jury with the idea that the judgment against Long would be paid by the estate, were prejudicial and ground for reversal, because the question of defendant's responsibility was so close that a verdict in his favor would have been at least equally reasonable (see Citti v. Bava, 204 Cal. 136, 139, 266 P. 954; Schlenker v. Egloff, supra), and there is every reason to believe that the errors substantially influenced the result.

It is contended that the errors were not prejudicial upon the ground that the distributee will ultimately have to pay the judgment, because plaintiff concedes that the record shows no personal negligence of Long. Obviously, the distributee is not bound by the plaintiff's concession. It was not necessarily to the interest of either the plaintiff or Long to show personal negligence, and it cannot be assumed that the evidence in litigation to which the distributee was a party would not show that Long, as executor, was personally at fault, or that he violated some duty to the heirs that would foreclose any right of indemnity. Also, since the distributee is not a party to this appeal, the question of Long's right of indemnity against the distributee cannot now be determined.

For these reasons, in my opinion, the judgment should be reversed.

SPENCE, J., concurs.

SCHAUER, Justice.

I dissent. In liberal construction of section 572 of the Probate Code I would hold that in such a case as this the executor should be liable exclusively in his representative capacity. When an executor con-

ducts the business of an estate under authorization of the court and the Probate Code he is not personally liable for the contract debts and obligations incurred in carrying on such business. No more, I think, should he, in the absence of personal fault, be personally liable for torts of estate employes. His actions in the premises are purely in the capacity of executor. The employe whose fault causes the injury to another is not the employe of the executor personally. He is the employe of the executor only in the latter's representative status. The doctrine of respondeat superior, then, should pass the burden on to the real employer, to the executor in his representative capacity but not against him otherwise.

It is asserted that the law which holds that an officer of a corporation is not liable under the doctrine of respondeat superior for the torts of corporate employes except where the officer is at fault cannot be applied to executors; that the corporate employe's liability can be related directly to the corporation because the latter is an entity and can be sued, but that the estate of a decedent is not an entity and cannot be sued. I do not find this proposition persuasive. If the estate of a decedent is enough of an entity to carry on a business, to contract and pay debts, and realize profits and losses, it should be enough of an entity to be sued. In fact the books are replete with cases in which estates, acting through the executors or administrators, have sued and been sued. The Probate Code (see §§ 572, 573 et seq. and Code Civ. Proc. 369) certainly authorizes such proceedings in relation to causes ex contractu. The question here is: Is this particular tort action authorized as against the executor in his official capacity?

Section 572 (Probate Code) declares that "the court may authorize the executor * * * to continue the operation of the decedent's business to such an extent and subject to such restrictions as may seem to the court to be for the best interest of the estate and those interested therein." The operation of a business ordinarily includes participation as a party plaintiff or defendant in such litigation as may arise from normal conduct of the business. Tort actions are not abnormal in the conduct of a business. Surely it cannot be seriously asserted that a business such as that here involved could be carried on for extended periods without the definite possibility of tortious conduct of some employe; human experience demonstrates the contrary.

Of course, it is not intimated that the court in authorizing the conduct of the business intended to authorize the commission of torts by employes. But the application of the doctrine of respondeat superior does not depend on express or intentional authorization of tortious conduct. (16 Cal. Jur. 1101, 1102, § 61.)

It seems to me that the declaration in the majority opinion that "If section 572 has any effect on the question of tort liability of the estate, the purpose of that section as well as the purpose of any authorization in the will for the carrying on of the business may be fully carried out by applying the rules of the Restatement of Trusts in regard to such liability [personal on the trustee] as well as the representative's right of reimbursement out of the assets of the estate" is thoroughly unrealistic, unwarranted and impractical. If it is to be recognized that the liability is ultimately and in justice that of the estate, then that liability should be imposed directly on the estate rather than through the roundabout method espoused in the opinion. The opinion says, in effect, that the non-negligent executor is personally liable in legalistic form but not in actual substance because he may ultimately recover from the estate. Such method must inevitably tend to multiply litigation and often may result in leaving a non-negligent executor with the actuality as well as the form of personal liability.

Section 572 (Probate Code) in its present substance is before us for initial construction in this case. We should not, on this open question, evolve a construction which seems so certain to produce multiplicity of suits, delays in final settlement of estates, and, at least occasionally, admittedly unjust actual responsibility, all stemming from the unrealistic concept that authorization to an executor to conduct a business in his official capacity does not carry with it authorization to sue or be sued in the same

capacity in respect to torts committed in doing the very thing authorized.

The judgment in this case, as well as the verdict upon which it is based, is in such form and substance as to warrant its construction as running against the defendant Long solely as executor of the estate. So construed the judgment could well be affirmed unless precluded by the facts that Long had been discharged as executor and the estate proceedings closed, and not reopened, prior to institution of the action. The questions which would arise as to the competence of Long to defend as executor without reopening the probate proceedings, and as to the validity and enforceability of the judgment if construed as suggested, I do not here reach because discussion thereof, in view of the majority holding, would be academic at this stage. The majority opinion construes the judgment as running against Mr. Long personally and as so construed affirms it. In my view it should be construed, and can properly be affirmed if at all, only as against Mr. Long as executor of the estate. If it cannot be affirmed against him in his representative capacity then it should be reversed and the cause remanded for further proceedings. Hence, regardless of what conclusion might be reached as to Mr. Long's capacity to defend as executor and as to the validity and enforceability of the judgment if construed to bind him only in his representative capacity, I am compelled to dissent from the majority's judgment and opinion.

Rehearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.



80 Cal.App.2d 330

Ex parte REED.

Cr. 2484.

District Court of Appeal, First District, Division 1, California.

June 13, 1947.

1. Extradition ⇐30

Where answers to letters from presiding justice of District Court of Appeal to Illinois, Louisiana, and federal penitentiary officials indicated that parole, granted habeas corpus petitioner while serving term in Illinois penitentiary, was canceled by Illinois officials in 1930 and that they never knew of petitioner's subsequent whereabouts until his imprisonment on conviction of felony in California in 1945 and they filed no detainers of or orders to hold petitioner while he was serving terms in Louisiana and federal prisons Illinois authorities did not waive right to extradite petitioner from California after such parole would otherwise have expired.

2. Extradition ⇐30

Under Illinois law, one released from California state penitentiary, to which he was committed on conviction of felony, after cancellation of out-of-state parole, granted him by Illinois authorities while he was serving term in Illinois penitentiary, was a fugitive from justice and subject to re-arrest for violation of such parole without having voluntarily returned to Illinois.

In the matter of the application of Tom Reed, also known as Alonzo Williams, for a writ of habeas corpus to procure his release from the custody of the Sheriff of Marin County under a requisition from the state of Illinois.

Writ discharged, and petitioner remanded to custody.

Wallace S. Myers, of San Anselmo, for petitioner.

F. N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

This is a petition for a writ of habeas corpus to procure the release of petitioner from the custody of the sheriff of Marin County who is holding him preparatory to releasing him to the custody of police officers of the State of Illinois under a requisition from that state. This court issued the writ based upon certain allegations in the petition hereafter mentioned. These allegations were denied in the return to the writ. Since the first hearing, by stipulation, evidence has been secured which supports the finding of this court that the al-

legations of the petition in question are untrue. This being so, at the second hearing, this court issued, from the bench, its order discharging the writ and remanding the prisoner to custody. This opinion is being filed pursuant to constitutional requirements.

[1] So far as pertinent to the main point involved, the petition, verified by the petitioner, alleges that in 1926 he was committed to the Illinois state penitentiary for a ten-year term; that in December, 1929, he was paroled on condition that he leave the State of Illinois; that he then left that state and has never returned thereto; that in August, 1930, he was convicted of a felony in Louisiana and served a term therefor; *that during his service of such term, the State of Illinois filed a detainer with the Louisiana prison officials, but such detainer was released and withdrawn prior to his release from the Louisiana prison;* that in April, 1940, he was again convicted of a felony in Louisiana and once more sentenced to the state prison of that state; *that while confined under that sentence, Illinois filed another detainer with the Louisiana authorities, but the officials of the State of Illinois released such detainer prior to his release from the Louisiana prison;* that in 1945 he was convicted of a felony in California and confined in San Quentin, being released therefrom May 22, 1947; that upon his release from San Quentin he was arrested under the Illinois warrant.

Based upon these allegations, and particularly upon those italicized above, this court issued the writ. A majority of this court felt, Justice Ward disagreeing, that if it were true that as early as 1930 the Illinois authorities had canceled the petitioner's parole, knew his whereabouts, and filed detainers in Louisiana and then canceled them, that they had waived their right to extradite him after his term of parole would otherwise have expired. There is substantial authority both ways on this issue of waiver. Stetson v. Mahoney, D.C., 42 F.Supp. 298, and United States ex rel. Howard v. Ragen, D.C., 59 F.Supp. 374, hold that a waiver exists in such a situation. United States ex rel. Palmer v. Ragen, 7 Cir., 159 F.2d 356; People ex rel. Ross v. Becker, 382 Ill. 404, 47 N.E.2d 475, and other cases hold to the contrary.

The return filed to the writ denied the allegations above italicized. On the return day of the writ it was stipulated that the Presiding Justice of this court should write to the proper Illinois and Louisiana officials (and also to the warden of the federal penitentiary at Atlanta, Georgia, where petitioner had been imprisoned from October, 1931, to October, 1933) to ascertain whether there were any records indicating that the Illinois officials had knowledge of the whereabouts of petitioner after the violation of his parole in 1930 and up to 1945, when he was imprisoned in California. It was further stipulated that the answers to such letters would be accepted as determinative of the truth or falsity of the challenged allegations. Pursuant to this stipulation, letters were sent to the officials in question. The answers to those letters indicate that petitioner's parole was canceled by the Illinois authorities in 1930 because of his failure to report, and a warrant was issued in that year for his arrest; that his whereabouts were then unknown; that there is no record in the Illinois files which are complete indicating that the Illinois officials ever knew of petitioner's whereabouts from 1930 until his imprisonment in 1945 in California; that there is no record in the Illinois files that the Illinois officials ever filed a detainer or hold with any other prison or in any other state except in California. The letters from Louisiana and Georgia indicate that the records of the prisons involved, which are complete, contain no record of any communication at all from the Illinois authorities relating to petitioner, and particularly contain no hold or detainer filed by the Illinois authorities. Under these circumstances, counsel for petitioner, at the second hearing, frankly admitted that, so far as the waiver issue was concerned, the facts did not warrant an application of that doctrine.

[2] Petitioner also urges that under Illinois law he is not a fugitive from justice and not subject to rearrest for violation of his out-of-state parole unless he

voluntarily returns to Illinois. This point need not be labored. It is completely answered by the case of Anderson v. Corall, 263 U.S. 193, 44 S.Ct. 43, 68 L.Ed. 247.

The writ heretofore issued is discharged (as of June 12, 1947), and the prisoner remanded to custody.

WARD and BRAY, JJ., concur.



80 Cal.App.2d 246

SAND v. CLARKE.

Civ. 15831.

District Court of Appeal, Second District, Division 2, California.

June 10, 1947.

1. War ⇐4

Evidence failed to establish that price at which defendant sold used airplane to plaintiff for his own use was in excess of ceiling price, where there was no evidence as to either number of years from date of acquisition of the airplane by original purchaser when new to date of sale, or number of hours of normal engine wear since last overhaul. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq.

2. Evidence ⇐370(4)
Trial ⇐39

In action to recover damages for over-ceiling sale of used airplane, photostatic copies of what purported to be a partial log of the airplane and a partial log of the engine offered in evidence by plaintiff were properly rejected on defendant's objection that logs were not complete and were not properly identified.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Robert B. Sand against T. T. Clarke to recover damages for alleged violation of provisions of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, 901 et seq., and regulations adopted pursuant thereto. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Desser, Rau & Christensen, of Los Angeles, for appellant.

Charles W. Cradick, of Los Angeles, for respondent.

WILSON, Justice.

This action was prosecuted to recover damages for alleged violation of the provisions of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., and regulations adopted pursuant thereto. From a judgment in favor of defendant plaintiff has appealed.

The complaint alleges that on or about July 12, 1945, defendant sold and delivered to plaintiff, "for his own use and consumption and not in the course of trade or business, a used airplane, powered with a single engine of not more than 500 horsepower which had been used other than for the purpose of sale," the same being a "1941 Aeronca Model Chief, bearing Manufacturer's Serial No. LB 12461, with a Lycoming engine," for the total price of $2400. It is further alleged that under the regulations then in force the maximum price that defendant could have charged plaintiff for the airplane was $1226.20, and that the excess charge was $1173.80. Plaintiff sought judgment for treble the amount of the overcharge. The answer denied all allegations in the complaint except that the sale of the airplane was admitted.

The court found that the allegations of the complaint were untrue and appellant contends that the evidence does not sustain the finding. The conditional sale agreement evidences the sale by defendant to plaintiff of a used airplane having the description set forth in the complaint. The regulations of the Office of Price Administration in force at the time of the sale fixing the maximum prices at which new and used airplanes were permitted to be sold were received in evidence. These regulations after listing numerous aircraft and maximum prices for new planes contain an intricate formula by which the prices of used

planes were to be computed, using the price of new planes of the same model as a basis. The regulations contain a list of aircraft designated by various names and models, including 31 models of Aeronca airplanes, but one answering to the description involved in this action does not appear. In the list of Aeronca planes there is Model "65-CA Super Chief, Stand.," and a "65-LB Super Chief, Stand.," each with a Lycoming engine, but none designated as "Chief". There is no evidence that an error occurred in the description contained in the sale contract nor is there evidence that the airplane purchased by plaintiff was one of the Super Chief models referred to in the regulations.

The regulations provide that if no price is listed for the airplane sold the seller should find the price listed for the nearest equivalent airplane of the same make. An "equivalent" is defined as "one that is similar to the one being priced in size, equipment, power, condition and ability to function." No evidence was offered to show that the airplane purchased by plaintiff was the equivalent, as defined in the regulations, of any airplane listed therein.

Section 1.2 of the regulations relates to used airplanes and applies to sales of any such craft as is powered with a single engine of not more than 500 horsepower "that has been used other than for the purpose of sale." There is no evidence of the purpose for which the airplane purchased by plaintiff had been previously used. Plaintiff offered no evidence as to the manner in which he computed or arrived at the amount of the alleged excess charge made by defendant, even assuming that the airplane in question was a model listed in the regulations or one equivalent to a listed model.

[1, 2] Two elements of the formula prescribed for computing the maximum price of used aircraft are (1) the number of years from the date of acquisition by the original purchaser when new to the date of sale, and (2) the number of hours of normal engine wear since the last overhaul. There was no evidence as to either of these factors. Plaintiff offered in evidence photostatic copies of what purported to be a partial log of the airplane and a partial log of the engine. They were rejected on defendant's objection that the logs were not complete and were not properly identified. There was no error in the ruling.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



80 Cal.App.2d 318

GARSIDE v. GARSIDE et al. (two cases).

Civ. 13268.

District Court of Appeal, First District, Division 1, California.

June 13, 1947.

1. Courts ⇐85(3)

Where notice of appeal was filed before July 1, 1943, rule 52 of the Rules on Appeal, which rules became effective on that date, had no application. Rules on Appeal, rules 52, 53b.

2. Appeal and error ⇐907(4)

Under the rules applicable to appeal taken before July 1, 1943, where reporter's transcript was not complete, findings were conclusively presumed to be supported by the omitted evidence and such findings had to be construed, if possible, to uphold the judgment and all ambiguities had to be construed in favor of sustaining the judgment.

3. Appeal and error ⇐907(3, 4)

On an appeal on the judgment roll alone or on less than a full reporter's transcript, under law as it existed prior to July 1, 1943, every presumption and intendment was resolved in favor of regularity of proceedings in trial court.

4. Partition ⇐42, 81

Under law as it existed in 1920 when partition sale occurred, Superior Court was given statutory right to protect the contingent remainder interest in the property and had jurisdiction over unborn remaindermen and had power to decree sale of

property and distribution of proceeds so long as it preserved rights of possible after-born remaindermen. Code Civ.Proc. §§ 752, 781.

5. Life estates ⇐6

Where testator's six children, pursuant to will and contract, held real estate in six separate parcels and each had in his respective parcel an undivided half interest in fee and a life estate in an undivided half interest with remainder to grandchildren and by reason of ages of parties involved it was unlikely that there would be after-born remaindermen, requirements in partition action that each child post a $1,500 bond to protect rights of possible after-born issue was adequate protection.

6. Judgment ⇐681

The doctrine of "virtual representation" is an exception to the general rule that no person is bound by judgment or decree except parties or those who stand in privity with parties, and it is applied as a rule of convenience and of practical necessity.

See Words and Phrases, Permanent Edition, for all other definitions of "Virtual Representation".

7. Judgment ⇐681

Under the doctrine of "virtual representation," where all the parties are brought before court that can be brought before it and court acts on property according to rights that appear, without fraud, its decision is final and conclusive, the rights of persons unborn being sufficiently cared for, if when estate is sold under a valid judgment, its proceeds take its place and are secured in some way for such unborn persons.

8. Judgment ⇐677

The protection of one whose property is brought into court by representation is to be found in his right to attack decree on ground of fraud or collusion in its procurement and in absence of such an attack decree is conclusive as to status of property.

9. Judgment ⇐681

Generally, whether there has been a true and legal virtual representation depends upon facts, and if it appears that there has been such representation and that rights of unborns have been considered and preserved the doctrine of virtual representation applies.

10. Judgment ⇐681

Where there was no fraud in partition proceeding and full disclosure was made to court and three of the defendants therein were possessors of interests identical in nature with those claimed by after-born contingent remainderman, the three partition defendants represented class to which after-born remainderman belonged so that, where trial court protected interests of any unborn contingent remaindermen by requiring the posting of bonds doctrine of "virtual representation" applied, and partition decree was binding upon afterborn contingent remainderman.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Separate actions by Vivian L. Garside, a minor, by Garth V. Lacey, her guardian ad litem against Thomas Garside, Andrew Tarp and others respectively for declaratory relief with respect to plaintiff's rights in certain realty and to vacate a judgment and order of sale rendered in a prior partition action involving the same property, which actions were consolidated for trial and wherein defendant Andrew Tarp cross-complained to quiet title. From a judgment for cross-complaint plaintiff appeals.

Affirmed.

Garth V. Lacey, of Salinas, for appellant.

A. E. Worth and James H. Walker, both of Salinas, for respondent.

PETERS, Presiding Justice.

Plaintiff, Vivian L. Garside, instituted two separate actions against defendants. The first (Superior Court action 19,923) sought a declaration of her claimed interest in certain real property standing of record in the name of defendant Andrew Tarp, and the second (Superior Court action 20,086) sought to vacate a judgment and order of sale rendered in a prior partition ac-

tion involving the same property, on the ground that such judgment and sale had been procured in violation of her rights, and that the court that rendered such judgment had no jurisdiction of her rights. The two actions were consolidated for trial, and but one judgment rendered. The trial court denied the prayer for declaratory relief and refused to vacate the partition judgment. In addition, on the cross-complaint of Andrew Tarp, the court quieted his title to the property and decreed that Vivian L. Garside has no right, title or interest in it. From this judgment the plaintiff has appealed.

[1-3] The appellant has had considerable difficulty in presenting a proper record on this appeal. The reporter's transcript is incompletely certified in that the certification merely refers to action 20,086 and no reference is made in the certification to action 19,923. It is also an admitted fact that even in action 20,086 the reporter's transcript omits one day's proceedings. This has resulted in various motions in this court. From the affidavits filed on such motions on behalf of appellant it appears that the court reporter who took down the proceedings of the day in question was a substitute reporter who had entered the diplomatic service and was not available to transcribe his notes, being then in Europe. Appellant was given ample time by this court to secure a proper reporter's transcript, the appeal and various motions, including respondents' motion to dismiss because of the incomplete record, being continued to await the return of the reporter. The various motions finally were set for hearing on the February, 1947, calendar. At that hearing all of the motions by both sides were withdrawn by stipulation, it being agreed that it was impossible to secure a reporter's transcript of the proceedings for the day in question. At that hearing appellant agreed that under the circumstances she desired to have the appeal heard as if it had been taken on the judgment roll alone. In other words, appellant has not seen fit to take advantage of the various other methods of securing a record provided by the rules, but has elected now to have her appeal decided according to the rules applicable to judgment roll appeals. The notice of appeal was filed February 16, 1943, so that Rule 52 of the Rules on Appeal is not applicable to this appeal. The new Rules on Appeal became effective on July 1, 1943, and Rule 53(b) expressly provides that Rule 52 is not applicable to appeals then pending. For this reason Rule 52 can have no application to this appeal, and this appeal must be determined according to the rules and presumptions existing before July 1, 1943. According to the rules then existing, where the reporter's transcript was not complete, the findings were conclusively presumed to be supported by the omitted evidence, and such findings had to be construed, if possible, to uphold the judgment. All ambiguities had to be construed in favor of sustaining the judgment. On an appeal on the judgment roll alone, or on less than a full reporter's transcript, according to the law as it existed prior to July 1, 1943, every presumption and intendment had to be resolved in favor of the regularity of the proceedings in the trial court. (See discussion and collection of cases Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, at page 680, 22 P.2d 5.) This is probably still the law as to appeals on incomplete records as distinguished from short records permitted by the rules. These are the rules applicable to this appeal. Certain exhibits have been transferred to this court by stipulation, and will be considered for what light they may cast upon the controversy.

The present actions have their origin in the fact that by the will of Thomas Garside, Sr., and by the decree of distribution in his estate, appellant became, as a then unborn child, a contingent remainderman in his estate. Thomas Garside, Sr., and his wife Ann, owned, as community property, about 153 acres of land in Monterey County. They had six children—Robert, William, John, Joseph, Thomas, Jr. (father of appellant), and Alice. Thomas Garside, Sr. died testate in February, 1911. At that time and until her death the wife was incompetent. The will directed that the real property should be divided into six equal parcels, and that each child should take one of the parcels for life with remainder over to each child's respective is-

sue. Thus, by the will, the testator attempted to will away the interest of his wife as well as his own interest. In realization of this fact, the six children, in July, 1912, before the administration of their father's estate had been completed, entered into a contract in reference to the property. By that contract it was recognized that the ranch had been community property of the husband and wife, and that the father had exceeded his powers in attempting to will to each child an entire life interest in a specified one-sixth of the property. It was further agreed that the decree of distribution in the father's estate had to distribute to the mother a one-half interest in the whole property, and would distribute an undivided one-half in a specified parcel to each of the six contracting parties. It was further recognized that the mother was unable to make a will because of her incompetency. It was then contracted that upon the mother's death her one-half of the ranch should be distributed to the six children, each receiving the mother's one-half interest in the respective parcel allocated to each of the children under the father's will.

The estate of the father was distributed in August, 1912, in accordance with the provisions of the contract and in accordance with law. By that decree the ranch was determined to be community property, and, pursuant to the terms of the will, it was divided into six equal parcels of 25.66 acres each, labelled Parcel "A" through Parcel "F". Pursuant to the terms of the will as modified by the contract, the decree distributed an undivided one-half interest in a specific parcel to the six children, Thomas Garside, Jr., father of appellant, receiving Parcel "F". The decree provides that the interest is given to Thomas Garside, Jr. "to have, hold and enjoy the same, for and during his Natural Life, without power of alienation or incumbrance, giving and vesting in him, a life estate Only, of, in and to said Subdivision 'F.' The remainder in fee, is hereby given and distributed to the issue begotten by him, surviving, the said Thos. Garside, in equal shares. In The Event that said Thomas Garside [Jr.] dies without issue surviving him, then and in such case said Subdivision 'F' is hereby distributed to his heirs, then alive." The other five children were given similar undivided one-half life interests in their respective parcels. The other undivided one-half interest in the entire tract was distributed to the incompetent mother of the life tenants. After the decree each of the children took possession of the parcel distributed to him or to her.

The mother died intestate in 1917, all six children then being alive. By the decree of distribution in her estate there was distributed to each of the six children an undivided one-sixth interest in her undivided one-half interest in the entire 153 acres. These interests, of course, were in fee simple and not subject to any remainder interest in the children of the distributees. Thus, at this time, each child owned a one-twelfth interest in the entire property, in fee, and held a one-twelfth interest in his or her parcel as life tenant.

In 1919 four of the Garside children, including appellant's father, brought an action against the other two children, and against the then three living children of the life tenants, requesting that the court order a sale of the entire 153 acres and order the proceeds divided among the parties to the action according to their respective rights. The defendants in that action, by amended prayer, admitted the allegations of the complaint and concurred in the prayer of the amended complaint. The amended complaint in that proceeding alleged that the only three grandchildren of Thomas Garside, Sr. were parties to the action; that the ages of the six children of Thomas Garside, Sr., were then: "Robert Garside, 62 years; Thomas Garside [Jr.], 46 years; Joseph Garside, 51 years; William H. Garside, 60 years; John Garside, 54 years; and Alice J. Hiserman, 57 years; and that there is little probability, if any, that children will hereafter be born" to the above persons. The trial court ordered the sale to be made, and after due notice confirmed a sale to one E. W. Palmtag for $70,000. The court made full and complete findings demonstrating that it was fully aware of all of the facts. It likewise protected the contingent remainder interests of the unborn children. By its decree, it required the referee to post a $5,000 bond conditioned to provide for the

safe keeping of that portion of the proceeds of the sale in which the unborn children (the three living grandchildren who were defendants having filed waivers) might have an interest. The court, by its decree, then required the six children of Thomas Garside, Sr. each to file a bond in the sum of $1,500 conditioned that each of the six children "shall safely keep such a portion of his or her proportionate share of the proceeds realized from the said sale as may be necessary to protect the interests of any child or children to him or to her hereafter born * * * this Court reserving, by this judgment, the right to increase or decrease any one or more of the said bonds, according as the interests of such child or children hereafter to be born may require." All of the required bonds were filed.

It is admitted that, after the sale to Palmtag was thus confirmed, he did not pay over the $70,000 sale price, but immediately deeded to each of the six Garside children the respective parcels, "A" through "F", in which they had been given life estates by the decree of distribution in the estate of Thomas Garside, Sr. It is admitted that this partition suit was a friendly proceeding between the six children and their then living children, entered into for the purpose of permitting the six children of Thomas Garside, Sr. to acquire separate fee simple interests in their respective parcels. It is this partition decree and order of sale that appellant in action No. 20,086 seeks to have vacated and set aside.

By virtue of the Palmtag transfers, Parcel "F" was deeded to appellant's father in fee simple. Some time later, in the year 1921, appellant's father and mother conveyed Parcel "F" to respondent, Andrew Tarp. The property was sold to Tarp for $500 an acre, a fair price. It was stipulated that Tarp had no actual notice of any irregularities in the Palmtag partition proceedings, and appellant admits in her briefs that there is nothing in the record of the partition proceedings that shows any irregularity, such irregularity, if any, only being ascertainable by going behind the records of the court.

Appellant was born to Thomas Garside, Jr. in 1924, several years after the transfer to Tarp. In Superior Court action 19,923 she alleges some of the facts above recounted; claims to be a remainderman, under the decree of distribution in the estate of Thomas Garside, Sr., in an undivided one-half interest in Parcel "F"; alleges that Tarp claims to own the parcel in fee; and prays for a declaration of her rights in that parcel. Tarp answered and cross-complained. By the answer and amendment to the answer he averred that he received the property by conveyance from Thomas Garside, Jr. and his wife, and that his grantors were then the owners in fee of the premises. He also sets forth the facts of the partition proceeding and pleads that judgment as a bar, and averred that, in any event, he is a bona fide purchaser for value without notice of any claims of appellant. By the cross-complaint he requested that his title be quieted against the claims of appellant.

In Superior Court action 20,086 appellant pleads her remainder interest under the decree of distribution in the Thomas Garside, Sr. estate; pleads the facts in reference to the partition proceeding, and then avers that the Palmtag bid was sham and no purchase price was paid by him; that the bid and sale were "sham and fraudulent"; that by such fraudulent sale it was intended to cut off her interest as a remainderman; that the interlocutory decree was secured by fraud and collusion of Thomas and William Garside; that they deceived the court; that the whole proceeding was fraudulently conceived and carried out to cut off her interest in the property; that the court acted in confirming the sale without knowledge that the bid was a sham. The answer of the Garsides admits that no cash was paid by Palmtag for the property, avers that the procedure was adopted on advice of counsel, and that they acted in good faith in reliance on such advice; denies in detail the allegations of fraud and collusion; denies concealing the true facts from the trial court; denies that the court confirmed the sale without knowledge of the true facts. The partition proceeding is pleaded as a bar. The answer of Tarp denies all the material allegations of the complaint, pleads the partition judgment as a bar and, in addition, sets up the defense that he is a bona fide purchaser for value without notice.

The trial court found the historical facts substantially as set out above, found that all the allegations in reference to fraud and concealment were untrue, found the facts in reference to the partition proceedings, and then found that "there was no actual fraud perpetrated upon the Court; that the parties thereto, through their attorneys and on their advice, sought a remedy to which they thought they were entitled; that said parties informed the Court of all the facts within their knowledge and the Court knew fully the methods adopted and the procedure that the parties proposed to adopt and which they did follow in securing for the respective heirs of their father and mother the portion of the Garside ranch to which they believed they were entitled, and the Court knew at the time of confirmation of the sale to E. W. Palmtag, that said E. W. Palmtag did not actually pay or intend to pay any money for the property, but did know that the actual consideration in the transaction was that said E. W. Palmtag would, after the confirmation of the sale to him, transfer to each of the Garside heirs then living a one-sixth of that acreage of the whole tract and that each one of said Garside heirs would execute a bond of $1500.00 to be affirmed by the Court as security for any possible afterborn issue; that the plaintiff was secured by that certain bond executed by Thomas Garside, Robert Garside, and William H. Garside and filed by Thomas Garside in the above entitled Court" in the partition proceeding and pursuant to the decree in that case. It was further found "that the Court had jurisdiction of all the parties in interest in the Property and jurisdiction of afterborn children and to pass upon their interest in the property by virtue of the doctrine of virtual representation; that the Court had jurisdiction of the subject matter of the action; that the proceedings in said partition action are regular upon their face; that the cross-complainant, Andrew Tarp, purchased the property for a valuable consideration and had no notice of the fact that said E. W. Palmtag did not actually pay to the Referee the sum set forth in the order confirming the said sale in the said action for partition; * * *" Based on these findings, which, under the rules heretofore mentioned must be conclusively presumed to be supported by the evidence, the court determined that Tarp was the owner of Parcel "F", and that appellant has no remainder or other interest in the parcel, and entered its judgment accordingly.

In view of the findings of no fraud and full disclosure, and that Tarp was a bona fide purchaser for value without notice, the only possible issue open to discussion on this appeal is that the court in the partition proceeding had no jurisdiction over the unborn remaindermen. There may be grave doubt as to whether this point may be urged at all against Tarp, when the facts upon which it is based admittedly do not appear on the face of the record, but in view of our conclusion on the jurisdictional question this point need not be decided.

[4] Appellant urges that the court in the partition proceeding never acquired jurisdiction over her or over her interest in the property and for that reason the decree in that proceeding cannot affect her. This contention lacks merit. In the first place, under the law existing in 1920 when the court directed sale to Palmtag took place, the law permitted a life cotenant to secure partition and permitted the court to protect the contingent remainder interests in the property. Section 752 of the Code of Civil Procedure then provided: "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners." Section 781 of the same code then read as follows: "In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of

the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties."

[5] Under these sections there can be no doubt that the court in the partition proceeding had jurisdiction over the subject matter. It had power, upon a proper showing, to decree that the ranch should be sold and to order the proceeds distributed between the six Garside children, who were fee simple owners of one-half of the property and life tenants as to the other half, as long as it preserved the rights of possible afterborn remaindermen. This it did by requiring all of the children, including appellant's father, to post $1,500 bonds to protect the rights of such afterborn issue, and by retaining jurisdiction to increase the amount of such bonds as the interests of afterborn remaindermen might require. This was adequate protection for such afterborns, particularly in view of the ages of the six Garside children in 1920, making it unlikely that there would be any such afterborn issue.

[6, 7] The remaining question is whether the finding of the trial court in the instant case that the court in the partition proceeding had jurisdiction over the person of appellant, then unborn, under the doctrine of "virtual representation" is sound in fact and in law. The rules applicable to the doctrine of virtual representation have long been recognized. The doctrine represents a well recognized exception to the general rule that no person is bound by a judgment or decree except parties or those who stand in privity with parties. The doctrine is not one of convenience only, but is one of practical necessity. It was discussed at length in the well-reasoned case of County of Los Angeles v. Winans, 13 Cal.App. 234, 109 P. 640. The following comments appearing in that case are particularly applicable here: "The rule as to virtual representation is stated broadly by the supreme court of the United States in Miller v. Texas & Pacific R. Co., 132 U.S. [662], 672, 10 S.Ct. 206, 33 L.Ed. 487, by recognizing the holding of Lord Redesdale in Giffard v. Hort, 1 Schoale & L. 386, as follows: 'Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred. Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life.' * * * Kent v. Church of St. Michael, 136 N.Y. 10, 32 N.E. 704, 18 L.R.A. 331, 32 Am.St.Rep. 693, uses the following language: 'Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons.'" (13 Cal.App. at pages 244, 245, 109 P. at page 645.)

[8] "The protection of a person whose property is brought into court by such representation is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement." (13 Cal.App. at page 246, 109 P. at page 646.)

"If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself, or merely to serve the convenience of the party whose title was being quieted against the unborn remaindermen, virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right. * * * The interests of

representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each." (13 Cal. App. at pages 248, 249, 109 P. at page 647.) (See for a full discussion of the doctrine the annotation appearing in 120 A.L.R. 876.)

[9, 10] From the Winans case, and from the California cases postdating that case (Mabry v. Scott, 51 Cal.App.2d 245, 124 P.2d 659; Fallon v. Superior Court, 33 Cal.App.2d 48, 90 P.2d 858; Curran v. Pecho Ranch & Stock Co., 95 Cal.App. 555, 273 P. 126) it can be stated as a general rule that whether there has been a true and legal virtual representation depends upon the facts of each case, and if it appears that there has been such representation, and that the rights of unborns have been considered and preserved, the doctrine will apply. This is substantially the rule announced in the Restatement. (Restatement of Property, § 182.) In the instant case it must be kept in mind that the trial court has found that in the partition proceeding full disclosure was made to the trial court, and that there was no fraud. Those findings must be conclusively presumed to be supported. In the second place, three of the defendants in the partition proceeding were possessors of interests identical in nature with those now claimed by appellant, that is, three of such defendants were children of life tenants and entitled to contingent remainder interests identical with that claimed by appellant. These three children, in a very real sense, represented the class to which appellant belongs in that proceeding. In the third place, the trial court protected the interests of the unborn contingent remaindermen by requiring the referee to post a $5,000 bond, by requiring each life tenant to post a $1,500 bond, and by retaining jurisdiction to increase that bond if necessary. That was a reasonable protection under the circumstances. The full purchase price was fixed at $70,000. No attack is made upon the reasonableness of that figure. Of that purchase price appellant's father was entitled to one-sixth, or $11,666.66. But appellant's contingent interest was in one-half of that amount (appellant's father owning the other one-half in fee simple) or $5,833.33. At that time (1920) her father, who is still alive, was 46 years of age, and there was not a strong likelihood of him having issue. While it is true that several years later he did have a child, and that child is appellant, it is also true that whatever interest appellant would now have in the property had it not been partitioned, would still be contingent, being dependent on her outliving her father. This being so, as conditions existed in 1920, the $1,500 bond was sufficient to protect the interests of any unborn child of Thomas Garside, Jr. There was no claim made in the court below that the $1,500 bond was not sufficient, nor does the record show that appellant has ever requested that that bond should now be increased. Appellant's rights, if any, in connection with that bond were not involved in either of the cases here on appeal. The issues now involved all revolve around appellant's claimed interest in the property now standing of record in the name of Tarp, a bona fide purchaser for value without notice. We agree with the trial court that appellant has no interest of any kind in that property.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.



80 Cal.App.2d 291

JAFFRAY v. MIES et al.

Civ. 3632.

District Court of Appeal, Fourth District, California.

June 11, 1947.

Rehearing Denied July 3, 1947.

Hearing Denied Aug. 7, 1947.

1. Appeal and error ⇐662(4)

Where it appeared in settled statement on appeal that plaintiff in quiet title action admitted that neither she nor her predecessor had any color of title subsequent to prior decision adverse to her predecessor, right to have title quieted could not be based on certain conveyances made prior to such decision.

2. Adverse possession ⇐85(4)

Evidence relating to alleged occupancy of city property by plaintiff's grantor by renting premises was insufficient to establish title by adverse possession.

3. Adverse possession ⇐57

Where, in prior action, title to premises had been quieted in improvement company as against plaintiff's grantor, plaintiff claiming that grantor had obtained title by adverse possession was required to make some affirmative showing that grantor's possession after prior decision was intended to be adverse.

4. Adverse possession ⇐45, 57

Where defendant in suit to quiet title remains in possession or assumes possession after adverse decree, his possession is presumed to be in subordination to true owner and does not become adverse without express notice of his adverse claim to such owner.

5. Adverse possession ⇐50

Party in possession of land after title thereto passed to state could not have claimed adversely to state when he recognized state's right by receiving no more rent.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by N. V. Jaffray against Leo J. Mies and another to quiet title to lots. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

James R. Jaffray, of Los Angeles, for appellant.

Herbert O. Kelly and Monroe & McInnis, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title involving certain lots in Oceanside in San Diego County. On a former action, title to these lots was quieted in San Diego Improvement Co. as against P. W. Marshall. San Diego Improvement Co. v. Brodie, 215 Cal. 97, 8 P.2d 1027. The defendants in the present action later acquired title to these lots from San Diego Improvement Co. Still later, and on May 2, 1945, the plaintiff, for a consideration of $10, obtained a deed to the property from P. W. Marshall. Although he was married at the time, Marshall's wife did not join in this deed.

On May 5, 1945, the plaintiff brought this action to quiet her title to these lots as against these defendants. An answer was filed, including a prayer for a judgment quieting title to the lots in the defendants. The court found in all respects in favor of the defendants and entered a judgment that the plaintiff has no right, title or interest in these lots, and quieting title thereto in the defendants. From this judgment the plaintiff has appealed, the appeal being presented on a settled statement.

[1] It is first contended that under certain conveyances made prior to the decision in San Diego Improvement Co. v. Brodie, supra, the record title to a one-third interest in and to three of the lots in question is in the plaintiff. This contention cannot be sustained both because the record fails to show that any valid title was thereby conveyed to the plaintiff, and because the settled statement establishes the fact to the contrary. It appears therein that the plaintiff admits that neither she nor Marshall had any color of title subsequent to the Brodie case, and that neither of them has any claim to the property in question, after title was quieted against Marshall and others in the Brodie case, "unless such title arose by adverse possession."

The defendants, by deeds and other instruments introduced in evidence, established a chain of title from San Diego Improvement Co. showing full legal title to the lots to be vested in them. They also introduced a series of tax deeds dated July 1, 1936, conveying the property in question to the state for delinquent taxes levied in 1930, a deed from the tax collector of San Diego County dated November 2, 1944, conveying this property to the city of Oceanside, pursuant to the provisions of Ch. 8, Pt. 6, Div. 1 of the Revenue and Taxation Code, and a quitclaim deed from the city of Oceanside dated November 22, 1944, conveying this property to the defendants.

The plaintiff's main contention is that after the judgment in San Diego Improve-

ment Co. v. Brodie, quieting title against Marshall and enjoining him from asserting any claim to the property, Marshall continued to cultivate the land in question, through tenants, and thus acquired title by adverse possession, which title passed to the plaintiff by the deed of May 2, 1945. The only witness for the plaintiff was Marshall. He admitted that he had paid no taxes, that he had made no improvements on the property, that the property was not enclosed by fences, and that he had no color of title. No evidence was introduced to show that taxes had not been assessed against the property, although it does appear that title was in the state for some years after 1936. Marshall testified that after the judgment in the Brodie case he continued to occupy the premises by renting to tenants; that at no time did he have any communications with the San Diego Improvement Co. or its successors in interest; that he knew that the San Diego Improvement Co. had conveyed the property to residents of Los Angeles; that he did not inform any of these persons or any officer of the San Diego Improvement Co. that he was collecting rent on the property; and that he collected no rent after he found that the State Department of Tax-deeded Land had leased the property in August, 1944, to one Romo. There was no definite evidence as to how much of the land had been leased to tenants, or during what periods of time. However, Marshall further testified that he "occupied, cultivated and used it, without a break, since November, 1918, for myself."

[2-4] Not only was the evidence not sufficient, under well-established rules, especially as applying to city property, to compel a finding in favor of the plaintiff on the issue of the adverse occupancy and use of these lots for the required period, but something more was here required by way of notice to the other parties that any continued use of the property by Marshall, after the decree against him in the Brodie case, was hostile and under a claim of right and not merely permissive. The fact that a judgment had been entered quieting title against Marshall and enjoining him from claiming any interest in the property should not be lightly dismissed. Under such circumstances, some affirmative showing that any continued occupancy by the defeated party was intended to be adverse, and not merely subject to the other party's superior right, should be required. While this point does not appear to be directly decided in this state this principle has been fully recognized elsewhere. The general rule is thus stated in 2 C.J.S., Adverse Possession, § 120, p. 672: "Where a defendant in a suit to quiet title remains in possession or assumes possession after a decree adverse to him and vesting title in another, his possession is presumed to be in subordination to the true owner and does not become adverse without express notice of his adverse claim brought home to said owner."

In Dupont v. Charleston Bridge Co., 65 S.C. 524, 44 S.E. 86, 90, it is said: "The conclusion cannot be avoided that, where there is a judgment for the recovery of land or any right of property remaining unenforced for the statutory period, the defendant in possession is presumed to hold in subordination to the right fixed by the judgment or decree; * * *."

Other cases recognizing this principle are Woolworth v. Root, C.C., 40 F. 723, affirmed 150 U.S. 401, 14 S.Ct. 136, 37 L.Ed. 1123, and Green v. Strubbe, 234 Ky. 380, 28 S.W.2d 469. While the facts are considerably different, the same principle was recognized and applied in West v. Evans, 29 Cal.2d 414, 175 P.2d 219.

[5] A further consideration is that title to this property was in the state under a tax deed from July 1, 1936, until November 2, 1944, when it passed to the city of Oceanside, and on November 22, 1944, the city of Oceanside deeded it to these defendants. Less than five years elapsed between the time the decree in the Brodie case became final and the date when the title passed to the state, and under well-established rules Marshall could not have claimed adversely to the state between 1936 and 1944, when he recognized the state's right by receiving no more rent.

Upon the record before us the evidence is sufficient to support the findings and judgment.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

WRIGHT v. SNIFFIN et al.
Civ. 7337.

District Court of Appeal, Third District, California.
June 13, 1947.
Rehearing Denied July 14, 1947.
Hearing Denied Aug. 7, 1947.

1. Automobiles ⇐244(7)

Evidence established motorist's negligence in attempting to pass bicyclists on wrong side of highway, within 100 feet of intersection, as ground for recovery for infant bicyclist's death. Vehicle Code, §§ 452, 530 (b), 544 (a, b), 546 (a).

2. Highways ⇐172

The statutory requirement of warning before turning a "vehicle" to cross at intersection applies to bicycles. Vehicle Code, §§ 452, 530 (b), 544 (a, b), 546 (a).

See Words and Phrases, Permanent Edition, for all other definitions of "Vehicle".

3. Highways ⇐172

A bicycle is a "vehicle" subject to Vehicle Code. Vehicle Code, §§ 452, 530 (b), 544 (a, b), 546 (a).

4. Highways ⇐169

A "vehicle" is that in or on which a person or thing is or may be carried, as a coach, wagon, car, bicycle, etc.; a means of conveyance.

5. Negligence ⇐136(14, 25, 26, 31)

Negligence, contributory negligence, and whether conduct or omissions contributed to or caused accident are ordinarily problems for jury.

6. Automobiles ⇐244(55)

Evidence of infant bicyclist's negligence in attempting to cross highway to make turn in front of following motorist without giving signal was sufficient to support verdict for motorist in action for bicyclist's death. Vehicle Code, §§ 452, 530 (b), 544 (a, b), 546 (a).

7. Automobiles ⇐242(8), 245(74)

One suing motorist for death of infant bicyclist was entitled to presumption that deceased used due care, despite evidence that bicyclist failed to give warning of intention to cross highway, and conflict of evidence, raising a jury question, was thereby created. Code Civ.Proc. § 1963, subd. 4.

8. Automobiles ⇐246(39)
Trial ⇐243

In action against motorist for death of bicyclist who was struck in making turn across highway without warning, instruction exonerating motorist if he merely failed to exercise best judgment when confronted with emergency was inapplicable to undisputed evidence that motorist placed himself in dangerous position by attempting to pass bicycle on wrong side of highway near intersection, and was irreconcilably conflicting with instruction that motorist was negligent as matter of law. Vehicle Code, §§ 452, 530(b), 544(a, b), 546(a).

9. Appeal and error ⇐1064(1)

Where theory upon which verdict was returned cannot be ascertained, irreconcilable instructions become erroneous and prejudicial.

10. Appeal and error ⇐1031(6)

Reviewing court must assume as ground for reversal that jury may have decided in favor of defendants in accordance with erroneous instruction exonerating defendants in event of emergency, rather than on ground of contributory negligence as evidence would have authorized, where court had no means of determining which theory prompted jury.

11. Appeal and error ⇐1031(1)

Reviewing court could not speculate as to what testimony of persons present at time of fatal accident, but not called as witnesses, might have been.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Alvin W. Wright against Ross Laverne Sniffin and another for death of plaintiff's daughter in collision between automobile and bicycle. From a judgment for defendants, plaintiff appeals.

Reversed.

C. Ray Robinson, L. A. MacNicol and Margaret A. Flynn, all of Merced, for appellant.

Stammer & McKnight, of Fresno, for respondents.

THOMPSON, Justice.

Plaintiff has appealed from a judgment, an order denying a directed verdict, and an order denying judgment notwithstanding the verdict, which were rendered against him, in a suit for damages for the death of his young daughter, which occurred as the result of a collision on the highway between defendant's automobile and a bicycle which the girl was riding. She attempted to cross the highway to her left without giving the arm signal required by Section 544 of the Vehicle Code, and ran into defendant's machine which was traveling, within 100 feet of the intersection, on the wrong side of the highway, for the purpose of passing the bicycles. The cause was tried with a jury.

The only witness who testified to the unfortunate casualty was the defendant Ross Sniffin, who was driving his father's Ford automobile with his consent. The accident occurred on the Merced-Los Banos highway, near the intersection of Mission Aveue, on October 5, 1945, at about 8:30 A.M. The automobile was traveling north from defendant's ranch near Dos Palos to meet the brother of Ross at the depot in Merced. As Ross approached the intersection, he observed at some distance ahead of his machine, three school girls riding bicycles on the proper right-hand side of the highway. They were traveling at the rate of about five miles per hour. Plaintiff's daughter, Norma, who was about 12 years of age, rode in advance of her companions near the center white line of the highway. When defendant's car reached a point about 300 feet behind the girls, Ross, the driver, reduced his speed to "about 30 or 35 miles an hour" and sounded his horn several times. He then started to drive around them on the left-hand side of the highway. When he was 100 or 200 feet behind the bicycles he again sounded his horn. The three bicycles were traveling about five or six feet apart. Norma's bicycle was in advance and traveling "about two feet from the white line." At the second sounding of the horn "the two girls behind pulled over to the right." Norma continued to ride forward. Defendant's right wheels were then about nine feet from the center white line. Evidently Norma did not hear the blasts of the horn. When the vehicles were 40 or 50 feet south of the intersection of Mission Avenue, according to defendant's testimony, Norma, without giving a left arm signal, or any warning whatever, suddenly turned her bicycle to her left. The driver of defendant's machine immediately applied his brakes with full force and swerved to his left. Norma's bicycle struck the automobile near the handle of the front door. The collision occurred in the intersection of the highways, near the western paved portion of the Merced-Los Banos highway. The paved highway was 20 feet wide and had seven foot shoulders. At the time of the impact defendant's car was traveling about 20 miles per hour. The machine ran onward 25 or 30 feet into a ditch at the northwest corner of the intersection, and turned over. Mr. Farr, a highway patrolman, testified that he found skid marks on the pavement. Norma Wright was instantly killed as a result of the collision.

The appellant contends that the negligence of the defendant was the sole proximate cause of the accident; that the deceased was not guilty of contributory negligence; that a bicyclist is not subject to the provisions of the Vehicle Code, and is not required by section 452 or 544 of that code to give an arm signal before turning right or left across a public highway; that Norma Wright's failure to signal her intention to cross the highway was not the proximate cause of the accident; that the instructions which were given to the jury were erroneous, conflicting, misleading and prejudicial, and that the court erred in refusing to give certain instructions offered by him.

[1] The evidence clearly shows that the defendant, Ross Sniffin, was guilty of negligence in attempting to pass the bicyclists on the wrong side of the highway, within 100 feet of the intersection, contrary to the provisions of Section 530 of the Vehicle Code. Subdivision (b) of that section reads in part:

"No vehicle shall at any time be driven to the left side of the roadway under the following conditions: * * *

"(2) When approaching within one hundred feet of or when traversing any intersection, * * *."

[2] The appellant asserts that Norma Wright, the deceased, was not guilty of contributory negligence, and that the provisions of the Vehicle Code with respect to the necessity of giving an arm signal or other warning before turning a vehicle to cross a highway at an intersection do not apply to bicycles. We cannot agree with that construction of the code.

Section 544 of the Vehicle Code provides that:

"(a) No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"(b) Any signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning."

Section 546, provides that:

"All signals herein required given by hand and arm shall be given from the left side of a vehicle in the following manner and such signals shall indicate as follows:

"(a) Left turn—hand and arm extended horizontally beyond the side of the vehicle."

[3, 4] We are of the opinion the appropriate provisions of the Vehicle Code, with respect to the operations of vehicles on the public highways, unless by their very nature they have no application, apply to bicycles. Sec. 452, Vehicle Code; Flury v. Beeskau, 139 Cal.App. 398, 403, 33 P.2d 1033; 5–6 Huddy's Cyc. of Automobile Law, p. 330, secs. 190, 191; Vol. 44, Words and Phrases, Perm.Ed., page 94. Clearly a bicycle is a vehicle. The word "vehicle" is defined in Webster's International Dictionary of 1928, at page 2270, as: "That in or on which a person or thing is or may be carried, * * * as a coach, wagon, car, bicycle, etc., a means of conveyance." See Vol. 44, Words and Phrases, Perm.Ed., pages 94, 95.

In the Flury case, supra [139 Cal.App. 403, 33 P.2d 1036], it is said: "The traffic rules which are prescribed by the California Vehicle Act apply to bicycles and motorcycles as well as to automobiles and other vehicles. * * * Under the circumstances of this case, the question regarding the alleged contributory negligence of the plaintiff was a problem for the determination of the jury. The rule of law regarding the effect of contributory negligence applies to a bicyclist just as it does to the operator of an automobile or other motor vehicle."

Section 452 of the Vehicle Code provides that: "Every person riding a bicycle * * * upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this division, except those provisions which by their very nature can have no application."

Clearly it may not be said the ordinary statutory provisions requiring an arm signal, or some sort of warning, and due care, before the operator of a vehicle turns across a highway at an intersection, are "by their very nature" inapplicable to bicyclists. If that be true, then no warning signals of a sudden change of course would be required by a bicyclist. In the present case, the court, in denying plaintiff's motion for judgment notwithstanding the verdict, specifically determined that "there is ample and substantial evidence to justify the jury in finding that the deceased, Norma Wright, was guilty of contributory negligence."

[5] The questions of negligence and of contributory negligence, and as to whether such conduct or omissions contributed to or are the cause of an accident resulting in injuries or damage, are ordinarily problems for the determination of the jury. Foster v. Einer, 69 Cal.App.2d 341, 346, 158 P.2d 978, 981. In the case last cited the court quotes with approval from 19 California Jurisprudence, page 732, as follows: "The proximity of one fact to another in a case, and their relation and sequence to each other, is essentially with-

in the province of the jury to determine. * * * Thus the question whether an injury was caused by the act of a defendant, by an intervening act of a responsible third person, or by an act of God, whether a violation of statute contributed proximately to an injury, and whether a minor had such judgment and ability to comprehend that his act was the proximate cause of the injury, are matters for the determination by the jury."

[6, 7] We conclude that the evidence would support the verdict in favor of the defendants, provided the jury was not misled by conflicting instructions which we will proceed to discuss. In spite of the evidence of the defendants that Norma failed to give a left arm signal or any warning of her intention to cross the highway, plaintiff was entitled to the presumption that the deceased used due care for her own safety (Code Civ.Proc., sec. 1963, subd. 4), which created a conflict of evidence regarding that subject. We are unable to determine whether the jury rendered a judgment in favor of the defendant on the theory that Norma was guilty of contributory negligence, or because defendant was excusable under an instruction given to the jury regarding the operation of their machine in a sudden emergency.

[8, 9] We are of the opinion the instructions which were given to the jury are irreconcilably conflicting and that it is impossible to determine whether the jury rendered a verdict in favor of the defendants on the ground that Norma Wright was guilty of contributory negligence, or because Ross Sniffin, the driver of defendant's car, was confronted with an emergency at the time of the accident which caused him to wrongfully operate his machine so as to result in the collision which might have been otherwise avoided. The rule is well established that when the instructions are irreconcilably conflicting, and it "cannot be ascertained upon what theory the verdict was returned," they become erroneous and prejudicial, and therefore require a reversal of the judgment on that account. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 280, 201 P. 599, 603. In the case last cited a judgment for damages for injuries sustained by plaintiff was reversed for the giving of conflicting instructions which prevented the court from determining the theory upon which the verdict was returned. The court said:

"* * * The instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. * * * Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict. * * *

"Because of the foregoing erroneous instructions, it will be necessary to reverse the case."

The conflicting instructions, one of which was given at the request of the defendants, consist of a positive charge that "* * * As a matter of law the defendants are guilty of negligence which was a proximate cause of the death of Norma Wright," and a contrary charge, in effect, that defendants would be relieved of liability for negligence if it appeared that Ross Sniffin was confronted with an emergency at the time of the accident and merely failed to exercise the best judgment in the manner in which he then operated his machine. The latter instruction is inapplicable to the undisputed evidence which shows that he voluntarily and wrongfully placed himself in that dangerous position by attempting to pass the bicycle by traveling on the wrong side of the highway within 100 feet of the intersection. That instruction reads: "You are instructed that a different rule of negligence applies in cases of emergency from that which applies when a person has an opportunity to stop and consider his course of action. Therefore, if the defendant Ross Laverne Sniffin was confronted with an emergency, without fault on his part, the mere failure on his part

to exercise the best judgment that the case renders possible does not establish a lack of care on his part which renders him liable in this case. The short period of time in which he was obligated to act and the impending danger to himself and to Norma Wright, with the consequent excitement attending such a situation, must be taken into consideration. If, therefore, you find from the evidence that the defendant was faced with an emergency and adopted the course of action which to him seemed best under the circumstances, and in so doing he acted as any ordinary prudent person would have acted under those same circumstances, and that there was no other act or omission on his part which was a proximate cause of the accident, that is all that can be required of him, even if you believe from the evidence that had he done something else there was a possibility or chance that the accident might have been avoided."

[10] It is apparent that the jury accepted the foregoing instruction as applicable to the facts of the case. The jury had a right to assume that the court deemed it to be applicable to the issues in the case, or it would not have been given. It is absolutely inconsistent with the first quoted instruction to the effect that defendants were guilty of negligence as a matter of law. We must assume that the jury may have decided in favor of the defendants in accordance with the last-quoted instruction solely on the doctrine of excusing a defendant for error in judgment for conduct performed in the stress of an emergency, and not otherwise. To be sure, the jury may have returned a verdict for the defendants on the ground that Norma Wright was guilty of contributory negligence. But we have no means on determining which theory prompted the jury to return its verdict.

[11] In the present case we may not say as a matter of law that Norma Wright was guilty of contributory negligence for the reason that she failed to give adequate warning that she intended to cross the highway to her left. The only evidence of her failure to give such warning was the testimony of Ross Sniffin, one of the defendants. The two girls who accompanied Norma at the time of the accident were not called as witnesses. We may not speculate as to what their testimony might have been on that subject. There was a conflict of evidence regarding Norma's failure to give the warning signal, which was created by the legal presumption that she used due care for her own safety. There was no evidence on the part of plaintiff dispelling, or tending to dispel, that presumption. It was a factor to be considered in determining Norma's alleged contributory negligence. That presumption reinforces the uncertainty as to whether the jury rendered its verdict for defendants on account of her alleged contributory negligence or merely because the jury was instructed that defendants were excusable on account of the emergency. We are convinced the instruction on emergency has no application to the facts of this case, because the driver of defendant's machine voluntarily placed himself in that critical situation, and in so doing violated the statute by attempting to pass a vehicle within 100 feet of the intersection.

Regarding the presumption of due care, which definitely applies to the facts of this case, the Supreme Court said in Anthony v. Hobbie, 25 Cal.2d 814, at page 819, 155 P.2d 826, 829: "The plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns. Code Civ.Proc. sec. 1963(4). The case was a proper one for the application of that presumption. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. That such presumption was not dispelled from the case is obvious from the foregoing discussion showing that plaintiffs' own evidence did not show decedent was guilty of contributory negligence as a matter of law. Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not. The rule is stated in Westberg v. Willde, supra, 14 Cal.2d at page 365, 94 P.2d at page 593, quoting from Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269."

The appellant also urges as ground for reversal of the judgment the refusal of the court to give the jury two proffered in-

structions involving proper elements to be considered in determining the degree of care, or the responsibility of an immature child of the age of Norma for her acts and conduct. The instructions appear to conform to correct principles of law, and were applicable to the facts of this case. They might well have been given to the jury. But it is unnecessary to discuss the merits of those instructions, or to determine whether they may have been adequately covered by others which were given to the jury, in view of what we have said regarding the giving of the conflicting and misleading instructions previously quoted. For the same reason it is unnecessary to determine whether plaintiff's motions for judgment notwithstanding the verdict, and for a new trial, were erroneously denied.

The judgment is reversed.

ADAMS, P. J., and SCHOTTKY, J. pro tem, concur.



80 Cal.App.2d 154

EBLE v. PELUSO et al.

Civ. 15600.

District Court of Appeal, Second District, Division 2, California.

June 4, 1947.

Rehearing Denied June 20, 1947.

1. Evidence ⇐117

In malpractice action, question whether witness was familiar with degree of care and skill of physicians and surgeons in good standing in county during time of treatment in question was proper over objection that no proper foundation had been laid since none was needed.

2. Evidence ⇐512

In malpractice action, question whether witness was familiar with degree of care and skill of physicians and surgeons in good standing in county during time of treatment in question, was not improper as calling for a conclusion.

3. Evidence ⇐545

An expert witness' qualifications may be shown by an examination of the witness, and the examination should not be limited by stringent rules.

4. Evidence ⇐545, 546

After a witness has testified that he is competent to express an expert opinion on a subject, cross-examination should be permitted to show the basis of his statement that he is qualified, and then from all of the evidence, the trial court, before permitting the witness to answer a hypothetical question, should rule whether, in its opinion, the witness has qualified as an expert.

5. Appeal and error ⇐1048(2)

Where trial judge in malpractice action erroneously declined to permit plaintiff's witness to answer questions asked of him, for purpose of establishing that he was qualified as an expert witness, and plaintiff was thereby prevented from showing that medical treatment administered to him was not in conformity with degree of skill ordinarily exercised by physicians in good standing in the county, judgment for defendants was reversed.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Malpractice action by Clarence Laurence Eble against Joseph D. Peluso, and others. From a judgment for defendants predicated on the granting of their motion for nonsuit, the plaintiff appeals.

Judgment reversed.

Arthur Garrett, of Los Angeles, for appellant.

Chase, Barnes & Chase and Chase, Rotchford, Downen & Chase, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a nonsuit in an action to recover damages for malpractice, plaintiff appeals.

So far as material here these are the essential facts:

On September 16, 1941, plaintiff while working as a linoleum layer tripped and fell fracturing the ring finger on his left hand. He was taken to a doctor who placed the injured member in a splint where it remained for two or three weeks. Five or six days thereafter the same doctor put a cast on the hand. The splint was retained on the injured finger but the non-injured fingers were left free.

About October 3, 1941, defendant doctor sent plaintiff to another doctor who X-rayed his hand and then referred him to Doctor Peluso. Said defendant treated the injured finger without obtaining satisfactory results until January 7, 1942, at which time it was amputated. The other fingers remained stiff and on June 5, 1942, the little finger on the left hand was removed.

Thereafter the present action was instituted and at the time of the trial plaintiff endeavored to qualify Dr. Frank R. Webb as an expert witness on the treatment of fractured fingers in Los Angeles County. Evidence was introduced tending to prove that he had graduated from the College of Physicians of Columbia University, New York City, in 1902, and had been in the practice of medicine continually thereafter; that he had quite a little experience in bone trauma as an interne in New York City, in the government hospital at Washington, D. C., and in general practice; that in 1912 he took a position with the Pacific Great Eastern Railway on a construction line caring for more than 2,000 men who were doing blasting and mountain excavation, and that in many of these cases there were injuries of the bone and joints; that in 1921 he was licensed to practice medicine in the state of California; that he was the chief autopsy surgeon for the coroner's department in Los Angeles county; that he had made many autopsies on persons showing bone disease and defective conditions of the bone in which he endeavored to and did obtain the history and course of treatment of such conditions, and that he familiarized himself with the surgical and medical procedure in such cases.

He was then asked further questions hereinafter set forth to which the trial court sustained objections and held that the doctor had not been qualified as an expert witness, and that in the absence of any testimony showing that defendant Dr. Peluso had not treated plaintiff with the degree of care and skill ordinarily exercised by practitioners in Los Angeles there was no showing of negligence and the defendants' motion for a nonsuit should be granted.

This is the sole question to be determined:

Did the trial judge commit prejudicial error in sustaining an objection upon the ground that no proper foundation had been laid and that it called for a conclusion of the witness to the following and similar questions: "Doctor, are you familiar with the degree of care and skill of physicians and surgeons in good standing in Los Angeles County during the years 1941 and 1942 and subsequent thereto in the treatment of fractures and ecchondromas?" [1]

[1] This question must be answered in the affirmative. The first objection that there was no proper foundation laid is clearly without merit for the reason that the question was in itself asked for the purpose of laying a foundation as to the witness' qualifications as an expert, and did not need any foundational predicate.

[1, 2] The objection that the question called for a conclusion of the witness is likewise without merit. It is true that the question calls, in a certain sense for

[1] Like objections were sustained to these questions:

a. "Doctor, are you familiar with the treatment of physicians and surgeons in good standing in Los Angeles County during the years 1941 and 1942, the treatment of cysts in fingers or otherwise known as ecchondromas?"

b. "Are you familiar with the care, skill and judgment in surgery that is practiced by physicians and surgeons in Los Angeles City in regard to the care and treatment of fractures, ecchondromas, and the mobilization or immobilization of the fingers in an ecchondroma, the fingers being ones that are not injured and those that are injured, and with the practice ordinarily exercised and used by physicians in good standing, with the treatment and surgery of ecchondromas?"

the conclusion of the witness in that it requires him to use his mental processes to conclude whether he is familiar with the degree of care and skill physicians in good standing in Los Angeles County use in the treatment of fractures of the bones. On the other hand, it calls for a statement of fact in asking him whether he has such information. The answer to this question is just as much a statement of fact as if it were asked of another witness and is in principle not different from asking a witness, "Did you see two automobiles strike each other?" Such question, in the first place, calls for the conclusion of the witness in the use of his mental processes that he did or did not see the collision, and further calls for the fact as to whether he did or did not observe the impact. Such questions are not objectionable on the ground that they call for conclusions of the witness, the rule being established that an expert witness' qualifications may be shown by an examination of the witness himself, which examination should not be limited by narrow and stringent rules.

[4] After the witness has testified that he is competent to express an expert opinion upon a subject cross-examination should be permitted to show the basis of his statement that he is qualified, and then from all of the evidence the trial court before permitting the witness to answer a hypothetical question should rule whether in its opinion the witness has qualified as an expert. (Scheerer & Co., Inc., v. Deming, 154 Cal. 138, 143, 97 P. 155; People v. Hawes, 98 Cal. 648, 651, 33 P. 791; Bloch v. American Insurance Co., 132 Wis. 150, 112 N.W. 45, 46; Frick v. Kansas City, 117 Mo.App. 488, 93 S.W. 351, 353; Scandell v. Columbia Const. Co., 50 App.Div. 512, 64 N.Y.S. 232, 236. See also 22 Corpus Juris (1920), sec. 609, p. 524; 32 C.J.S., Evidence, (1942) § 458, p. 98; Salmon v. Rathjens, 152 Cal. 290, 299, 92 P. 733.)

[5] In the present case it is evident that since the trial judge declined to permit the witness to answer the questions asked him, plaintiff was foreclosed from establishing the qualification of his alleged expert witness and thus prevented from showing that the treatment administered by defendant doctor was not in conformity with the degree of care and skill ordinarily exercised by physicians and surgeons in good standing in Los Angeles County, which obviously was prejudicial to plaintiff's case.

McCurdy v. Hatfield, — Cal.App.2d —, 173 P.2d 670, cited by defendants, is not of any assistance in view of the fact that the Supreme Court granted a hearing therein December 19, 1946. Therefore the cited case is not authority. Neither does it have any bearing upon the questions presented in this case.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 223

WALLICH v. KOREN.

Civ. 15791.

District Court of Appeal, Second District, Division 2, California.

June 6, 1947.

1. Trade-marks and trade-names and unfair competition ⇐77

Where continuance of an employer's trade depends upon keeping secret the names of customers, or other valuable information known to employer, an employee who has gained knowledge of such secrets cannot thereafter utilize such knowledge to prejudice of former employer.

2. Injunction ⇐56

Independent of an express contract, equity will enjoin disclosure of confidential knowledge of trade secrets which former employee learned in course of his employment.

3. Trade-marks and trade-names and unfair competition ⇐77

Defendant's knowledge of names, addresses, and requirements of plaintiff's cus-

tomers learned during employment by plaintiff is a part of good will of plaintiff's business, and is a trade secret, and plaintiff is entitled to injunctive relief if defendant undertakes to use such information to plaintiff's detriment.

4. Trade-marks and trade-names and unfair competition ⇐77

Where first-aid supplies salesman, who had been given an exclusive territory, a list of patrons, and valuable information relative to them, after termination of employment, commenced to solicit same persons in sale of first-aid supplies on his own account, and gave impression that he was selling former employer's products, former employer was entitled to injunction against selling to or solicitation of his customers.

Appeal from Superior Court, Los Angeles County; H. S. Schaffer, Judge.

Action by F. R. Wallich, individually and doing business as Wallich Laboratories and as Golden State Supply Company, against J. H. Koren to recover damages and injunctive relief because of unfair practices by the defendant. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Hansen & Sweeney and John L. Mace, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The sole question posed by this appeal is whether under the facts found by the court the plaintiff was entitled to damages and injunctive relief on account of unfair trade practices by the defendant, appellant herein.

For about ten years prior to the commencement of this action respondent manufactured and distributed first-aid medical supplies and maintained a laboratory in which he employed skilled chemists for the creation of his products. July 17, 1940, he employed appellant by written contract whereby the San Joaquin Valley, Los Angeles county, and other portions of Southern California areas were assigned exclusively to appellant who agreed to solicit the retail trade over the routes designated. The salesman was supplied with respondent's list of patrons within the specified territory with their addresses and other valuable information relative to them. Appellant continued to solicit respondent's customers within the territory until April, 1944, when the employment was terminated. About December 15, 1945, appellant reentered the field of his former employment and commenced to solicit and to sell first-aid supplies to respondent's customers on the routes formerly traveled by him while in respondent's employ. Such supplies were similar to those then manufactured and distributed by respondent and formerly sold through the agency of appellant. In his efforts he was aided by the list of respondent's patrons acquired during his previous tenure, by his intimate acquaintance with such patrons, by his knowledge of their stocks and by their friendly attitude toward respondent and partiality to his products. He was aided also by his knowledge of the customers' requirements, buying habits and buying intervals acquired during the prior employment.

The court awarded judgment for the sum of $250 and enjoined appellant from selling to or soliciting the purchase of first-aid medical supplies from any of these persons who were customers of respondent on the routes traveled by appellant while in the employ of respondent. Also, he was enjoined from attempting to induce any of such former customers to withdraw their trade from respondent and to purchase such supplies from appellant and from revealing the names and addresses of such customers.

There is no dispute as to the facts. The issue is to be determined by resolving whether the facts bring the case within unfair trade practices, such as appellant's using trade secrets and canvassing the "routes" of his erstwhile employer, as defined by certain California decisions (George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399; Scavengers' Protective Association v. Serv-U-Garbage Company, 218 Cal. 568, 24 P.2d 489; Golden State Milk Products Company v. Brown, 217 Cal. 570, 20 P.2d 657; Pasadena Ice Company v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; Em-

pire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann.Cas. 1914c, 628), or whether it is a case of a commercial salesman who on leaving his employer immediately engages in a competitive business and makes use of only such information gained from his former employer as such a salesman is entitled to use in building up a business for himself or for another competitor. If his conduct was of the first class the judgment should be affirmed; if of the second it should be reversed.

[1-3] If the continuance of an employer's trade depends upon keeping secret the names of customers, or other valuable information known to such employer, his employee, having gained knowledge of such secrets in the course of his employment, cannot thereafter utilize such knowledge to the prejudice of his former employer. New Method Laundry Company v. MacCann, 174 Cal. 26, 30, 161 P. 990, Ann.Cas. 1918C, 1022. Independent of an express contract equity will enjoin the disclosure of confidential knowledge of trade secrets which a former employee learned in the course of his employment. Empire Steam Laundry v. Lozier, supra, 165 Cal. at page 99, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann. Cas.1914C, 628. The fact that a defendant was employed by plaintiff for years during which he learned the names, addresses and requirements of plaintiff's customers justifies injunctive relief where the defendant undertook to use such information to the detriment of plaintiff. Such knowledge is a part of the good will of the business and is a trade secret. Dairy Dale Company v. Azevedo, 211 Cal. 344, 295 P. 10; Pasadena Ice Company v. Reeder, supra.

Appellant contends that the facts here under consideration more nearly parallel those in Continental Car-Na-Var Corporation v. Moseley, 24 Cal.2d 104, 148 P.2d 9, and that it should control this decision. A careful reading discloses that it cannot be placed in the category of the route cases, in which the products sold are essentially the same and the quality of service rendered is similar. Preferably, it is the case of a commercial salesman who had no assurance of an order unless he could satisfy the prospective buyer that his wares could be sold at a lower price, or that for other reasons they would be more salable than competing products. The court emphasized that in selling to plaintiff's customers the defendants did nothing with the intention of harming the plaintiff. The case is one in which the former employee was not in possession of secret information not readily accessible to others; he was within his rights in advising the trade of his change to the house of a rival employer. Therefore it is not authority for appellant's contention herein.

On the other hand, the court below was guided by the decision in George v. Burdusis [21 Cal.2d 153, 130 P.2d 403] and respondent now places its reliance in the same authority for an affirmance. The facts reported and the conclusions derived warrant such reliance. After a partnership of over four years Aleck Burdusis conveyed his interest to his partners including the good will in the partnership which had conducted a linen supply business. He was soon joined by his brother Tom and together they traveled the route which Tom had traveled for three years as agent of the old firm, and within a week procured for Aleck 137 of the 160 customers he had served for his former employers. The court held that the use by a former employee of a customer list of his former employer whereby to solicit business for a rival concern is an unwarranted disclosure of trade secrets, which act on the part of such employee will be enjoined (citing authorities first mentioned herein); that in such cases the wrong to the former employer lies not only in the knowledge of the identity of the customers but also in the former employee's personal acquaintance with and knowledge of the customers and of their "places of residence, their peculiar likes and fancies and other characteristics," all of which mightily aids a solicitor to secure and retain the business of those he visited while in the service of his former employer (citing Dairy Dale Company v. Azevedo, 211 Cal. 344, 295 P. 10); that a list of customers is a trade secret if there is confidential information concerning the value of such customers; that to act upon it is an improper use of confidential information and amounts to unfair competition,

"for the additional influence of the friendly contact of the former employee with the persons whose business he would carry to his new connection brings the solicitation within the condemnation of unfair competition."

[4] While the cases supporting the contentions of the distributor and his former employee or the person who subsequently employed such erstwhile agent announce the doctrines and their limitations urged by both contenders, the facts of the Burdusis decision justify the application here of the rules therein announced. The findings herein disclose that during his service for respondent appellant was assigned to a particular route with the exclusive right to sell respondent's products; that a list of regular customers on such route was maintained by respondent with their business addresses and information concerning the quantity of repeated sales to each, by the use of which list any salesman could cover comparatively extensive geographical territory and make more sales than would be possible without such information. The peculiar nature of respondent's medical products and his customers' developed preferences therefor, his knowledge of the buying intervals of customers acquired by him during his ten years of business and the fact that the majority of his customers repeated their orders periodically are trade secrets, entitled to protection. The business relationship between respondent and his customers had resulted from repeated purchases by his patrons in preference to the products of competitors, and such relationship continued unless disturbed by some efficient subversive agency. By the contract of appellant's original employment his territory and routes as well as his hours of employment and the prices of the merchandise were prescribed by respondent, and the list of respondent's customers for first-aid supplies was to be the employer's property and constituted a valuable asset.

While the judgment is entitled to affirmance upon the facts above discussed, it is further fortified by evidence which warranted the inference that appellant designedly set out to pirate upon the established reputation and good will of respondent. He admitted that he was able to cover a large geographical territory within five or six weeks because of his knowledge of respondent's customers gained from his seven years of service to respondent. While operating on his own account in 1946 he caused to be manufactured first-aid supplies with appearance and label similar to those of Wallich which were calculated to deceive the latter's customers. With such supplies he traveled the routes on which he had formerly solicited customers on behalf of respondent. He sold them his own products and they believed that they were buying the merchandise of his erstwhile employer. In December, 1945, he called at the office of the Hazeltine Packing Company at San Fernando which had purchased supplies from him from 1941 to 1944. As he approached Mr. Franzwa, the buyer, the latter said: "Are you back?" to which appellant replied: "Yes, back from the service and on the job again." In response to his inquiry as to what supplies were needed Mr. Franzwa said: "Well, you can check it up as you usually do." Appellant then entered the vault where he had always checked the supplies to ascertain the needs of the company, brought from his automobile what he determined was necessary to replenish the stock, and received from the witness cash for his invoice. Mr. Franzwa believed at the time that he was purchasing respondent's products. His illusion was soon dispelled. In four days respondent's representative called only to learn of the recent visit of appellant.

A similar experience with appellant was related by the witness Hall, purchasing agent of the Ventura Tool Company. When the witness reminded Koren that a Mr. Abell was handling the territory for respondent, appellant stated that "he had purchased that route" from Wallich who was supplying the merchandise but that he "was in business for himself." On the strength of such statements Mr. Hall purchased from Koren his needed supplies.

There is nothing to be said in extenuation of such deception as was practiced in the cited instances. For the entire course of appellant's conduct the law can offer

nothing but censure. Our civilization has passed beyond the era of cutthroat competition. Not only do business men deprecate practices that deprive one's neighbor of his rights, but the ethic that abounds among upright men is to let rivals live and, if a competitor deserves success, so to act as to defeat the piracy of such advantages as he may have honorably acquired.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



80 Cal.App.2d 255

Ex parte ANCHETA.

Cr. 2016.

District Court of Appeal, Third District, California.

June 10, 1947.

1. Habeas corpus ⇐9

Where wife and her father testified without contradiction that she was not restrained of her liberty by her parents, husband was not entitled to writ of habeas corpus for wife's release from such alleged restraint.

2. Habeas corpus ⇐85(1)

In habeas corpus proceeding for release of person from alleged illegal detention, burden is ordinarily on petitioner to show such detention by preponderance of evidence.

3. Habeas corpus ⇐9

To entitle person to writ of habeas corpus for release of another from restraint of liberty, restraint asserted must be shown to have been actual, illegal and involuntary.

Habeas corpus proceeding by Tranquilino del Rosario Ancheta for release of his wife, Hazel Virginia Fletcher Ancheta, from alleged restraint of her liberty by her parents.

Writ discharged.

Gordon A. Fleury and Richard J. Lawrence, both of Sacramento, for petitioner.

PER CURIAM.

[1] By means of habeas corpus the petitioner Tranquilino del Rosario Ancheta seeks to obtain release from the alleged restraint of the liberty of Hazel Virginia Fletcher Ancheta, his wife, by her parents. An answer to the petition denies the material allegations thereof. From the undisputed evidence adduced at the hearing by this court, it appears that Hazel, the wife, is not restrained of her liberty. There is no merit in the petition.

The petition alleges that Tranquilino del Rosario Ancheta and Hazel Fletcher were lawfully married in the State of Washington on March 17, 1947. That fact is conceded by the answer. Hazel is fifteen years of age. After the marriage was consummated, and the spouses returned to California, Hazel was returned to her parents and is now living with them at their home in Yolo County. Hazel was sworn and testified positively, at the hearing of this writ, that she was not restrained of her liberty by either of her parents, and that she did not wish to return to her husband. Mr. R. V. Fletcher, the father of Hazel, testified that neither he nor his wife had forbade her returning to her husband, or had done anything to prevent her from doing so; that they had not restrained her of her liberty in any particular, but that, on the contrary, she was perfectly free to return to her husband whenever she desired to do so. There was absolutely no evidence to the contrary. Mr. Ancheta failed to take the witness stand in his own behalf. From the uncontradicted evidence it appears without conflict that the parents of Hazel are not restraining their daughter's liberty, as alleged in the petition, or at all.

[2, 3] Ordinarily, the burden of proof is on the petitioner to show by a preponderance of evidence the alleged illegal detention. 13 Cal.Jur. 275, sec. 53. The asserted

restraint of liberty must be shown to have been actual, illegal, and involuntary. 13 Cal.Jur. 221, sec. 5. No such showing appears in this case.

The writ is discharged.



80 Cal.App.2d 242

STAMPER v. CITY OF LOS ANGELES et al.

Civ. 15784.

District Court of Appeal, Second District, Division 2, California.

June 10, 1947.

1. Municipal corporations ⇐220(9)

Pension provisions should be broadly construed in favor of those who were intended to be benefited thereby, but they cannot be construed so as to confer benefits on persons not entitled thereto.

2. Municipal corporations ⇐187

Under city charter permitting member of police department to retire after 20 years' aggregate service, in computing the "aggregate service" of member, he is not entitled to credit for periods during which he was absent from duty. St.1927, pp. 2008, 2020, 2023, §§ 181, 183, Pen.Code, §§ 143, 817, 818, 825, 828, 836.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggregate Service".

3. Evidence ⇐32

Appellate court does not take judicial notice of city ordinances.

4. Municipal corporations ⇐187

Under city charter entitling member of police department to retire after 20 years' "aggregate service" and entitling member's widow to pension if member shall die while eligible to retirement, where 20 years 132 days elapsed between date of members appointment and his death but his total absences amounted to 151 days and overtime computed on basis that 8 hours constituted a day's work amounted to 70½ days, his widow was entitled to pension. St.1927, pp. 2008, 2020, 2023, §§ 181, 183.

5. Municipal corporations ⇐187

Under city charter entitling member of police department to retire after 20 years' aggregate service, when 20 full years have elapsed after appointment of member, he is entitled to retire on pension if he has not been absent from duty, but, if he has been absent, he must serve sufficient additional time to equal time he has been absent, to be entitled to pension. St.1927, pp. 2008, 2020, 2023, §§ 181, 183.

6. Municipal corporations ⇐187

Under city charter entitling member of police department to retire after 20 years' aggregate service, if member has served overtime during 20 years after appointment such overtime may be credited against absences charged against him, but overtime services during 20-year period cannot be utilized to permit retirement prior to expiration of 20 years after date of appointment. St.1927, pp. 2008, 2020, 2023, §§ 181, 183.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceeding by Laura Stamper against the City of Los Angeles, etc., and others for a writ of mandate requiring the city and its Pension Commission to grant and allow a pension. From a judgment ordering the writ to issue, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and John J. Tully, Jr., and O. M. Lloyd, Deputy City Attys., all of Los Angeles, for appellants.

George E. Cryer and R. Alston Jones, both of Los Angeles, for respondent.

WILSON, Justice.

Respondent, the widow of Roscoe C. Stamper, who at the time of his death was a police officer of the City of Los Angeles, petitioned for and obtained a writ of mandate requiring the city and its Pension Commission to grant and allow a pension

to which she alleged she was entitled by virtue of the provisions of the City Charter. The appeal is from the judgment ordering the writ to issue.

The decedent was appointed a police officer in the Los Angeles Police Department on October 1, 1924, and remained a member of the department until his death on February 10, 1945. During the period of his service he was absent from duty without pay two days. On three voluntary signed requests he was granted leaves of absence from duty without pay and on account of sickness an aggregate of 147 days. The last day on which he worked was February 8, 1945, accounting for two days' absence on February 9 and 10. His total absences amounted to 151 days. Deductions were made from his compensation at his regular rate of pay for the days on which he was absent. He worked overtime a total of 564 hours, or 70½ days, for which he was compensated at his regular rate of pay.

Section 183 of the charter (Stats.1927, pp. 2008, 2023)* provides that the widow of a member of the police department is entitled to a pension if such member shall die "while eligible to retirement from such department on account of years of service." Under the provisions of section 181 (Stats. 1927, pp. 2008, 2020) a member of the department may be retired at his own request "after twenty years' aggregate service."

The question is whether decedent had had twenty years' aggregate service in the police department. If so he was eligible to retirement on the date of his death and the widow is entitled to her pension. If his aggregate service was less than 20 years he would not have been, if living, eligible under the charter to retire on February 10, 1945, consequently petitioner, as the widow of an ineligible officer, would not be entitled to a pension.

Between October 1, 1924, the date of decedent's appointment, and February 10, 1945, the date of his death, the elapsed time was 20 years 132 days. Appellants contend that in computing the "aggregate service" of the decedent he is not entitled to credit for the 151 days' absence by reason of the fact that he was absent from duty and off the payroll, and therefore his aggregate service was 19 days less than the required 20 years. Save for his overtime which we shall discuss later we would be in agreement with appellants' argument.

[1] Pension provisions should be broadly construed in favor of those who were intended to be benefited thereby (Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737; Casserly v. City of Oakland, 215 Cal. 600, 603, 12 P.2d 425), but they cannot be construed so as to confer benefits on persons not entitled thereto.

[2] Respondent contends that "twenty years' aggregate service" as used in the charter means that after 20 years have elapsed from the date of induction into the police department, disregarding absences from duty, a member of the department is entitled to retire on the pension provided in the charter. She argues that decedent was a police officer from the day he took the oath as such until his death (citing Pen.Code secs. 817, 818, 825, 828, 836), and was subject to penalties for failure to perform the duties prescribed in section 143 of said code. We fail to see even the remotest connection between these provisions and the question before us. There is no denying that when a police officer is appointed and takes the oath as such he remains a policeman until he dies, resigns or otherwise terminates his official connection with the department. But he is not in "service" and his aggregate service is not accumulating unless he performs service. While absent from duty with or without leave he is not executing the functions of an officer and is not compensated for the period of his absence. If he were granted leave of absence for three months in each of 20 years after his appointment he would have had a total absence of 60 months or five years during the 20-year period. If respondent's definition of "aggregate service" were adopted a police officer, having

* Both appellants and respondent have referred in their briefs to several sections of the City Charter without official reference. Our search of the statutes for the original charter and for the amendments would have been unnecessary if counsel had provided the citation.

had such leaves of absence, would be entitled to retire on a pension after having performed his duties for a total elapsed time of only 15 years. Neither the commission in framing the charter nor the electors in adopting it had any such intention and respondent's theory is rejected as having no foundation.

An analysis of the opinion in Dierkes v. City of Los Angeles, 25 Cal.2d 938, 156 P. 2d 741, shows that the court held that a police officer is not entitled to credit a period of absence toward his retirement. It appears (25 Cal.2d at page 941, 156 P.2d 741) that the plaintiff had entered the police department on August 15, 1922, and had served, except for an absence of 14 days on leave, an aggregate period of 19 years less one day when he was called into the Navy. After serving more than a year in the Navy he was released for the purpose of resuming his duties in the police department and claiming his retirement. The court said that, but for the period spent in the Navy, his 20-year period of service in the police department would have become complete on August 29, 1942—20 years plus 14 days (his period of absence) after his appointment. If the charter provision means elapsed time the court would not have added his absent days to the 20 year period.

[3, 4] An officer who has lost a portion of his time of service and has been absent from his duties may, if permitted by his superiors under the rules and regulations of the department, make up the time lost. From the stipulation of facts on which the cause was submitted and from the arguments in the briefs of both parties we are led to assume that decedent's service overtime was officially authorized by ordinance or otherwise. Reference is made in both briefs to city ordinances that were not pleaded and were not offered in evidence purporting to relate to the number of hours constituting a day's work and to payment for overtime. We give no consideration to them since we do not take judicial notice of city ordinances. Pacific Finance Corporation v. City of Lynwood, 114 Cal.App. 509, 515, 300 P. 50, 1 P.2d 520; Marysville Woolen Mills v. Smith, 178 Cal. 786, 791, 175 P. 13. In computing decedent's overtime at 70½ days we assume on the basis of the stipulation of facts and the argument that eight hours constitute a day's work. Decedent's absences, without considering his overtime, were sufficient to reduce his aggregate service at the time of his death to 19 days less than the required 20 years. Deducting said 19 days from his 70½ days' overtime left him with 51½ days more than 20 years' actual service, rendering him eligible to retirement prior to his death.

What we have said concerning overtime however cannot be extended further than to allow the credit thereof against absences charged to the officer. If a police officer should work overtime and have no absences charged against him, the charter, reasonably construed, does not permit him to add the overtime to his regular time and thus acquire 20 years' service and permit him to retire in less than 20 calendar years after the date of his appointment.

[5, 6] From the foregoing discussion these rules are deduced: (1) When 20 full years have elapsed after the appointment of a police officer he is entitled to retire on pension provided he has not been absent from duty during that period. (2) If he has been absent he must, in order to be entitled to a pension, serve a sufficient time in addition to 20 elapsed years to equal the time he has been absent. (3) If he has served overtime during the 20-year period such time may be credited against such absences as have been charged to him. (4) Overtime service during the 20-year period cannot be utilized to permit retirement prior to the expiration of 20 years after the date of appointment or for any purpose other than to cancel absent time.

Since decedent was entitled to retire on a pension prior to his death respondent is entitled to a widow's pension in the amount provided by the terms of the charter.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

80 Cal.App.2d 161

MEYER v. SELGGIO.

Civ. 15729.

District Court of Appeal, Second District, Division 2, California.

June 4, 1947.

1. Pleading ⇐121(4), 129(1)

A denial for want of information or belief of an alleged fact which may be ascertained from an inspection of public record within defendant's reach is insufficient to raise an issue and such denial constitutes an admission of the allegation.

2. Brokers ⇐52, 54

A broker's commission is earned when vendor and purchaser have executed a binding, written agreement upon the terms provided in contract of employment of broker and purchaser is ready, willing, and able to perform the contract on the terms prescribed.

3. Brokers ⇐84(2)

In action to recover broker's commission, the readiness, willingness, and ability of purchaser are conclusively presumed upon proof that vendor entered into a valid contract of purchase and sale with purchaser.

4. Brokers ⇐60

Where vendor and purchaser have entered into valid contract of purchase and sale, broker's right to commission is not affected by failure of either party to carry out the agreement.

5. Pleading ⇐8(15)

Allegations of fraud in general terms are merely allegations of conclusions of law and present no issuable facts.

6. Pleading ⇐121(4), 129(2)

Answer denying, for want of information or belief, allegations that plaintiff was a duly licensed broker and had complied with code provisions to entitle him to use a fictitious name, admitted such alleged facts, since they were matters of public record and could have been ascertained by defendant from an examination of such records. Civ.Code, §§ 2466, 2468.

7. Pleading ⇐127(2)

Where vendor in action by broker to recover commission admitted execution of a written contract of sale of property, his denial of allegation that purchaser was ready, willing and able to complete the contract and his allegation that contract was predicated upon ability of purchaser to obtain financing were immaterial.

8. Pleading ⇐125, 127(2)

Where vendor admitted execution of a contract of sale of his property, his denials that a sale was consummated or that agreement constituted a sale or was so intended were merely legal conclusions contrary to admitted facts and immaterial in broker's action for commission.

9. Brokers ⇐82(2)

In broker's action for commission, affirmative allegation in answer that purchaser refused to complete contract was immaterial.

10. Brokers ⇐82(4)

In broker's action for commission, answer alleging that purchaser rescinded contract of sale because of material misrepresentations and alleging on information and belief that if any fraudulent representations were made they were made by broker, without alleging any specific acts of fraud, did not raise an issue of fraud.

11. Pleading ⇐349

Where vendor by answer admitted that he employed broker to sell hotel business on stated terms, including agreement to pay broker a commission, and that broker obtained purchasers, ready, willing and able to buy the property who executed a written contract of purchase and sale on the terms specified and no other material issues were raised by the pleadings, broker was entitled to judgment on the pleadings for agreed commission.

12. Appeal and error ⇐901

Error in rulings of trial court must be made affirmatively to appear in order to warrant reversal.

13. Appeal and error ⇐681

Where record failed to disclose nature of proposed amendment, appellate

court must presume that such amendment was immaterial and properly refused.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Herbert O. Meyer, doing business under the name and style of Meyer Investment Company, against Frank Selggio to recover broker's commission for sale of fixtures, lease and good will of a business, wherein defendant filed a cross-complaint. Judgment on the pleadings in favor of plaintiff, and defendant appeals.

Judgment affirmed.

Herbert L. Iasigi, of Los Angeles, for respondent.

Lindelof & Perelli-Minetti, of Los Angeles, for appellant.

McCOMB, Justice.

Defendant appeals from a judgment predicated upon the granting of plaintiff's motion for a judgment on the pleadings in an action to recover a broker's commission for the sale of the fixtures, lease and good will of a business known as the Detroit Hotel in Los Angeles.

So far as material here the pleadings disclose the following allegations and denials:

The Complaint

In the complaint is alleged:

1) the duly and regularly licensing of plaintiff as a business opportunity broker under the laws of the state of California;

2) the compliance by plaintiff with the provisions of sections 2466 and 2468 of the Civil Code authorizing him to do business under a ficticious name;

3) the employment by defendant of plaintiff for the sale of the Detroit Hotel on certain terms and conditions, including an agreement to pay plaintiff a commission of $1500 upon sale of the property;

4) that plaintiff negotiated the sale of the hotel in conformity with the terms and conditions of his written agreement for its purchase and sale signed by the defendant and vendee;

5) that he obtained purchasers who executed a contract for the purchase of the hotel, which contract defendant also executed agreeing to sell the property; and

6) that the purchasers were ready, willing and able to comply with the terms of the agreement of sale.

The Answer

The answer denied:

1) plaintiff was a duly licensed broker;

2) plaintiff had complied with the provisions of sections 2466 and 2468 of the Civil Code relative to doing business under a fictitious name;[1]

3) a consummated sale;

4) the readiness, willingness and ability of the purchasers to complete the purchase of the hotel;

5) that the sales agreement constituted a sale or was so intended;

6) the indebtedness of defendant to plaintiff, but alleged that defendant had executed a listing agreement in favor of plaintiff which listing agreement covered the Detroit Hotel setting forth the terms and conditions upon which plaintiff was given an exclusive right for thirty days to sell the hotel and by which defendant agreed to pay plaintiff a 10% commission in the event the hotel was sold.

As affirmative defenses it alleged:

a) that the sales agreement was rescinded by the purchasers due to material misrepresentations of plaintiff;

b) that the sales agreement was predicated upon the ability of the purchasers to obtain financing, which was not obtained.

Defendant moved for leave to amend his answer, but the record fails to disclose the nature of the proposed amendment.

On the foregoing state of the record the trial court granted plaintiff's motion for a judgment on the pleadings and entered judgment accordingly.

There are two questions presented for our determination:

First: Did the pleadings admit a cause of action in favor of plaintiff?

This question must be answered in the

[1] These denials were for lack of information or belief.

affirmative and is governed by these pertinent rules of law:

[1] 1. It is settled that a denial for want of information of belief of an alleged fact which may be ascertained from an inspection of a public record within the reach of defendant is insufficient to raise an issue, and that such a denial constitutes an admission of the allegation of the complaint. (See 21 Cal.Jur. (1925) page 150, section 101.)

[2] 2. A broker's commission is earned when the vendee and vendor have executed a binding, written agreement between them upon the terms provided in the contract of employment of the broker, and the vendee is ready, willing, and able to perform the contract on the terms prescribed. (Lind v. Huene, 205 Cal. 569, 570 et seq., 271 P. 1087.)

[3] 3. The readiness, willingness, and ability of the vendee are conclusively presumed in a suit by a broker to recover his commission upon proof that the vendor has entered into a valid contract of purchase and sale with the vendee. (Malmstedt v. Stillwell, 110 Cal.App. 393, 398, 294 p. 41.)

[4] 4. The right of the broker to his commission is not affected by failure of either party to carry out the agreement. (Lind v. Huene, supra; Twogood v. Monnette, 191 Cal. 103, 107, 215 P. 542.)

[5] 5. Allegations of fraud in general terms are merely allegations of conclusions of law, and present no issuable facts. (See 12 Cal.Jur. (1923) page 800 et seq., section 62.)

[6] Applying rule 1, supra, to the facts, defendant's attempted denial for want of information or belief that plaintiff was a duly licensed broker, and that he had complied with the requisite code provisions to entitle him to the use of a fictitious name, were ineffectual since such matters are of public record and could have been ascertained by defendant from an examination of such records. Therefore such defensive denials constituted an admission of each of said alleged facts.

[7, 8] In addition, defendant admitted by the allegation of his answer that he had signed a listing card in favor of plaintiff by which he had employed plaintiff and agreed to pay him a commission. He further admitted in his answer that he had executed the contract of sale in favor of the vendee obtained by plaintiff. Therefore, under rules 2 and 3 supra since defendant admitted that he executed a written contract of sale of his property, he was foreclosed from questioning the readiness, willingness and ability of the purchasers to complete the contract, and his denial of such allegation in the complaint was immaterial. Also, his allegation in the answer that the contract was predicated upon the ability of the purchasers to obtain financing was immaterial for the same reason. Likewise, his denials that a sale was consummated or that the agreement constituted a sale or was so intended were merely legal conclusions contrary to the admitted facts.

[9] The affirmative allegation that the vendee refused to complete the contract was immaterial under rule 4, supra.

[10] Likewise there is no merit in the contention that an issue of fraud upon the part of plaintiff was raised by the pleadings. The answer fails to allege any specific acts of fraud and merely upon "information and belief alleges that" if there were any false or fraudulent representations, such "false and fraudulent representations were made by plaintiff".[2] Clearly such allegations fall far short of the requirements of rule 5, supra.

[11] The net result of the analysis of the pleadings leaves the admissions by defendant that he employed plaintiff to sell

[2] The attempted allegation of fraud in the answer was as follows: "That defendant denies that any false and fraudulent representations were made by him to the Perrys, and in this respect alleges that all material dealings and negotiations between defendant and the Perrys were handled and conducted by plaintiff and plaintiff's efforts to bring about sales in this matter and that if in fact any false and fraudulent representations did take place defendant is informed and believes and upon his information and belief alleges that such false and fraudulent representations were made by plaintiff."

his property on certain terms and conditions, including the agreement to pay plaintiff a commission, and that plaintiff obtained purchasers, ready, willing, and able to buy the property, who executed a written contract together with defendant on the terms specified by defendant. Therefore, since there are no other material issues raised by pleadings, the trial court properly granted plaintiff's motion for a judgment on the pleadings.

Second: Did the trial court commit prejudicial error in refusing to permit defendant to amend his answer?

[12, 13] This question must be answered in the negative. The rule has been uniformly observed in California that on appeal, before a judgment will be reversed error in the ruling of the trial court must be made affirmatively to appear. In the present case the record is wholly devoid of the proposed amendment to the answer of defendant. Therefore we must presume that the amendment was immaterial and that the trial judge's ruling was correct.

Judgment affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 344

PEOPLE v. HARPER.

Cr. 4104.

District Court of Appeal, Second District, Division 2, California.

June 13, 1947.

1. Criminal law ⇐1159(5)

Conviction upon plea of guilty to a charge of robbery while armed with a deadly weapon would not be reversed on ground that evidence did not establish sanity of defendant at time of offense for reason that medical experts did not consider the facts that defendant had been confined in hospitals for dementia præcox, in view of experts' testimony that in forming their opinions they had considered previous confinement of defendant in hospitals for dementia præcox.

2. Criminal law ⇐1166½(1)

Conviction upon plea of guilty to a charge of robbery while armed with a deadly weapon would not be reversed on ground that prejudicial error was committed in permitting prosecution to open and close the trial, in view of fact that defendant through his counsel expressly waived any objection which he might have had to the prosecution opening and closing the trial.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

George Dean Harper was convicted of robbery while armed with a deadly weapon, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was charged with having committed a robbery while armed with a deadly weapon. Upon arraignment he entered pleas of (1) not guilty and (2) not guilty by reason of insanity. Thereafter by leave of court he withdrew his plea of not guilty, was rearraigned and pleaded guilty as charged in the information. The issue of not guilty by reason of insanity was later tried before a jury which was unable to agree and a mistrial was declared. Upon a second trial the jury found defendant sane at the time of the commission of the offense to which he had pleaded guilty. Judgment and sentence were duly pronounced and defendant has appealed.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder consecutively:

[1] First: *That the evidence does not establish that defendant was sane at the time of the commission of the offense to*

which he had pleaded guilty for the reason that Doctor Marcus Crahan and Doctor Victor Parkin, duly qualified experts, in giving their opinion that defendant was sane at the time of the commission of the criminal offenses did not take into consideration the fact that defendant had been confined, while he was in the navy, in a hospital because he was suffering from dementia præcox; and also that they did not take into consideration the records of the United States Public Health Service Hospital which reflected that defendant had also been confined in such hospital suffering from dementia præcox.

This proposition is devoid of merit. Both Dr. Crahan [1] and Dr. Parkin [2] testified that in forming their opinions they had taken into consideration the previous confinement of defendant in hospitals because he was suffering from dementia præcox.

[2] Second: *That the trial court committed prejudicial error in permitting the prosecution to open and close the trial.*

This contention is likewise untenable, for the reason that defendant through his counsel expressly waived any objection which he might have had to the People's opening and closing the trial.[3]

In view of the fact that the record is free of error the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

[1] On page 115 et seq. of the reporter's transcript appears the following testimony given by Doctor Crahan:

"Q. Did you ask him anything about his previous illnesses or injuries? A. Yes.

"Q. What did he say in that regard? A. He said that he had had measles, chickenpox, whooping cough, influenza, mumps, and he had an appendectomy at Mare Island; had his tonsils removed at the age of nine; while in Kiska, Alaska, he had a piece of shrapnel removed from his neck. He denied other illnesses, injuries or surgery. He said that he was in a locked mental ward in three hospitals for a total of six months in 1944, and he had no family member who had ever been mentally committed.

"Q. Now, when he told you that he had been in three mental wards—had been locked in a mental ward in three hospitals for a total of six months, did you ask him what the nature of his illness was? A. Yes.

"Q. What did he say? A. He said that that resulted in his discharge from the Navy; that he was discharged from the Navy on the basis of malaria and dementia praecox.

"Q. Now, when you formed your opinion as to the defendant's sanity, did you take into consideration the fact that he was in a hospital with the illness of dementia praecox? A. That he might have been, yes.

"Q. You took that fact into consideration? A. Yes."

[2] On page 132 et seq. of the reporter's transcript appears the testimony of Doctor Parkin as follows:

"Q. Did you ask him anything about his previous illnesses? A. Yes, I did.

"Q. What did you learn in that regard? A. He told me he had had malaria; he had been hospitalized in Mare Island and later at Imola, the Navy Annex to Mare Island.

"Q. Didn't he tell you he was at the U. S. Public Health Service Hospital at Fort Worth, Texas? A. Yes.

"Q. Suffering from dementia praecox? A. He said he was at Fort Worth and he was discharged from there suffering from dementia praecox.

"Q. Didn't he tell you he was at a hospital in Fort Worth, the U. S. Public Health Service Hospital? A. I don't know that he mentioned that. I haven't got that here.

"Q. Did he tell you he was discharged from a hospital, and that he had been suffering from dementia praecox? A. That is what he said, yes.

"Q. In forming your opinion as to his sanity or insanity, did you take into consideration the fact that he was at Fort Worth, Texas, in a hospital suffering from dementia praecox? * * * A. I did."

[3] After the jury had been empaneled and defendant with the court's permission had called a doctor who was examined and cross examined, appears the following colloquy between the deputy district attorney, defendant's counsel, Mr. Oster, and the court:

"Mr. Alexander: I thought I was to offer the People's case, if your Honor please.

"Mr. Oster: I have no objection.

"The Court. I am perfectly willing to accommodate these doctors.

"Mr. Oster: It is perfectly agreeable to me, your Honor. I did not want to see them have to sit around here two or three days unnecessarily."

LA MAR v. LA MAR.*

Civ. 15618.

District Court of Appeal, Second District, Division 3, California.

June 4, 1947.

As Modified July 1, 1947.
Rehearing Denied July 17, 1947.
Hearing Granted Aug. 28, 1947.

1. Divorce ⇐150(2)

In divorce action, there must be specific findings as to acts relied on as grounds for divorce. Civ.Code, § 131; Code Civ. Proc. § 632.

2. Divorce ⇐150(2)

Defendant, in order to have merits of his appeal from judgment granting his wife a divorce, properly presented and sufficiency of evidence to support judgment weighed, was entitled to have a finding as to which act or acts upon defendant's part amounted to extreme cruelty to wife and whether trial judge believed defendant's denials as to such acts or conduct. Civ. Code, § 131; Code Civ.Proc. § 632.

3. Divorce ⇐150(2)

Where husband filed cross-complaint for divorce, he was entitled to know, by specific findings, whether his testimony as to acts and conduct of his wife, as specifically alleged in cross-complaint, was disbelieved by trial judge or whether, in believing such testimony, court nevertheless held evidence to fall short of actionable extreme cruelty. Civ.Code, § 131; Code Civ. Proc. § 632.

4. Husband and wife ⇐262(1)

In absence of evidence showing that husband and wife, who took title to property as joint tenants, actually intended it to be community property, presumption existed that they intended to create a common-law estate. Civ. Code, § 683.

5. Evidence ⇐426

Evidence may be admitted to establish that realty is community property, even though title has been acquired under deed executed in a form that ordinarily creates in grantee a common-law estate with incidents unlike those under law of community property. Civ.Code, § 683.

6. Evidence ⇐426, 461(4)

Evidence is admissible to show that husband and wife intended to take property as community property, even though they accepted a deed drawn to them as tenants in common. Civ.Code, § 683.

7. Husband and wife ⇐264

In divorce action, evidence sustained finding that parties actually intended to and did take farm property as community property, even though they took record title as joint tenants. Civ.Code, § 683.

8. Husband and wife ⇐278(1)

Where husband executed two copies of proposed property settlement agreement and delivered them to wife who signed both copies but retained possession thereof, in absence of delivery, there was a mere offer which husband could revoke. Civ.Code, §§ 1054, 1565, 1586, 1587, 1626.

9. Vendor and purchaser ⇐25

A contract to convey land, executed in duplicate, is in effect one instrument, which does not take effect until one of the duplicates is finally delivered to the party to whom the land is to be conveyed. Civ.Code, §§ 1054, 1565, 1626.

10. Husband and wife ⇐278(1)

Proposed property settlement which was never delivered by wife to husband was incomplete and did not become effective. Civ.Code, §§ 1054, 1565, 1626.

11. Husband and wife ⇐278(1)

Where proposed property settlement agreement was signed by both parties but had not been delivered by wife to husband, husband's letter to wife notifying her of revocation of the proposal accomplished a complete revocation and the proffered agreement became a nullity. Civ.Code, §§ 1054, 1565, 1586, 1587, 1626.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action for divorce by Helen Sanders La Mar against Jack C. La Mar, wherein the defendant filed a cross-complaint. From an adverse judgment, defendant appeals.

Reversed.

* Subsequent opinion 186 P.2d 678.

John W. Preston and David L. Sefman, both of Los Angeles, for appellant.

Don Lake, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Plaintiff brought this action for a divorce against defendant by a complaint setting forth two causes of action. The first charges defendant with the commission of numerous acts of adultery with a named corespondent, and the second, in general terms only, as is permitted by section 426b of the Code of Civil Procedure, with the commission of acts of extreme cruelty. The complaint further alleges that the parties are possessed of community real and personal property, including certain ranch acreage situate near Lancaster, in the County of Los Angeles, and that this ranch property was purchased from the earnings of plaintiff.

The defendant filed an answer to the complaint denying its allegations, and a cross-complaint charging the plaintiff, in general terms, with the commission of acts of extreme cruelty toward defendant. The cross-complaint further alleges that there is community property belonging to the parties consisting of cash, in the possession of plaintiff, and real property situate in Los Angeles, title to which is in plaintiff; that the parties own, as tenants in common, the Lancaster ranch property described in the complaint. Subsequent thereto, defendant filed an amended cross-complaint for divorce alleging, in paragraph V thereof, specific acts of extreme cruelty on the part of the plaintiff, and again alleging the existence of community property, and that the said ranch property is owned by the parties as tenants in common. The amended cross-complaint prays for a divorce from plaintiff, for an award to cross-complainant of all of the community property, for an accounting, and other relief. Plaintiff answered said amended cross-complaint denying all of the material allegations thereof, again alleging said ranch property to be the community property of the parties hereto.

At the trial evidence was offered by all parties to the action and the court orally indicated its intention to find for plaintiff on her second cause of action, but for defendant and the corespondent on her first cause of action for adultery.

Upon submission of the proposed findings of fact and conclusions of law, defendant filed his written objections to the proposed findings on the ground, in part, that such proposed findings did not cover specific facts as to the issue of extreme cruelty and requested the court to comply with section 632 of the Code of Civil Procedure and make specific findings as to the acts relied upon as constituting this ground for a divorce. The court failed and refused to make specific findings as requested, but on such issue of extreme cruelty found, in general terms, that the allegations contained in paragraph II of the second cause of action in plaintiff's complaint were true and those in paragraph V of the amended cross-complaint were untrue. The court further found, in general terms, that the allegations contained in paragraph V of plaintiff's complaint were true, reference to the complaint indicating that therein the plaintiff described and claimed as community property the ranch acreage near Lancaster, California.

The court rendered judgment for plaintiff, granting her an interlocutory decree of divorce from the defendant and, with the exception of $2,500 which was awarded to defendant, awarded all community property, including said ranch property, to plaintiff. From said judgment, and the whole thereof, the defendant now appeals.

Section 131, Civil Code, declares: "In actions for divorce, the court must file its decision and conclusions of law as in other cases * * *." As to "other cases," section 632, Code of Civil Procedure, in part, declares: "In superior courts * * * upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated."

[1-3] As was said in Bilger v. Bilger, 1942, 54 Cal.App.2d 739, 740, 129 P.2d 752, 753: "In interpreting said section 131 of the Civil Code it has been held that the re-

quirement that findings be made 'as in other cases' demanded that there be specific findings as to the acts relied on as grounds for divorce, since whether or not those acts had been committed was the material issue of fact in such cases," citing Franklin v. Franklin, 1903, 140 Cal. 607, 74 P. 155, and other cases. By rejecting the request for specific findings and the making instead of general findings as to the respective causes of action for extreme cruelty, a situation was created whereby no findings of fact were made but, instead, mere conclusions of law were stated. The basic question as to whether defendant had committed all, part, or none of the acts relied upon by plaintiff as constituting extreme cruelty was left open and undecided. As was further said in Bilger v. Bilger, supra, 54 Cal.App.2d at page 742, 129 P.2d at page 754: "[T]he appellant, in order to present the merits of her appeal, was entitled, under the law, to definite findings from which it could be determined whether the trial court disbelieved her testimony concerning her husband's acts and conduct and denied the divorce on that ground, or did believe her testimony but nevertheless concluded that such acts and conduct did not constitute extreme cruelty." See Del Ruth v. Del Ruth, 1946, 75 Cal.App.2d 638, 644, 171 P.2d 34. The same rule applies here in that the defendant herein, in order to have the merits of his appeal properly presented and the sufficiency of the evidence to support the judgment weighed, is entitled to have a finding as to which act or acts upon his part amounted to extreme cruelty to his wife, and whether or not the trial judge believed his denials as to such acts or conduct. He was likewise entitled to know, by specific findings, whether his testimony as to the acts and conduct of his wife, as specifically alleged in his cross-complaint, was disbelieved by the trial judge or whether, in believing such testimony the court nevertheless held such evidence to fall short of actionable extreme cruelty.

It is next contended by defendant that the trial court erred in finding the ranch property near Lancaster to be community property and in awarding it to plaintiff, since it was owned by plaintiff and defendant as joint tenants or tenants in common. The evidence discloses that title to this property was originally taken in the names of the plaintiff and defendant, as joint tenants, by recorded deed dated April 30, 1943, and that title of record still so remains.

[4-6] In the absence of evidence showing that a husband and wife who took title to property as joint tenants actually intended it to be community property, it must be considered that their intention was to create such a common law estate. Civ.Code, sec. 683. Evidence may be admitted, however, "to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. * * * Again, it may be shown that husband and wife intended to take property as community property even though they accepted a deed drawn to them as tenants in common. * * * It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. * * * Such rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties. Moreover, it is well settled that property may be converted into community property at any time by oral agreement between the spouses [citing cases], and an agreement at the time the property is acquired has the same effect." Tomaier v. Tomaier, 1944, 23 Cal.2d 754, 757, 758, 146 P.2d 905, 906.

Evidence was offered by plaintiff to show that a substantial part of the purchase price of the ranch property came from her separate funds and that, shortly prior to the escrow transaction for its purchase, defendant suggested to her that the property would be owned by them as community property "but that in the event of anything happening to either one of us it would be better to put it into joint tenancy, so as to save going through probate."

"Q. But he said that it would remain your community property? A. Community property.

"Q. And what did you say to that? A. I agreed to that."

[7] While denying any agreement on his part that the ranch property was to be held by them as community property defendant did testify that, when they were married they decided that everything would be fifty-fifty. Defendant further denied that plaintiff had furnished most of the purchase funds for this property and claimed that he contributed approximately one-half, either by his separate funds or by earnings from the ranch itself. From the foregoing evidence the trial judge, as the trier of fact, was entitled to find that plaintiff and defendant actually intended to and did take such property as community property even though they took record title as joint tenants.

Our attention has been directed to no evidence showing any intention upon the part of the plaintiff and defendant herein to subsequently convert title thereto from its status as community property to one whereby the parties held it as tenants in common unless a proposed property settlement agreement wherein such term is used may be so considered.

The record discloses that, differences having arisen between the parties, plaintiff suggested to defendant dividing the property and making a property settlement agreement. Defendant's attorney then prepared and defendant signed, in duplicate, a proposed property agreement which read, in part, as follows:

"Whereas, the parties now have a desire to settle, fix and determine forever their community property rights; and

"Whereas, the parties have agreed upon a full and complete settlement of their property rights and other obligations arising out of and because of their marital relations; * * * it is mutually agreed as follows: * * * 4. *That both parties own as community property* a certain ranch located in Lancaster, California. That it is hereby agreed between the parties hereto that said ranch, its improvements and equipment shall be sold at any price agreed upon by the parties, and the net proceeds derived from the sale of said ranch shall be divided equally, share and share alike, between the parties hereto. *In the interim said property shall be held as tenants in common, each holding an undivided one-half interest in the same.*" (Italics ours.)

The two copies of the agreement signed by defendant were then delivered to Mr. Paul Cote, plaintiff's attorney. Plaintiff signed both such copies but at all times thereafter retained possession thereof, one being kept by her and the other by her attorney, Mr. Cote. No delivery of an executed copy of the agreement was ever made to either defendant or his counsel. On November 8, 1945, a registered letter was addressed to plaintiff, signed by Mr. David L. Sefman, attorney for defendant, as follows:

"At the request of my client, Mr. Jack C. LaMar, I am directing this letter to you concerning that proposed property settlement agreement between yourself and Mrs. LaMar, which was prepared in August, 1945.

"You are hereby notified that Mr. LaMar hereby gives you notice of revocation of the proposed agreement above referred to, by reason of the fact that said agreement was never accepted to this date, and for other reasons not herein specifically designated."

Notwithstanding his notice of revocation defendant now relies upon the proposed property agreement as a binding contract between the parties whereby the status of the property, as either community or joint tenancy owned, has been converted into ownership by them as tenants in common. He points to those portions of the agreement which we have italicized in his claim that, even though the parties in the same paragraph refer to it as community property owned by them, the subsequent sentence providing that in the interim it shall be held as tenants in common, each holding an undivided one-half interest in the same, accomplishes such a change in character of ownership.

[8] At the trial defendant, through his counsel, took the position that the property agreement, although signed by plaintiff, was never delivered to defendant "as required by the provisions of the Civil Code," but remained in her own possession and that

therefore no executed and binding agreement was ever reached by the parties. He further contended that the contract as signed and delivered by him to plaintiff constituted a mere offer or proposal and, not having been accepted, was revoked by the letter of November 8, 1945. He now argues on appeal that the agreement was fully executed by the mere signing thereof, even though no delivery of such a signed copy was ever made by plaintiff to defendant and, having been so fully executed, was not revoked by the above-mentioned revocation letter. The position taken by defendant at the trial was the correct one and that now advanced by him on appeal cannot be sustained.

[9, 10] A contract to convey land, executed in duplicate, is in effect one instrument, which does not take effect until one of the duplicates is finally delivered to the party to whom the land is to be conveyed. None was here delivered to defendant but each of the duplicates was kept within the power and control of plaintiff by its retention by her and her attorney. Without such delivery the acceptance and execution of the proposed contract was not complete. Ivey v. Kern County Land Co., 1896, 115 Cal. 196, 201, 46 P. 926; 17 C.J.S., Contracts, § 45, p. 387. The consent of the parties to a contract must be communicated by each to the other (Civ.Code, sec. 1565), and a contract in writing takes effect upon its delivery to the party in whose favor it is made, or his agent. Civ.Code, sec. 1626. The same rule applies to a grant of property. Civ.Code, sec. 1054. Delivery of the proposed property agreement never having been made by plaintiff to defendant, "the agreement was inchoate and incomplete and never became effective." McKinney v. Sargent, 1932, 216 Cal. 18, 22, 13 P.2d 373, 374. "Without delivery, it is a mere scrap of paper, and is ineffective for any purpose." Hudemann v. Dodson, 1932, 215 Cal. 3, 6, 7 P.2d 997, 998. See Hurlbut v. Quigley, 1919, 180 Cal. 265, 272, 180 P. 613.

[11] No acceptance by plaintiff of defendant's proposal to contract having been communicated to the latter, such proposal was revocable by defendant by the communication of a notice of revocation. Civ. Code, secs. 1586, 1587. Defendant's letter of November 8, 1945, to plaintiff, constituted such a notice and accomplished a complete revocation of his proposal to enter into a property agreement. Such being the case the proffered agreement became a nullity and its provisions have no binding effect either upon the parties or the involved property whatsoever. The court's finding that the ranch in question was community property, therefore, remains unaffected by the proposal to hold the property as tenants in common in the interim pending its sale.

The judgment is reversed.

SHINN, Acting P. J., and WOOD, J., concur.



80 Cal.App.2d 215

PSIHOZIOS v. HUMBERG et al.

Civ. 15773

District Court of Appeal, Second District, Division 2, California.

June 6, 1947.

1. Landlord and tenant ⇐180(3)

In action by tenant from month to month for damages for alleged wrongful eviction, on ground that landlord orally agreed that if tenant made certain improvements, he should be permitted to remain as tenant indefinitely, evidence was insufficient to establish a fraudulent design of landlord in order to induce tenant to make the improvements.

2. Fraud ⇐58(1)

Proof of fraud must be clear and convincing.

3. Frauds, statute of ⇐129(2)

In action by tenant from month to month for damages for alleged wrongful eviction, on ground that landlord orally agreed that if tenant made certain improvements, he should be permitted to remain as tenant indefinitely, tenant could not avoid

application of the statute of frauds on ground that investment by tenant of $400 in improvements was part performance. Civ.Code, § 1624, subd. 4.

4. Frauds, statute of ⇐129(1)

Part performance of an oral contract by the payment of money or the purchase or lease of realty does not defeat the operation of the statute of frauds except as it may be applied for purposes of relief in equity. Civ.Code, § 1624, subd. 4.

5. Frauds, statute of ⇐44(4)

In an ordinary action of law, one who proves an oral contract for a lease of realty for a longer period than one year cannot recover because of the statute of frauds. Civ.Code, § 1624, subd. 4.

6. Frauds, statute of ⇐144

In action by tenant from month to month for damages for alleged wrongful eviction, on ground that landlord orally agreed that if tenant made certain improvements, he should be permitted to remain as tenant indefinitely, tenant could not avoid application of the statute of frauds on ground that by reason of landlord's alleged fraudulent statement on which tenant relied, a lease of some sort was created by estoppel granting tenant right of possession. Civ.Code, § 1624, subd. 4.

7. Landlord and tenant ⇐115(3), 118(4)

Where lease of tenant who had paid his rentals monthly under the lease expired, the tenant held a tenancy at will or from month to month. Civ.Code, §§ 1945, 1946.

8. Landlord and tenant ⇐115(1)

Alleged agreement by landlord to permit tenant from month to month to remain if tenant made certain improvements on the leased premises, if it created any lease, created a lease for an indefinite term and therefor a tenancy from month to month. Civ.Code, §§ 1945, 1946.

9. Landlord and tenant ⇐114(1, 2), 115(1, 2), 118(2, 3)

Where a person enters into a property without a definite term and monthly rentals are accepted, or where he gains possession under a void parol lease, the tenancy is either at will, or from month to month, or from year to year according to the circumstances.

10. Landlord and tenant ⇐116(5)

Where notice to tenant from month to month of termination of lease was served on tenant about May 23d, his tenancy was terminated as of June 30th. Civ.Code, § 1946.

11. Landlord and tenant ⇐180(1)

Where landlord gave tenant 30 days' notice of termination of lease, and tenant from month to month voluntarily vacated the premises, tenant was not entitled to recover damages for wrongful eviction. Civ.Code, § 1946.

12. Landlord and tenant ⇐116(5), 283

The mere service of notice on a tenant by a landlord to terminate a tenancy at will may serve the purpose of laying the foundation of an action at law to recover the tenement or it may serve merely to advise the tenant that his term will expire at the end of 30 days.

13. Landlord and tenant ⇐180(1)

The beneficial enjoyment of a property by one holding under a lease is not disturbed by a suit to oust him, and so long as the landlord acts in good faith in suing to obtain a decree of ouster because of the tenant's alleged violation of some covenant of his lease, landlord is not liable to the tenant in damages.

14. Landlord and tenant ⇐180(1)

In action by tenant from month to month against landlord for damages for alleged wrongful eviction, tenant could not justify his voluntary abandonment of the realty after notice by landlord to pay increased rent or vacate in 30 days, on ground that he was so frightened at receiving notice to vacate from constable that he was warranted in quitting the premises.

15. Frauds, statute of ⇐138(5)

Where tenant from month to month made improvements of the value of $400 because of the alleged oral promise of landlord, ineffective because of the statute of frauds, that tenant could remain indefinitely as a tenant, tenant was entitled to recover from landlord the $400 less the use

to the tenant of the improvements during the time preceding his removal by landlord. Civ.Code, § 1624.

Appeal from Superior Court, Ventura County; Raymond McIntosh, Judge.

Action by James Psihozios against Annabel C. Humberg and others to recover damages for alleged wrongful eviction of plaintiff as tenant. From a judgment for the plaintiff against Annabel C. Humberg, Annabel C. Humberg appeals.

Judgment reversed with instructions.

Arthur H. Blanchard, of Santa Paula, and William A. Reppy and Neil D. Heily, both of Oxnard, for appellant.

James C. Hollingsworth and Edward Henderson, both of Ventura, for respondent.

MOORE, Presiding Justice.

On November 1, 1941, respondent leased from Mrs. S. L. White, a resident of Maine, certain premises in the city of Santa Paula which she used for the conduct of a cafe and beer parlor. His lease was for 15 months at a rental of $42.50 a month. One of its covenants was that should the lessee continue his occupancy after the expiration of the term such holding over would be considered as a month to month tenancy. Also, it granted the lessee an option to purchase the property in event of a sale. After learning of the lessor's intention to sell the premises and while still a tenant, on September 26, 1944, respondent declared in writing his unwillingness to pay more than $6,500 for the property. On the first of the following month appellant acquired the property for the sum of $7,500. Respondent continued as her tenant and paid the same rental until he abandoned the place on July 1, 1945, having made certain repairs during early January. The controversy between him and appellant arose out of two events, as shown by the findings, which preceded respondent's removal from the restaurant. In December, 1944, appellant stated to respondent that "if he would remodel and renovate said premises * * * plaintiff could continue to remain in occupation and possession of said premises so long as he * * * continued to pay the rent for said premises upon the same terms and conditions as he * * * had been paying rent to the former owner thereof." Respondent believed and relied upon such statement and had "said premises remodeled and renovated at the sole cost and expense of plaintiff" in the sum of approximately $400.

The court determined that appellant did not intend to perform or abide by her promise but that it was made "with the intent and purpose on the part of the defendant to defraud and deceive the plaintiff so that the defendant would have said premises remodeled and renovated at the sole cost of plaintiff, and without plaintiff being permitted to remain in possession of said premises as stated by defendant to plaintiff."

[1, 2] The only proof of a fraudulent design of appellant is such inference as may be drawn from the facts of her promise in December and the notice terminating respondent's tenancy in May. Nothing was said in either her promise in December or in her notice in May that indicated a desire to cheat or deceive her tenant. During the interim the parties continued on friendly relations until appellant was advised that respondent had participated in the filing of a complaint against her before the real estate board and that he had used profanity in reviling her. So slight is the evidence of a fraudulent purpose on the part of appellant that it does not comport with the rule that proof of fraud must be clear and convincing. Whatever the amount or degree of fraud that might have been committed by appellant it could apply to the issues of this case on but one of two theories, namely: (1) that the investment by respondent of the sum of $400 on account of a prospective lease of real property was part performance and established a lease notwithstanding no writing containing terms was executed by appellant; (2) that by reason of appellant's fraudulent statement on which respondent relied a lease of some sort was created granting the right of possession.

[3-6] The first theory is a vain grasp for a right that is denied by the statute of frauds. Civil Code, sec. 1624, subd. 4.

Part performance of an oral contract by the payment of money on the purchase or lease of real property does not defeat the operation of the statute except as it may be applied for purposes of relief in equity. Dondero v. Aparicio, 63 Cal.App. 373, 377, 218 P. 608. Such a contract by reason of its part performance can be enforced only in equity. Davis v. Judson, 159 Cal. 121, 131, 113 P. 147. In an ordinary action at law one who proves an oral contract for a lease of realty for a longer period than one year cannot recover. Dondero v. Aparicio, supra, 63 Cal.App. at page 377, 218 P. at page 608. As to the second theory, it is elemental that if an oral promise in good faith cannot overcome the statute of frauds, surely a dishonest promise can have no greater force. Of course, it was not the conscious aim of respondent by his pleading or by his argument on the proof to urge that the promise of an extended term of occupancy created a new lease. His logic is that because he was deceived by appellant she is estopped to deny that respondent's tenancy was continued. Granting such to be true, yet neither the false promise nor any rational deduction therefrom could have effected a lease for a term of years. If he was entitled to continue his occupancy it was only as tenant at will.

The second occurrence found by the court as a cause for this action was in May, 1945. Appellant then served written notice upon respondent to quit the premises or pay a monthly rental of $200. Pursuant to such notice respondent vacated the cafe about July 1, 1945. By reason of his inability to find another location in Santa Paula he lost his business and the good will thereof, to his damage in the sum of $4,000. This sum was supplemented with the sum expended by him "in renovating and remodeling the premises," making the total judgment $4,400 in favor of respondent on the theory that he was wrongfully evicted from the property.

By this appeal it is (1) contended that respondent's tenancy was from month to month, terminable upon 30 days' notice; (2) denied that there was any eviction either pleaded or proved, and (3) contended that respondent's outlay was for renovating only and that it was done solely for his own benefit.

[7] At the time of appellant's purchase of the property respondent held a tenancy at will or from month to month. This resulted from (1) his lease of 1941 whereby he paid his rentals monthly and (2) the automatic application of section 1945 of the Civil Code [1] which makes a renewal of "hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly." While respondent was thus holding under a month to month tenancy the offer was made to him by appellant that if he would renovate and remodel the cafe he "could continue in occupation and possession so long as he continued to pay rent upon the same terms and conditions as he had been paying rent to the former owner." Respondent does not contend that such oral promise was the equivalent of a written lease for an indefinite period, but asserts that because it was fraudulently made appellant was estopped to deny her promise to him.

[8] But conceding respondent's right to remain as long as he paid the rent upon the "same terms and conditions" he gained no more than a month to month tenancy. This is proved by the terms of the White lease which specifically provided that "if the lessee hold over the said term with the consent, express or implied of the lessor such holding shall be construed to be a tenancy only from month to month." It is established also by sections 1945 and 1946 [2]

[1] "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year."

[2] "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month; provided, however, that as to tenancies for a period of a month or longer either of the parties may terminate the

of the Civil Code. Nowhere in respondent's brief is it contended that a perpetual estate of any kind was granted to him, not even a leasehold for life. Nor do the findings so declare. If he was to occupy the cafe on the "same terms and conditions" as formerly, surely such terms emphasized the month to month feature of the tenancy with the same force and clarity as that provision which obligated him to pay every month the sum of $42.50. If the rental was not increased neither was the term enlarged by the promise of appellant. If her language may be construed as creating a lease it was for an indefinite term with monthly rentals reserved. If it was for an indefinite term it was a tenancy from month to month. Palmer v. Zeis, 65 Cal.App. 2d Supp. 859, 861, 151 P.2d 323; 35 C.J. 1106. At the time of appellant's December promise respondent gained no impression that he was to become a permanent tenant. He testified that he "expected to stay a couple of years", while she denied having made any promise at all. Moreover, the court made no finding that a tenancy of any term was created by the promise of appellant but found that after the expiration of the White lease, January 1, 1943, respondent "was renting said real property from month to month" until appellant became owner and "thereafter until on or about the first day of July, 1945, plaintiff paid said rent to defendant as owner of the premises." In neither the findings nor the evidence is there basis for a tenancy other than one at will or from month to month. The law forbids any other conclusion.

[9] Where a person enters into a property without a definite term and monthly rentals are accepted, or where he gains possession under a void parol lease, "the tenancy is either at will, or from month to month, or from year to year, according to the circumstances." Phelan v. Anderson, 118 Cal. 504, 506, 50 P. 685, 686; Linnard v. Sonnenschein, 94 Cal.App. 729, 735, 272 P. 315.

[10-13] As a month to month tenant respondent's right to occupy the cafe was terminable by either party "by giving one month's notice thereof at any time." Civil Code, sec. 1946. Such notice having been served upon respondent about May 23, 1945, his tenancy was terminated as of June 30th. He accepted the logic and effect of the notice, and without awaiting court action to invoke a decree for his ouster he abandoned the cafe on July 1, 1945, and instituted this action the following August 17 to recover damages for wrongful eviction. Such facts do not constitute eviction, lawful or unlawful. Respondent had no right to remain after June 30, 1945, the expiration date of the notice, except upon terms prescribed by appellant. But respondent was not evicted vi et armis or by judicial process. He voluntarily vacated the premises. The mere service of a notice upon his tenant by the landlord to terminate a tenancy at will may serve either of two purposes: (1) it may lay the foundation for an action at law to recover the tenement or (2) it may serve merely to advise the tenant that his term will expire at the end of 30 days. If he accepts the notice as severing the relationship he may remove his effects from the premises and be no further bound for rentals. That is exactly what respondent did. Having removed voluntarily from the premises he was without a cause for action against appellant. The beneficial enjoyment of a property by one holding under a lease is not disturbed by a suit to oust him; and so long as the landlord acts in good faith in suing to obtain a decree of ouster because of the tenant's alleged violation of some covenant of his lease he is not liable to the tenant in damages. Black v. Knight, 176 Cal. 722, 728, 169 P. 382, L.R.A.1918C, 319; Schubert v. Bates, —— Cal.App.2d ——, 173 P.2d 697.

In Black v. Knight the landlord obtained judgment against his tenant for unlawful detainer. The latter left the premises without asking for a stay, and prior to the issuance of execution and in an action for damages for unlawful eviction alleged that by

same by giving one month's notice thereof at any time and then rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof."

the judgment for unlawful detainer he was required to and did surrender possession. The court held that until the landlord enforces an erroneous judgment he does not actually disturb the possession. Certainly, then, the mere notice to a tenant at will that his term will end in 30 days is not an eviction. He is not forced or obliged thereby to yield possession, and if he does abandon the premises the landlord is not liable for the tenant's failure to enjoy the remainder of his term. Thus in the case at bar respondent without compulsion or threat of any kind retired from the scene and permitted appellant to occupy the cafe. If he had opined that his claim to continued possession was lawful, surely he would have remained on the property and awaited the outcome of litigation. All the facts he knew at the trial were known in June, 1945, and all the law that is available to him now was in force and effect in July when he left the cafe, and if it supported his position then he could have secured his right to a continuing tenancy as well as a money judgment for damages. If he was not entitled to the former he has no right to the latter.

[14] Respondent argues as a basis for justifying his abandonment of the property that because of his fright at receiving the notice from the constable he was warranted in quitting the premises. He is sure that "the justice of his claim will not be defeated because he acceded to the express demand of appellant." In support of his argument he cites Miller v. Nathan, 87 Cal. App. 185, 261 P. 1047. It is not applicable. It dealt with a valid lease for five years. The landlord prosecuted a terrorizing campaign to oust his tenant without having to resort to the courts. The notice began with a scarehead: it advised the tenant that if he did not vacate promptly, action for ouster would follow immediately; that possession should be delivered to his agent who was justice of the peace and United States commissioner. It was accompanied by a letter from the agent containing a list of his offices, stating that the reason for his demand was that the lease had been breached by failure to pay the October rent. Within a few days after service of the notice the agent urged Miller to vacate to avoid litigation, and within a week defendant filed a suit before the same justice of the peace for rentals not due and attached movables on the leased premises. In the instant case, while the notice was delivered by the constable it advised respondent that if he did not quit, his monthly rental would be $200. In view of his net income of $500 monthly from the cafe he could comfortably have remained for a while at the advanced rental to take his bearings and determine upon his legal procedure. Having voluntarily retired from the contest before it was begun, respondent is now a judgment creditor without a valid basis for his award. While it would be interesting to inquire into the constituent elements of the amount adjudged to be due him as general damage, in view of the conclusion derived that he is not entitled to such recovery further discussion thereof would be useless.

[15] However, the same is not true as to the $400 which respondent claimed and the court found to have been expended by him in renovating and remodeling appellant's cafe in the belief that he would occupy it for many months. If such investment primarily benefited the real property respondent should be repaid such sum less the value to him of the use of the improvements and repairs during the six months preceding his removal. There is no evidence in the record whereby such value could be determined by the reviewing court.

It is therefore ordered that the judgment be and it is reversed with instructions to ascertain the value of the use to respondent of the improvements made by him and to award him not to exceed $400 less the sum of such value. Appellant to recover costs on appeal.

McCOMB and WILSON, JJ., concur.

PEOPLE v. OCEAN SHORE R. R., Inc., et al. *

Civ. 12838.

District Court of Appeal, First District, Division 2, California.

May 20, 1947.

As Modified on Denial of Rehearing June 19, 1947.

Hearing Granted Aug. 14, 1947.

1. Eminent domain ⇐221, 223

In condemnation proceeding, all issues except the sole issue of compensation are to be tried by the court, and, if court does not make special findings on those issues, its findings thereon are implicit in verdict awarding compensation. Code Civ. Proc. §§ 592, 1248, 1256; Const. art. 1, § 14.

2. Eminent domain ⇐219

In action to condemn land for state highway purposes, procedure under which the trial court in trying issues of ownership, also determined basis for severance damages before submitting issue of compensation to jury, was proper.

3. Eminent domain ⇐219

In action to condemn land for state highway purposes, where procedure under which the trial court, in trying issues of ownership, also determined basis for severance damages before submitting issue of compensation to jury, was agreed to by all parties at opening of hearing, any irregularity in procedure was waived.

4. Eminent domain ⇐158

In action to condemn land for state highway purposes, evidence supported finding that defendants had some compensable interest in portion with respect to which plaintiff denied defendants' title. Code Civ.Proc. § 1244, subds. 2, 5.

5. Eminent domain ⇐158

In action to condemn land for state highway purposes, evidence supported holding that defendants held title by deed to disputed parcels. Code Civ.Proc. § 1244, subds. 2, 5.

6. Eminent domain ⇐158

Quitclaim deed in defendants' favor made pending condemnation proceedings before title vested in public, could be considered on question of defendants' title.

7. Eminent domain ⇐158

In action to condemn land for state highway purposes, evidence sustained determination that defendants had compensable interest in disputed parcel which had been conveyed to defendants by quitclaim deed purporting to convey only a right of way for railroad purposes and which plaintiff contended had been lost by nonuser or abandonment for railway purposes.

8. Adverse possession ⇐65(1)

Possession by a railroad of actual roadbed under a claim of right based on a deed, but under a mistake as to location is considered adverse and may ripen into complete title.

9. Railroads ⇐63, 82(1)

Generally, a railway company will acquire by prescription only a servitude or easement of right of way for railroad purposes which can be lost by nonuser or abandonment of its status as a railway carrier.

10. Railroads ⇐69

Where railroad's claim of right to roadbed is based on a deed in fee, the interest acquired should not be measured by actual user made or needed by the railroad but should be commensurate with the interest granted in the deed.

11. Adverse possession ⇐114(1)

In action to condemn land for state highway purposes, evidence of deed conveying property to defendants or predecessors and subsequent occupancy by defendants or predecessors for purposes of railroad right of way of property 255 to 500 feet from strip described in deed, possession however, being actual, open, notorious, exclusive, continuous and uninterrupted for more than five years, was sufficient to establish title in fee by adverse possession, as basis for severance damages.

12. Dedication ⇐15, 45

The issue of dedication of right of way to railroad company presented a mixed question of law and fact, with respect to which, intention of the parties was the controlling factor.

* Subsequent opinion 196 P.2d 570.

13. Dedication ⇐20(1)

A dedication of property in fee for a public use cannot be implied from user alone.

14. Dedication ⇐63(1)

When a mere easement has been acquired for a public purpose, the abandonment of the public purpose effects an abandonment of the easement.

15. Dedication ⇐63(1)

Where a utility acquires an easement in the nature of right of way for a public purpose, whether the public purpose has been abandoned is a question of fact.

16. Easements ⇐30(1)

Generally, an easement acquired by enjoyment or sufferance may be lost by disuse. Civ. Code, § 811, subd. 4.

17. Easements ⇐30(2)

Where an easement is acquired by grant, nonuser alone is not sufficient proof of an intention to abandon, but even as to such an easement, intent to abandon is properly inferred when nonuser has continued for such a length of time as to be inconsistent with any other theory than an intent to abandon.

18. Eminent domain ⇐262(4)

In action to condemn land for state highway purposes, question of intent to abandon whatever rights the defendants could assert to particular property under their theory of dedication thereof for railroad right of way was a question of fact for the trial court.

19. Easements ⇐8(1)

Acquisition of a right through adverse possession requires that holding for prescribed period be adverse and under claim of right and that owner of the land have knowledge or means of knowledge of the adverse claim. Civ. Code, § 806.

20. Easements ⇐40

Where easement is acquired either by prescription or adverse possession, its character is determined by the user under which it is claimed. Civ. Code, § 806.

21. Railroads ⇐69

Where no deed is involved, railroad company acquires by prescription or adverse possession only an easement in right of way.

22. Eminent domain ⇐317(2)

An easement is the extent of the interest which a railroad can condemn under statute. Code Civ.Proc. § 1239, subd. 2.

23. Eminent domain ⇐158, 262(4)

In action to condemn land for state highway purposes, evidence justified inference that permission granted defendants to operate railroad over certain lands gave them permissive use only dependent upon continued operation, and since burden was on defendants to prove that they obtained an interest in the land of greater extent, implied finding of trial court, adverse to them, could not be disturbed. Civ. Code, § 806; Code Civ.Proc. § 1239, subd. 2.

24. Estoppel ⇐52

"Estoppel" is a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth were established, that other would suffer. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

25. Estoppel ⇐54

Essential elements of equitable estoppel invoked by railroad to establish an interest in land, were knowledge on part of landowner, and ignorance of true state of facts on part of railroad.

26. Estoppel ⇐54, 90(1)

Estoppel is based on a knowledge of the facts and acquiescence with the situation developed thereby on the part of the party against whom it is claimed.

27. Property ⇐9

Payment of taxes alone is not proof of ownership of land assessed and is insufficient to create any presumptionable ownership, although it would support an inference that as between tax assessor and taxpayer some taxable interest was assumed to rest in the taxpayer.

28. Railroads ⇐63

Payment of taxes on right of way by railway could not overcome presumption

that title was in owner of the paper title and that use by railway was by permission or silent acquiescence.

29. Railroads ⇐78

Although statute authorizing railroad corporations to construct their roads across, along or upon any stream of water, street, avenue or highway may have been intended as a franchise to railroad companies to occupy all public roads and highways, that privilege was withdrawn by enactment of the Public Utilities Act in 1915. Civ. Code, § 465, subd. 5; St. 1915, p. 137, § 43.

30. Railroads ⇐76

The statute authorizing railroad corporations to construct their roads across, along or upon any stream of water, street, avenue or highway, if construed as a legislative grant of a creative franchise, is nothing more than a vesting of power to acquire franchise, and cannot be construed as a special grant to all railroads of a vested right to use all public highways as they may choose. Civ.Code, § 465, subd. 5.

31. Eminent domain ⇐120
Railroads ⇐76

The statute authorizing railroad corporations to construct their roads across, along or upon any stream of water, street, avenue or highway does not grant to every private railroad the perpetual right to use all public streets and highways for the operation of railroads, nor is the right conferred a property right for which all railroads must be compensated when the state seeks to construct, improve, or make use of any of its public highways for general highway purposes. Civ.Code, § 465, subd. 5.

32. Railroads ⇐76

Assuming the statute authorizing railway corporations to construct their roads across, along or upon any stream of water, street, avenue or highway, to be valid as a franchise granted as incident to the incorporation of all railroads, such privilege does not ripen into a right until accepted and actually exercised by the corporation. Civ.Code, § 465, subd. 5.

33. Railroads ⇐82(4)

Any rights which railroad could acquire under statute authorizing railroad corporations to construct their roads across, along or upon any stream of water, street, avenue or highway could be lost by nonuser or abandonment, though discontinuance of operation is authorized by the railway commission. Civ.Code, §§ 465, subd. 5, 468.

34. Eminent domain ⇐221

In action to condemn land for state highway purposes, whether particular interest to which defendants sought to attach their claim of severance or consequential damages, had been abandoned, conveyed, assigned or otherwise lost to them was a question of both law and fact, but in so far as it was a question of fact, it was one of those issues determinable by the court before submitting issue of compensation to the jury.

35. Dedication ⇐44
Eminent domain ⇐205
Railroads ⇐82(4)

In action to condemn land for state highway purposes, wherein defendants as basis of claim for severance damages asserted vested right in portion of former railroad roadbed by dedication, adverse possession or estoppel, evidence supported finding that defendants did not have title to any portion of the roadbed, and that even if defendants had obtained any rights which would support a claim to severance or consequential damages, that there had been an intentional abandonment of all of those interests by cessation of operation, dissolution of status as a railroad carrier, sale of property, and distribution of assets.

36. Eminent domain ⇐96

"Unity of use" is not the determinative factor of whether separate pieces of property constitute one parcel within statute providing for assessment of damages in eminent domain proceedings, and it is only where physically contiguous property is injured by taking that severance damages are allowed under that statute. Code Civ. Proc. § 1248.

37. Eminent domain ⇐96

Parties having no rights as to operation through particular parcel, connecting their roadbed north and south of it, were not entitled to consequential or severance damages with respect to southern part, on

ground that all parts of roadbed together as one unit had a special value for railroad purposes which was destroyed by taking of the land under condemnation, and on the ground that right of compensation for destruction of such unity of use was protected by the fifth amendment. Code Civ. Proc. § 1248; U.S.C.A.Const. Amend. 5.

38. Eminent domain ⇐96

Parties who had lost by nonuser or intentional abandonment whatever rights they may have had as to operation of railroad through particular parcel, connecting their roadbed north and south of it, were not entitled to consequential or severance damages with respect to the southern part on the ground that taking by condemnation for highway purposes of strip north of parcel cut off access to the roadbed farther south and that therefor there was a damaging of that southern roadbed for public use for which provision in the State Constitution required just compensation. Code Civ.Proc. § 1248; Const. art. 1, § 14.

39. Eminent domain ⇐200

Owner claiming damages from taking of property by eminent domain has burden of proving actual, rather than ethereal, damage to his property.

40. Eminent domain ⇐205

In action to condemn portion of former railroad right of way for state highway purposes, where defendants held at most a paper franchise to operate a railway and isolated portions of old roadbed, proof of consequential or severance damages as for loss of access to portion of roadbed which was separated from land taken by the parcel to which defendants had no claim, was insufficient.

41. Eminent domain ⇐134

Where state sought to condemn for highway purposes a portion of former railroad right of way, the value of the old roadbed in the way of saving to the state in its plan to construct a public highway was not a proper measure of damages.

42. Eminent domain ⇐130

The value of condemned property to the owner, or the loss suffered by him through the taking is the basis upon which jury must determine amount which condemnor must pay.

43. Eminent domain ⇐96

Where state sought to condemn for highway purposes a portion of former railroad right of way, the expenditures which had originally been advanced in construction of the roadbed for railway purposes did not bear on the "loss" which owners would suffer by taking of the roadbed for highway purposes.

44. Eminent domain ⇐221

In action by state to condemn portion of former railroad right of way for state highway purposes, evidence that reproduction of railroad roadbed for railway purposes had been made impracticable by voluntary abandonment of railroad operations and by disposal of connecting links of right of way by sale, abandonment, judgment, or reversion rendered question of possible reproduction one of fact, in so far as it affected damages.

45. Eminent domain ⇐136

In action to condemn portion of former railroad right of way for state highway purposes, evidence of abandonment of railroad roadbed for railway purposes, and of the economic infeasibility of renewing railroad operations rendered formula of cost of reproduction less depreciation as a measurement of damages inapplicable and made the "loss" which defendants would suffer, and not the "gain" to the plaintiff, the measure of damages.

46. Eminent domain ⇐134

The "strategic value" of abandoned railroad right of way to the state for highway purposes was not a proper measure of damages for taking of portion thereof for state highway purposes.

47. Eminent domain ⇐131

Although cost of reproduction becomes a factor in determining true market value as measure of damages for land taken, the real test is what some purchaser other than the condemnor would be willing to pay for the property and what it is worth to the owner in the open market, not what the necessi-

ties of condemnor require him to pay for his special project.

48. Eminent domain ⇐202(1)

In action to condemn land for state highway purposes, evidence tending to prove that defendants' property was only an abandoned railroad roadbed was properly admitted, the issue being properly raised by plaintiff with respect to proof of loss which defendants might suffer.

49. Eminent domain ⇐224

In action to condemn land for state highway purposes, failure of trial judge to accompany jury in its view of the land did not preclude him from granting a new trial on issue of compensation, on ground of insufficiency of the evidence.

50. Appeal and error ⇐883

Parties who by stipulation had acquiesced in court's absence when jury viewed premises under condemnation could not complain of such absence on appeal.

51. Eminent domain ⇐220, 224

Where, before jury left to view premises under condemnation, counsel for both sides expressly stipulated that judge need not accompany them, presence of trial judge for all purposes was waived, including the right to grant a new trial on issue of damages.

52. Evidence ⇐219(1), 265(2)

Generally, sales, options, and offers for sale of land under condemnation made by owner, if sufficiently near time of taking to be of service to jury, are admissible against owner as admissions against interest, and where measure of damages for taking is fair market value of the property at time of taking, such sales, options and offers are competent evidence having a substantial bearing on question of such market value, and although not conclusive proof of market value are relevant to show what a willing buyer would pay in cash to a willing seller.

53. Appeal and error ⇐970(2)

In action to condemn land for state highway purpose, admissibility of evidence of prior option to sell larger portion of land including the land taken was for the trial court on consideration of all the circumstances.

54. Eminent domain ⇐224

In action to condemn land for state highway purposes, new trial was properly granted on ground that damages awarded by jury were excessive under the evidence.

55. Appeal and error ⇐891

Where motion by defendants, after appeal had been partially briefed, for leave to offer additional evidence in the District Court of Appeal consisting of documents affecting title to land under condemnation was made more than two years after cause had been tried in superior court and no good reason was given why the proffered documents were not discovered in time for trial, and such evidence was merely cumulative, relating to events occurring prior to trial, motion would be denied.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action in eminent domain by the People of the State of California, acting by and through the Department of Public Works, against the Ocean Shore Railroad, Inc., and the Ocean Shore Railroad Company to condemn land for state highway purposes. From portion of judgment adjudging defendants to be owners of all of land under condemnation and entitled to severance damages for a portion thereof, plaintiff appeals; from portion of judgment precluding severance damages as to a portion of the land condemned, and from order granting new trial on issue of compensation, defendants appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., and C. C. Carleton, Holloway Jones, Geo. C. Hadley and Jack M. Howard, all of San Francisco, for appellants.

Keys and Erskine, A. P. Black, and Edwin H. Williams, all of San Francisco, and Nichols & Richard, of Oakland, for respondents.

NOURSE, Presiding Justice.

The People of the State commenced this action in eminent domain to condemn for state highway purposes a 60 foot strip

approximately 3⅓ miles long, from Junipero Serra Boulevard, San Francisco, on the north to Edgemar on the south, which had formed part of a railroad right of way of defendants Ocean Shore Railroad, Inc., and Ocean Shore Railroad Company, hereinafter called defendants, plus an additional parcel of land acquired by the same defendants between the right of way and the ocean. The proceeding, commenced in San Mateo County, was transferred to Alameda County on motion of defendant Ocean Shore Railroad, Inc.; as to the other, minor, defendants it remained and is still pending in San Mateo County. People v. Ocean Shore Railroad, 24 Cal.App.2d 420, 75 P.2d 560. Defendants claimed severance damage, as the 3⅓ miles taken allegedly formed part of a 17½ mile right of way continuing southward through Sharp Park to the Quillici property in San Mateo County. The court tried the issues of ownership and the basis for severance damage before impaneling a jury to try the issue of compensation. The court found and instructed the jury that defendants owned the property under condemnation in fee and that the property was a part of a larger parcel extending to the south to Sharp Park; but that it did not form a continuous parcel with the alleged right of way south of Sharp Park as Sharp Park constituted a complete separation.

The jury rendered a verdict of $485,190 for the property to be taken and $30,000 severance damages. On motion of the plaintiff the court granted a new trial solely on the issue of compensation. Plaintiff appeals from the judgment in so far as defendants are adjudged owners of all the 3⅓ mile strip under condemnation and entitled to severance damages as to the portions of the right of way north of Sharp Park; defendants appeal from the judgment in so far as it precludes severance damages to the alleged right of way south of Sharp Park and from the order granting a new trial on the issue of compensation.

The Ocean Shore Railway Company, predecessor of defendants, was organized in 1904-1905 for the construction and operation of a railway along the coast from Santa Cruz to San Francisco. Two sections—one from San Francisco to Tunitas in San Mateo County (38 miles) and another from Swanton to Santa Cruz (15.5 miles) were completed and were operated from 1907 to 1920. There always remained a gap of 26 miles. In 1911, after a receivership, assets and operation were transferred to a new California corporation, defendant Ocean Shore Railroad Company, which continued operations as a public utility, but was unable to operate without loss and in 1920 applied to the California Railroad Commission for permission to permanently abandon operations. Application as to both divisions of the railroad was granted. It also filed with the Secretary of State a certificate of diminution of stock stating that it was no longer a public utility. After that the Ocean Shore Railroad Company took up and sold all tracks, ties, telephone lines, etc., sold rolling stock, railroad equipment, terminal facilities and made some seventeen distributions to stockholders. The application for distribution stated that the corporation was in liquidation and did not propose to engage in other business than that incidental to liquidation.

In 1934 the defendant Ocean Shore Railroad Company caused the incorporation of the defendant Ocean Shore Railroad, Inc., a Nevada corporation, and deeded its assets to it in return for the new company's stock. Therefore this action was commenced against the Ocean Shore Railroad, Inc., but on June 25, 1936, subsequent to the commencement of the action the property was deeded back to the Ocean Shore Railroad Company and interest in the award was assigned to it. The Ocean Shore Railroad Company was then brought in as a defendant in this suit and answered. It is now the only one of the two companies interested in the award. The above facts are undisputed.

Defendants also refer to the following facts, denied or criticized by plaintiff: After the cessation of operations the company listed its roadbed in San Mateo County with the assessor of San Mateo County and paid real estate taxes on it.

As will be pointed out later plaintiff disputes that the description provided for assessment mentions all the right of way under condemnation, or the part through Sharp Park relevant to severance damages.

Defendants also contend that a group of men headed by one Selah Chamberlain in 1929 acquired an option from defendants on the right of way and stock of defendants which was renewed or changed several times and at last exercised in November 1933. This group seems also to have perfected title to part of the right of way by acquiring supplementary deeds or quitclaim deeds and even to have done some restoration work on the roadbed just before these proceedings were commenced in 1935. With respect to the option of the Chamberlain group and related matters much evidence was taken, and arguments were had in the absence of the jury for the purpose of deciding whether the option disclosing a price of one hundred thousand dollars for all the 16 or 20 miles right of way and the offer to sell the same for the same price to the Joint Highway District in case the option should not be exercised, should be permitted to go to the jury. The transcript does not show that this evidence went to the jury, or what ruling was made on the offer of proof.

With respect to the law plaintiff concedes defendants' ownership of the right of way in so far as title in the nature of a fee was acquired by purchase and grant, but argues that where no such title was shown and defendants must base their right on dedication, prescription or adverse possession such rights were lost since 1920 by nonuse for more than the statutory period, and by abandonment of the use of the right of way for railway purposes and of defendants' position as a public utility. These questions come up both in plaintiff's appeal in so far as plaintiff denies defendants' title to certain specific parts of the right of way to which the trial judge has recognized their title and in defendants' appeal with respect to the lower court's decision that defendants were not entitled to a right of way through Sharp Park.

In as much as the parties appear herein both as appellants and as respondents we will refer to the parties throughout as plaintiff and defendants. We will first consider the appeal of the plaintiff from that portion of the judgment holding that defendants were owners of all the 3⅓ mile strip subject to condemnation and were entitled to severance damages as to the right of way north of Sharp Park relating to the so-called Mary Tobin property.

[1, 2] But first it is necessary to dispose of defendants' objections to the procedure under which the court, in trying the issues of ownership, also determined the basis for severance damages before submitting the issue of compensation to the jury. The point is raised for the first time in the final brief filed after the cause had been submitted for decision. It is based on the statement found in Rose v. State of California, 19 Cal.2d 713, 729, 123 P.2d 505, 515, where the court said that the question whether the right of access to a portion of a public street under condemnation was substantially impaired was a matter "for the trier of the facts." There was no question of the propriety of the court to determine, in the absence of the jury, the question whether severance damages were allowable. The facts on which the claim of a right of access was based were conceded. The precise question involved here as to how the existence of the right upon which the claim for damages is based should be determined was raised in People v. Ricciardi, 23 Cal.2d 390, 402, 144 P.2d 799, 805, where the court said:

"When the proceeding comes on for hearing all issues except the sole issue relating to compensation are to be tried by the court, and if the court does not make special findings on those issues its findings thereon are implicit in the verdict awarding compensation. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 P. 238; Oakland v. Pacific Coast Lumber & Mill Co., supra, 171 Cal. 392, at page 397, 153 P. 705. In the Vallejo case, 169 Cal. at page 556, 147 P. 238 the court said: 'A condemnation suit is a special proceeding.

It is not included in the classes mentioned in section 592 (Code of Civil Procedure) in which a jury is required. That section is expressly made applicable to condemnation suits. Code Civ.Proc. § 1256. It follows that, except those relating to compensation, the issues of fact in a condemnation suit, are to be tried by the court, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.' In the Oakland case the point was urged that the question whether the parcels of land involved constituted one parcel within the meaning of section 1248 of the Code of Civil Procedure must be submitted to the jury for determination. The court said 171 Cal. at page 397, 153 P.2d 705: 'But neither the state nor any of its mandatories nor any other person or corporation, exercising the power of eminent domain, is compelled to submit to the determination of a jury every question of fact (Vallejo & N. R. R. Co. v. Reed Orchard Co., [169 Cal. 545] (147 P. 238), and this question of fact (namely, whether or not, the probative facts being without controversy, the resultant fact establishes the existence of a parcel from which a portion is to be taken) is essentially a question of law for the determination of the court. It is only the "compensation," the "award," which our Constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried as in many other jurisdictions they are tried, without reference to a jury. Const., art. I, § 14.' The law declared in these two cases has been followed in this state without deviation."

Particular emphasis should be laid on the succeeding paragraph of the opinion because it is a complete answer to the contention made here: "It was therefore within the province of the trial court and not the jury to pass upon the question whether under the facts presented, the defendants' right of access will be substantially impaired. If it will be so impaired the extent of the impairment is for the jury to determine. This is but another way of saying that the trial court and not the jury must decide whether in the particular case there will be an actionable interference with the defendants' right of access. This the trial court did when it ruled on the admission of evidence and in its instructions to the jury."

[3] It should also be noted that the precise procedure now criticized was agreed to by all parties at the opening of the hearing. Before the jury was summoned and while the trial judge sought an agreement as to how these questions were to be heard counsel for defendants stated that "* * * as I understand the law, * * * Your Honor will pass upon the question of whether or not we are sufficiently contiguous in the different pieces of land involved that have been established to determine whether or not the question should go to the jury on severance damage. * * *" And it was agreed that where there was any question of title ownership the court should determine it as a question of law in the absence of the jury. The court then addressed to counsel this inquiry: "Now, second, is there any question as to—on the issue of severance damage as to whether there is land that is part of the whole that is lost, not taken"? Counsel for defendants replied that such was a question of law for the trial judge alone to decide.

If the procedure was irregular as now claimed, it is a question which is not open for discussion because of defendants' acquiescence in the first instance (2 Cal.Jur. p. 849) and their failure to raise it within the proper time.

[4] Plaintiff's original attack is made on the ruling relating to the Gillogley property. This is a small part of parcel No. 5 second described in the complaint and alleged to be owned by defendants Ocean Shore Railroad, Inc., and John A. Macready. Plaintiff now contends that a .73 acre part of this 12.92 acres parcel of the right of way, deeded by Unger, Kaufmann, Thurston et al. to Ocean Shore Railway protruded eastward into the land of Gillogley, the owner of the land to the east of that of the grantors. Though the issue is really one of fact we will state the respective arguments for the purpose of clarity.

Plaintiff argues that defendants failed to prove record title, deed or conveyance

as to this part, whereas the State has acquired record title in the Gillogley property in general; therefore the trial court should have excluded this part from defendants' interest and should have determined its area.

As against this defendants argue: Plaintiff's contention is contrary to the allegations of its complaint, particularly to the allegation "that the defendants named in the complaint are the only persons interested in said respective parcels of land." John A. Macready's title from Unger, Kaufmann, Thurston et al. excludes defendants' 12.92 acre strip transferred earlier, and Macready does not claim any interest in it. Therefore, it is argued, that by plaintiff's own allegations defendants are the owners of the total 12.92 acres strip. City of San Jose v. Freyschlag, 56 Cal. 8. Plaintiff, however, argues that section 1244, Code of Civil Procedure, requires the condemnor to mention all owners, or the fact that they are unknown (subd. 2) but that the extent of the interest of the defendants need not be set out (subd. 5). The duty to set out the interest is by 1244, Code of Civil Procedure, put on the defendant. Plaintiff is therefore not bound by an allegation of ownership in the complaint which in addition alleges an interest also of unknown parties. Defendants assumed the burden of proof of ownership and procured exhibits showing the chain of title from Unger, Kaufmann, Thurston et al., but they did not produce any evidence as to the part that had not belonged to Unger, Kaufmann, Thurston et al. Defendants argue further that the original plats attached to the deeds as to parcel 5 second show that the right of way at the most eastern point reached the east line of lot 2 belonging to grantors but did not cross it; that if there is doubt from the description in the deed the plat is controlling, citing Ferris v. Coover, 10 Cal. 589. Plaintiff points out that on the plat the center line of the right of way at the point in question comes nearer to the east line of Lot 2 than the 36 foot distance between middle line and east border of the right of way, so that part of the 60 foot right of way is at any rate cut off by the east line. The witness Oakley, called by defendants, testified that "that little sliver" on the outside of the curve, outside the limits of the construction, was immaterial to the railroad. Defendants argue that the new maps which show a larger protrusion over the east line of Lot 2 are unreliable because they were made by the witness Poss without knowing the plat attached to the deeds and by using uncertain monuments; other evidence shows that deeds were secured when the right of way crossed into any piece of property; that this was not done as to the Gillogley property could be considered an indication that the property line was not crossed; also that the earthquake of 1906 caused considerable earth movement in that neighborhood located on the San Andreas fault. Hence, they say that there was sufficient evidence to support the court's implied finding that the whole of the right of way parcel remained west of the east line of Lot 2, on the land of the grantors. Plaintiff answers that as there was some property not covered by the deeds the burden was on defendants to prove title tracing back to the government as the paramount source of title; as they have not done so they must lose even if the question who actually is owner is not solved. Rockey v. Vieux, 179 Cal. 681, 178 P. 712.

Defendants contend that if it was not certain that their right of way remained outside the Gillogley property the rule of Loustalot v. McKeel, 157 Cal. 634, 640, 108 P. 707, applies, holding that where a boundary is uncertain with respect to deeds and the parties make a marked dividing line in which they acquiesce and which they occupy during the period of prescription both parties are conclusively estopped from questioning such line; that this case is brought under the rule on the ground that they constructed their roadbed and paid taxes on it without any claim or protest by Gillogley. Plaintiff argues that there is no construction along the agreed borderline to bring our situation under the rule; defendants' witnesses place the right of way over the borderline, though not so far, and testify that the protruding part is beyond the area of construction; the payment of taxes as to possible Gillogley property is denied

as the taxes were paid on the basis of a right of way through the lands mentioned in the deeds not mentioning Gillogley.

We have referred to the respective arguments and counter-arguments of the parties with some of the authorities upon which they rely for the purpose of showing the conflict in their respective contentions on the question of title. Though we must concede under the accepted rule that the burden of proving title was on the defendants, we cannot say that the trial court erred in finding for them even though there was no construction by the railroad along the disputed strip. It is clear from the evidence that no one else laid any claim to this disputed strip and that apparently adjacent landowners conceded defendants' ownership. But from a view of all the evidence it is apparent that the trial court had sufficient proof to support the finding that defendants had some compensable interest, and on that ground alone this portion of the judgment must be affirmed.

[5, 6] The next parcel referred to in the briefs as the Globe Wireless property is designated in the complaint as parcel 2 first (1.44 acres) and parcel 2 second (.67 acres). Although the two parcels are separated by parcel 5 first as to the title of which there is no controversy, the situation with respect to parcels 2 first and 2 second is identical.

In July, 1905, C. A. Hooper who owned tracts of land of which these two parcels formed part, made with the Ocean Shore Railway Company an agreement to place in escrow three deeds for rights of way through his different properties, to be delivered when the Railway Company should have completed construction and should have begun the operation of its line between the cities of San Francisco and Santa Cruz, and said line shall cross the rights of way described. Plaintiff alleges that this deed was never delivered as the railroad between the two cities was never completed and operated; defendants allege that it is unknown whether it was ever delivered, contending that the condition was fulfilled by operations somewhere between the two cities, as the conditions did not require an unbroken line. It is, however, conceded that no deed was recorded. The agreement granted the Railway Company immediate possession and the roadbed was constructed and operated over the Hooper properties although there is a controversy as to how far the roadbed followed the right of way described in the agreement. Thereafter in November, 1907, Hooper conveyed the properties belonging to him across which the railroad ran to C. A. Hooper & Co., a corporation, without excepting any railroad right of way. After the operation of the railroad was stopped the description provided for assessment in San Mateo County mentioned the right of way running through the property of C. A. Hooper. Later the following conveyances of the land of Hooper took place: March, 1929, from C. A. Hooper & Co. to Heintz and Kaufmann; September, 1929, from Heintz and Kaufmann to Robert Dollar Company; in 1933 from Robert Dollar Company to Globe Wireless, Limited, each of which deeds contained the exception "excepting and reserving therefrom the right of way of the Ocean Shore Railroad Company." There is no reference to the deeds put in escrow or to the Ocean Shore Railway Company which was a party to the escrow agreement, but only to the right of way of the Ocean Shore Railroad Company. In 1934 C. A. Hooper & Co. quitclaimed the right of way through his property to Selah Chamberlain and Selah Chamberlain quitclaimed the same right of way to defendant Ocean Shore Railroad Company. The description in these quitclaim deeds is the same as in the original escrow agreement. In 1937 after the commencement of this action C. A. Hooper & Co. made a new quitclaim deed to the Ocean Shore Railroad Company which contains another description of the right of way and the sentence: "The above description is to cover the right of way and roadbed on which the Ocean Shore Railroad line was constructed and operated and a map is attached to this agreement showing the above mentioned property."

Plaintiff contends that the original escrow agreement (and also the 1934 quitclaim deeds) describe a right of way far west of the actual location and that the reservations made in the mesne convey-

ances could only relate to the right of way as mentioned in the escrow agreement. It argues that therefore none of the deeds was effective; the deed put in escrow was not delivered and contained a description of other property; the 1934 quitclaim deeds contained the same wrong description and the 1937 quitclaim deed as to the actual right of way was made when the title had been transferred to Globe Wireless, which actually claims ownership in the proceeding which remained for trial in San Mateo County.

Defendants contend that the last quitclaim deed contains the correct description, and that the reservation in the mesne conveyances related to the actual right of way without any reference to the escrow deeds which moreover were probably never delivered. For that reason, they argue, Hooper & Co. retained title to the actual right of way in so far as the title had not been transferred to Ocean Shore Railroad by previous deeds; that the 1937 quitclaim deed was then effective to transfer to defendant all title to the actual right of way which they did not yet have resulting in a complete title by deed. In this respect defendants contend that where the description in the 1905 and 1934 deeds is ambiguous or defective the intention of the parties and the practical construction they gave to the deed is decisive, citing Blume v. MacGregor, 64 Cal.App.2d 244, 148 P.2d 656; Schmidt v. Klotz, 130 Cal. 223, 62 P. 470; 9 Cal.Jur. 303 (Deeds, sec. 167); 26 C.J.S., Deeds, § 30, page 220. Here they claim the intention was to transfer the actual right of way and that this is shown by the last quitclaim deed as a practical construction. Plaintiff however urges that intent and practical construction can not vary the description of a deed which is clear and certain to the contrary, citing Fratt v. Woodward, 32 Cal. 219, 91 Am.Dec. 573.

Defendants argue further that they have acquired title by adverse possession and the payment of taxes, citing Smith v. Southern Pac. R. R. Co., 1 Cal.2d 272, 34 P.2d 713; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P. 519; Almaden Vineyards Corp. v. Arnerich, 21 Cal.App.2d 701, 705, 70 P. 2d 243.

With respect to these two parcels there was sufficient evidence before the trial court to support the holding that defendants held title by deed. The reservation made in the deed from C. A. Hooper & Co. to Heintz and Kaufmann can very well be construed as referring to the right of way as it was actually on the ground, in which case the 1937 quitclaim deed of C. A. Hooper & Co., which clearly purported to transfer title to the actual roadbed, was effective. The fact that this deed was made after the commencement of the suit does not exclude it from consideration where it was made pending condemnation proceedings, before title vested in the public. Compare Brick v. Cazaux, 9 Cal.2d 549, 554, 71 P.2d 588; Bank of America v. City of Glendale, 4 Cal.2d 477, 482, 50 P.2d 1035; 29 C.J.S., Eminent Domain, § 202, page 1117. Although there was evidence before the trial court which would support the conclusion that the intention of the parties to the 1934 quitclaim deeds was also to transfer title to the actual right of way, we do not need this reasoning in support of the judgment of the lower court and therefore abstain from analyzing any of the cases cited by either party with respect to this point.

[7] The property designated as parcel 1, and referred to as the Edgemar property, is the southern most parcel under condemnation. It adjoins on the north parcel 2, first discussed under the former paragraphs. The complaint mentions as owners Ocean Shore Railroad, Inc., C. A. Hooper & Co., Henry Sinsheimer and five Does as successors in interest to San Pedro Land & Dairy Company, a defunct corporation. A right of way through the property that afterwards became Edgemar was described in 1905 in the escrow agreement between C. A. Hooper and Ocean Shore Railway Company. However, C. A. Hooper seems to have had a 50% interest only in this property; a deed of January 31, 1906, by which the property itself was conveyed mentions not only Hooper but also Sinsheimer and the San Pedro Land & Dairy Company as grantors, the San Pedro Land & Dairy Company claiming to own a ¼ interest. This deed to Lawler excepted "the land

heretofore conveyed to the Ocean Shore Railway Company for a right of way and embracing 2.29 acres of land, more or less." In November, 1906, Lawler conveyed the property to Henshaw, Henshaw to Edgemar Realty Syndicate and Edgemar Realty Syndicate to two trustees as security for a loan from the Union Savings Bank of Oakland. All three deeds, made approximately at the same time, exclude the right of way of Ocean Shore Railway Company without reference to any conveyance. August, 1912, the trustees deeded to the Union Savings Bank of Oakland after foreclosure because of default of the Edgemar Realty Syndicate, again with the same exception. After dissolution of the Union Savings Bank its trustee Percy C. Black made a quitclaim deed in 1937 to the Ocean Shore Railroad Company; it "purports to convey only the sixty foot right of way and roadbed constructed by the Ocean Shore Railroad Company over which its trains were operated." The 1937 quitclaim deed of C. A. Hooper mentioned herein in the discussion of the Globe Wireless property also purports to quitclaim the actual right of way through Edgemar.

Plaintiff contends that the right of way as described in the escrow agreement is far to the west of the actual roadbed. On the other hand defendants argue that it is clear that the parties in interest wished to transfer the actual roadbed to the railway company and tried to act accordingly. Of the owners alleged by plaintiff in the complaint, Hooper made an express quitclaim deed of his part, and none of the others claim any interest. Edgemar Realty Syndicate, one of the later grantees, filed a map of its planned subdivision with the county recorder showing a 60 foot right of way, of which plaintiff concedes that it shows the actual location. Defendants seek therefore to apply to the Edgemar property the same rule as to construction of deeds according to intent of the parties and practical construction as mentioned with respect to the Globe Wireless Property.

With respect to the property under consideration the position as to the quitclaim deeds is different from that with respect to the preceding Globe Wireless property. Here the quitclaim deed of Hooper can not be sufficient basis of title as he had only a 50% interest and because in the deed to Lawler he and his associates excepted the right of way conveyed, which seems to refer to the agreement and not to the actual situation. However, if the reservations in the later deeds which except the right of way without special reference to any conveyance, are considered also to except the right of way as described in the agreement, and not the actual roadbed—and the trial judge could reasonably construe the reservations in all the mesne conveyances in the same way—then the title to the actual right of way would have gone by the successive mesne conveyances to Black of the Union Savings Bank and his quitclaim deed of 1937 would give defendants a title by deed. Plaintiff concedes that under this theory the various quitclaim deeds may have given defendants the necessary right of way for railroad purposes only, but argues that neither this nor any other ground gave defendants a fee that could survive nonuser or abandonment for railway purposes as in Ocean Shore Railroad Co. v. Spring Valley Water Co., 87 Cal.App. 188, 262 P. 53, and Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal.App. 704, 270 P. 216. The argument is that defendants' claim must fail because the deeds here only mention the right of way for railroad and transportation purposes and the consideration is not the full value of the land, but, as recited in the escrow agreement, "the benefit by him expected to be derived therefrom" and the quitclaim deed of Black expressed merely a nominal consideration. It may be conceded that ordinarily the rights conferred by such deeds would not be intended to survive nonuser or abandonment for railway purposes. However, the trial court could conclude to a contrary intent from the fact that Black made his deed in 1937 when actual user had been abandoned since 1920 so that the right of way granted could not with any possibility be dependent on actual user.

We hold therefore that also with respect to the Edgemar property the decision of the trial court is sufficiently supported by the quitclaim deed in evidence without any need of recourse to the unexpressed inten-

tion of the parties, although there can be no doubt that this intention at all times coincided with the result here attained.

[8-11] The parcel, referred to as the Mary Tobin property, is part of the railroad right of way but is not part of the 3⅓ miles sought to be condemned. It is a part of the strip lying between the property to be condemned and Sharp Park, the strip as to which the lower court recognized the right to severance damages. Plaintiff contends that between the description in the deed from Mary Tobin and the actual right of way there is an offset of 255 to 500 feet, and the evidence fully supports this contention. It is then argued by plaintiff that this gap in the record title excludes the Mary Tobin property and all of the right of way south of it from the contiguous parcel with respect to severance damages.

Defendants do not claim with respect to this property title by any quitclaim deed; the questions here involved are only whether the actual roadbed and the description in the deed correspond, whether the deed should be construed to apply to the actual roadbed and whether defendants have acquired title by adverse possession, dedication or estoppel.

The deed from Mary Tobin dated July 14, 1905, clearly purports to grant in fee a 60 foot strip through her property from the Burlington Beach property on the north to the Herbert et al. property to the south. Defendants contend that all later deeds as to the Mary Tobin property itself except the actual roadbed of the Ocean Shore Railroad Company. Actually the earlier deeds except the land as conveyed in Mary Tobin's deed of July 14, 1905. Defendants argue that any defect in description would make the Mary Tobin deed indefinite and ambiguous and that then intent and practical construction of the parties would be decisive; as to this construction defendants point to an agreement of June 24, 1918, between defendant Ocean Shore Railroad Company and Mary Tobin and others as to the construction of a ditch and pipeline, in which defendants' ownership of a strip is clearly recognized by Mary A. Tobin, and to the fact that none of the adjacent owners ever claimed any interest in the actual roadbed.

The evidence is too clear to permit controversy that the roadbed through the Mary Tobin property was constructed over a strip of the grantor's land running from 255 to 500 feet from the strip described in the deed of July 14, 1905. However, on the basis of the evidence before it the trial court can very well have concluded that defendants occupied the actual roadbed under a claim of right based on that deed, but under a mistake as to the location. In such a situation the possession is considered adverse and may ripen into complete title. 2 C.J.S., Adverse Possession, § 84, page 630.

The evidence shows without conflict that defendants' possession has been actual, open, notorious, exclusive, continuous and uninterupted for more than five years. In general a railway company will acquire by prescription only a servitude or easement of right of way for railway purposes which can be lost by nonuser or abandonment of its status as a railway carrier. This point will be treated more amply in a later part of the opinion. In the special situation, however, where the claim of right is based on a deed in fee the interest acquired should not be measured by the actual user made or needed by the railroad company but should be commensurate with the interest granted in the deed. As the decision of the lower court with respect to this point is sufficiently supported by the existence of a title in fee by adverse possession, no discussion is required of a possible construction of the deed itself as applying to the actual roadbed, notwithstanding the divergence in description.

[12, 13] On the trial of the issue of ownership the court found that the defendants did not have title to any portion of the roadbed running through Sharp Park and that they were not therefore entitled to severance damages in relation to the portion of the roadbed running south of the Park. From this ruling the defendants have appealed.

Primarily defendants concede that no deed or conveyance was obtained as to the 2500 feet of roadbed constructed through

the Sharp lands. Plaintiff concedes that the roadbed was constructed and that the railroad was operated through these lands from about 1907 to 1920 when operation of the entire road was abandoned. Defendants state in their brief, without any reference to the transcript, that Honora Sharp, the prior owner of the premises, promised to give the right of way as a gift but died soon after without having done so. The date of the death does not appear but it is conceded that the railroad was in operation over those lands when they were conveyed by the trustees of Honora Sharp to the City and County of San Francisco in 1916 for park purposes.

On these facts the defendants contend that they have a vested right in the Sharp Park roadbed based on dedication, adverse possession or estoppel. The issue of dedication presents a mixed question of law and fact. Just like the question of abandonment the intention of the parties is the controlling factor. A dedication of property in fee for a public use cannot be implied from the user alone, and here defendants concede that there was no express dedication, that nothing more passed from the owner than an unproved oral promise of the owner to grant permission to construct the railroad over her lands. Assuming that such permission had been proved the question immediately arises whether it was more than a license to operate the railroad over the Sharp lands for the benefit of the lands, in which case the implied dedication would be conditional upon the continued operation of the railroad so that the right would revert upon the abandonment of the operation. It is a fair inference from all the evidence relating to this portion of the roadbed that, if any form of dedication could be implied from all the circumstances, it was a dedication conditioned upon the continued operation of the railroad for the benefit of the donor.

[14, 15] This view is fortified by the accepted rule that when a mere easement has been acquired for a public purpose the abandonment of the public purpose effects an abandonment of the easement. This rule is stated in Slater v. Shell Oil Co., 39 Cal.App.2d 535, 549, 103 P.2d 1043, 1051, where the court said: "It is well settled that where a utility acquires an easement (as distinguished from a fee simple title) in the nature of a right of way for a public purpose, the abandonment of the public purpose terminates the easement and the easement reverts. Northern Pac. Ry. Co. v. Townsend, 190 U.S. 267, 23 S.Ct. 671, 47 L.Ed. 1044; Barton v. Jarvis, 218 Ky. 239, 291 S.W. 38; Simons v. Munch, 115 Minn. 360, 132 N.W. 321; Chicago & N. W. Ry. Co. v. Sioux City Stockyards Co., 176 Iowa 659, 158 N.W. 769; Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208, 1 L.R.A., N.S., 806, 114 Am.St.Rep. 509, 6 Ann.Cas. 239; Robertson v. Bertha Mineral Co., 128 Va. 93, 104 S.E. 832; California & N. Railroad Company v. Mecartney, 104 Cal. 616, 38 P. 448." The same case is authority for the rule that the question whether or not there has been an abandonment is a question of fact. Now defendants argue and cite authorities holding that since abandonment of an interest in land is a question of intent it is incumbent upon the landowner to prove that the licensee had such intent. This rule is general when applied to a grant or conveyance. Here the question of the burden of proof is not involved. The basic question is whether the easement acquired by sufferance may be lost by abandonment of the public use. Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal.App. 704, 270 P. 216, and Ocean Shore Railroad Co. v. Spring Valley Water Co., 87 Cal.App. 188, 262 P. 53, cited and relied on by defendants, are not helpful. Both cases involved grants either in fee or of a perpetual servitude in the right of way for railroad purposes. The distinction is made clear in the last case where the court said that the servitude had been acquired by grant in perpetuity and not (at page 194 of 87 Cal. App., at page 55 of 262 P.) "in any degree as a subsidy, or for any consideration of its usefulness to the land." Nothing is found in either case to the effect that a license or easement granted for a special public purpose does not lapse when the licensee abandons the purpose for which the right was acquired.

[16-18] There can be no controversy over this general rule of property that an easement acquired by enjoyment or sufferance may be lost by disuse. Garbarino v.

Noce, 181 Cal. 125, 130, 183 P. 532, 6 A.L.R. 1433; Civil Code sec. 811, subd. 4. As to an easement acquired by grant nonuser alone is not sufficient proof of an intention to abandon, yet, even as to such an easement such intent is properly inferred when such nonuser has continued for such a length of time as to be inconsistent with any other theory than an intent to abandon. 17 Am.Jur. p. 1029. Thus the question of the intent to abandon whatever rights the defendants could assert under their theory of dedication was a question of fact for the trial court and all the circumstances support the inference drawn by the trial court adverse to them.

[19, 20] Next the defendants argue that they gained a title in fee by adverse possession. They contend that their holding of the strip through the Park was hostile and under claim of right but they do not cite any evidence proving the assertion. Contrarily, since the right to operate was based solely on an oral permission presumably for the benefit of the lands, it was a reasonable inference that the holding, rather than being hostile and under claim of right, was merely a holding under the permissive use and therefore not adverse. Defendants cite Arrington v. Liscom, 34 Cal. 365, 94 Am.Dec. 722, following the undisputed rule that adverse possession for more than five years can ripen into a title in fee. They cite Barbour v. Pierce, 42 Cal. 657, 662, which is not in point as it only states that title to an easement can be acquired by holding under claim of right although the easement had its origin in a permission. It is dictum as no claim of right was found. Here there is no proof of claim of right and moreover defendants need for their argument more than an easement by user. They rely on the presumption of hostile intent and claim of right after long use, citing Yuba Consolidated Goldfields v. Hilton, 16 Cal.App. 228, 116 P. 712, 715, and Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370. But their express admission that there was no grant and the inference that their holding was merely permissive for the purposes of operating the railroad belies their argument.

Two elements of the doctrine of acquisition of a right through adverse possession are important here—first the holding for the prescribed period must be adverse and under claim of right, and second the owner of the land must have knowledge, or means of knowledge of the adverse claim. 17 Am. Jur. pp. 974-976; 9 Cal.Jur. p. 950; Civil Code, sec. 806; 1 Cal.Jur. p. 527. The Code section provides: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Thus where the easement is acquired either by prescription or adverse possession its character is determined by the user under which it is claimed. Fletcher v. Stapleton, 123 Cal. App. 133, 137, 10 P.2d 1019. See also Moore v. California Oregon Power Co., 22 Cal.2d 725, 735, 140 P.2d 798; Cordano v. Wright, 159 Cal. 610, 622, 115 P. 227, Ann. Cas.1912C, 1044; De la Cuesta v. Bazzi, 47 Cal.App.2d 661, 672, 118 P.2d 909; 9 Cal. Jur. pp. 950, 953.

[21-23] Application of this rule to a railroad right of way leads to the conclusion that where no deed is involved the railroad company acquires by prescription or adverse possession only an easement in the right of way. 127 A.L.R.Annotation 517, 518. Another argument for this restriction is that an easement is also the extent of the interest which a railroad can condemn under sec. 1239, sub. 2 of the Code of Civil Procedure. City of Oakland v. Schenck, 197 Cal. 456, 466, 241 P. 545. It is fair to infer from what evidence there is on the subject that Mrs. Sharp's permission to operate the railroad over her lands gave a permissive use only dependent upon continued operation. Since the burden is on the defendants to prove that they obtained an interest in the land of greater extent, the implied finding of the trial court adverse to them cannot be disturbed.

[24] Next the defendants claim that they acquired title to the strip through the Park by estoppel. Their argument on this point is not clear. We can find none of the elements of the doctrine of estoppel applicable to the facts of the case. This doctrine, based on sec. 1962, sub. 3, Code of

Civil Procedure, is clearly stated in Davenport v. Stratton '4 Cal.2d 232, 243, 149 P. 2d 4, 9: "Estoppel may be defined to be a bar by which a man is precluded from denying a fact in consequence of his own previous action which has led another to so conduct himself that, if the truth were established, that other would suffer. (10 Cal. Jur. p. 611.)"

[25, 26] But two of the essential elements of the doctrine of equitable estoppel, knowledge on the part of the landowner, and ignorance of the true state of facts on the part of the railroad, are absent. "An estoppel is based on a knowledge of the facts and acquiescence with the situation developed thereby on the part of the party against whom it is claimed. 'There can be no estoppel when the facts are not known, as no one can be presumed to have waived that the existence of which he has not known.' Wheaton v. North British & M. Ins. Co., 76 Cal. [415], 429, 18 P. [758], 765, 9 Am.St.Rep. 216; Puterbaugh v. Wadham, 162 Cal. [611], 618, 123 P. 804; Norton v. Overholtzer, 63 Cal.App. 388, 218 P. 637. 'There can be no estoppel in pais where the party against whom the attempt is made to invoke such estoppel does not know the full truth of the facts to which his conduct, declarations, or representations constituting the basis of the alleged estoppel relate.' Bisconer v. Billing, 71 Cal.App. 779, 236 P. 329; Eaton v. Wilkins, 163 Cal. 742, 127 P. 71; Bashore v. Parker, 146 Cal. 525, 80 P. 707; Davis v. Winona Wagon Co., 120 Cal. 244, 52 P. 487; Murphy v. Clayton, 113 Cal. 153, 45 P. 267; Ions v. Harbison, 112 Cal. 260, 44 P. 572." Weintraub v. Weingart, 98 Cal. App. 690, 701, 277 P. 752, 757. It is equally important that "One relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury. 10 Cal.Jur., pp. 636, 637; 10 R.C.L., pp. 696, 697; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.2d 263." Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 273, 83 P.2d 503, 506.

We have said that these two elements are not present here. The proof (if we may grant defendants the benefit of the term without any evidence) is that Mrs. Sharp gave them oral permission to operate the railroad across her land. This at its best was merely an easement by sufferance. But there is no proof, and no suggestion in the briefs, that Mrs. Sharp or her successors in interest had any knowledge that the defendants claimed any greater interest in the land, nor that, after they had abandoned operation of the railroad and removed all the tracks, they made any claim that they then possessed a title in fee to the strip formerly occupied.

[27, 28] The defendants assert that they obtained some color of title to the fee of the roadbed through the Park by payment of the taxes assessed to them since 1904. Payment of taxes alone is not proof of ownership of the land assessed. Keane v. Cannovan, 21 Cal. 291, 303, 82 Am.Dec. 738. It is insufficient to create any presumption of ownership. It would support an inference that as between the tax assessor and the taxpayer some taxable interest was assumed to rest in the taxpayer. But this alone could not overcome the presumption that the title is in the owner of the paper title and that the use by the railway was by permission or silent acquiescence. Furthermore there is no evidence that, following the abandonment of the operation, the true owners of Sharp Park had any knowledge of the payment of these taxes or that defendants based any claim to any interest in the land on such payment of taxes.

But it is argued that the defendants obtained the right to severance or consequential damages because of some general interest in the strip through the Park by reason of subdivision 5 of section 465 of the Civil Code. This section authorizes railroad corporations "To construct their roads across, along or upon any stream of water, * * * street, avenue or highway." Though the point is not made clear in the briefs it seems to be defendants' contention that the code section is a statutory grant to all railroad corporations of the unlimited right to occupy all public streets and highways and, as such, a right which becomes compensable in any suit to condemn any portion of a railroad right of

way. If this is a proper construction of the code section it is apparent that it was modified by the later enactment of the Public Utilities Act in 1915, St.1915, p. 115, in which (section 43) the right of a railroad to cross a public road, highway or street is expressly limited. Though this section restricts the right to cross a public highway at grade it cannot be denied that the clear purpose of the Act is to vest in the Public Utilities Commission plenary power to regulate all railway construction interfering with the general use of public highways for highway purposes.

[29, 30] Hence, though section 465 of the Civil Code, which was enacted in 1872 when the building of railroads was a matter of special public concern, may have been intended as a franchise to railroad companies to occupy all public roads and highways that privilege was withdrawn by the enactment of the Public Utilities Act in 1915. Even if we consider that section as a legislative grant of a creative franchise it was nothing more than a vesting of power to acquire the franchise. By no process of interpretation can the section be held to be a special grant to all railroads of a vested right to use all public highways as they may choose. The right to acquire by occupation and use is far different from the ownership by grant of the right to use the highways. It is only the ownership of the vested right which may form a basis for severance damages in this case. The difference between these interests is well stated in San Joaquin & K. R. Canal & Irr. Co. v. Merced County, 2 Cal.App. 593, 596, 597, 84 P. 285, 286:

"A corporation may have power to acquire realty, and yet never own such property. Its corporate franchise, its charter, may grant the power to acquire and exercise separate, distinct and varied franchises, but none may ever be acquired or owned.

"This distinction between the power to own, and ownership, is very important when we come to consider the difference between the creative franchise, vesting the power to acquire, and other franchises which it may subsequently acquire by purchase or acceptance. It points the difference between the general, creative franchise to be, and the special franchises which, when accepted or purchased, vest privileges or franchises resting in special grant from governmental sources. Above all things, it eliminates the heresy that all special franchises, enjoyed and exercised by a corporation, whether acquired by acceptance or purchase, are merged in the general franchise which creates the corporation, and endows it with enumerated powers."

Defendants cite and rely on the statement in Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 762, 18 P.2d 413, 420, where the court said that the railroad "could have been run" over the public highway through Sharp Park. However the part of the opinion in which the cited words appear merely argues that the acquisition of a right of way through Sharp Park would not be made impracticable by the park purposes for which the property was granted to San Francisco as the right of way "could have been run" over the portion granted for highway purposes. This statement is purely factual and the words "as contemplated by subdivision 5 of section 465 of the Civil Code" are surplusage. The case does not contain any decision that the Railroad Company had any vested rights as to Sharp Park under that section nor was any question of severance damage involved.

[31] It would serve no useful purpose to review other cases cited by defendants on the general question of the extent of corporate franchises. Sound reason does not support their contention that the State granted to every private railroad, both local and foreign, the perpetual right to use all public streets and highways for the operation of railroads, or that this right or franchise is a property right for which all railroads must be compensated whenever the State seeks to construct, improve, or make use of any of its public highways for general highway purposes. If the statute could be made susceptible to such a construction we have no doubt that it would be promptly held unconstitutional as a gift of public property for private purposes.

[32] Furthermore, assuming the statute to be valid as a franchise granted as incident to the incorporation of all railroads it is settled law that such privilege does not ripen into a right until accepted and actually exercised by the corporation. Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 318, 83 P. 54, 5 L.R.A.,N.S., 174, 7 Ann.Cas. 511; Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 111, 116 P. 557. Here there is no proof that the purported franchise was accepted. All the evidence we have been able to find is to the contrary—that the railroad through Sharp Park was constructed in part near or along the side of the county road, but that no part of the county road was occupied or used during the period of forty years since the Railway Company commenced construction. It also appears that any right which defendants might have had under the statute was abandoned long before this proceeding was commenced. Sears v. Tuolumne County, 132 Cal. 167, 64 P. 270; Tehama v. Pacific Gas & Electric Co., 33 Cal.App.2d 465, 471, 91 P.2d 936, 939. In the latter case the court quoted with approval the pertinent passage from 26 C.J. § 110, page 1042, reading: "A franchise may be lost by subsequent abandonment after it has been exercised. The abandonment of a franchise, is a question of intention. Nonuser is a fact in determining it. The disposal of property necessary for use in the exercise of a franchise will tend strongly to show the abandonment of such franchises." See also 37 C.J.S., Franchises, § 26.

To state defendants' position in simple language it is this—the Ocean Shore Railroad, Inc., a foreign corporation, succeeded to the rights of the old Ocean Shore Railway Company including the statutory franchise granted by section 465 of the Civil Code. Its predecessor had never accepted this franchise and had not operated over the county road in Sharp Park. Nevertheless it is argued that this is a creative franchise which, though not having been accepted over a period of forty years from the time of the "grant", is nevertheless available to the successor which is not an operating railroad. We are satisfied that the code section was never intended to impose such an unreasonable servitude upon all the public highways of the State. This conclusion is fortified by the reasoning in United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 63 S.Ct. 1047, 1055, 87 L.Ed. 1390, 1400, 1401, where compensation for a possible use of land based on the right of the landowner to acquire other property by eminent domain was denied, the court saying:

"Equity and fair dealing do not require the payment by the United States to the landowner of the amount of a valuation of his lands based on the existence of his privilege to use the power of eminent domain. It is 'private property' which the Fifth Amendment declares shall not be taken for public use without just compensation. The power of eminent domain can hardly be said to fall in that category. It is not a personal privilege; it is a special authority impressed with a public character and to be utilized for a public end. An award based on the value of that privilege would be an appropriation of public authority to a wholly private end. * * * The landowner is, to be sure, deprived of a preferential advantage, which was an incidental attribute of the public authority with which the state endowed him. But that advantage had no higher dignity than a promise of a gratuity.

"There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken (United States v. Miller, [317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55, supra]; United States v. Chandler-Dunbar Water Power Co., supra, 229 U.S. [53], page 81, 33 S.Ct. page 678, 57 L.Ed. 1063, [1082]; Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 [727]), not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate (United States v. Miller, supra, 317 U.S. at page 376, [370], 63 S.Ct. page 281, [276],

87 L.Ed. [336, 341], 147 A.L.R. 551), the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, Valuation Under Eminent Domain (1936) § 71, § 73."

Hence, if the defendants had any franchise or "right" stemming from this section of the code it was nothing more than an "opportunity" which might be asserted as incident to the operation of the railroad and, as such, it was not an element of damages. But, assuming that through any one of these theories the defendants obtained some rights in the strip running through the Park which would support a claim to severance or consequential damages, the evidence discloses an intentional abandonment of all those interests long prior to the commencement of this proceeding.

The defendants state in their closing brief: "The Spring Valley litigation prevented the use of Water Company lands and the Sharp Park roadbed and in addition it also prevented the use of the balance of the said property from San Francisco to Santa Cruz."

This is an incorrect statement of the true situation. The Spring Valley litigation involved the question of reversion to the original owners after abandonment of the right of way for railroad purposes. The abandonment occurred more than a year earlier when the corporation requested the State Railroad Commission to permit it to abandon operations because of its inability to pay the wages of its employees or to make any profit. The controversy with the Spring Valley Water Company had no relation to either of these two factors. The Commission on October 20, 1920, granted the petition and authorized the defendants "to discontinue permanently on its Northern Division its service as a common carrier. * * *" A few days later the Railroad Commission granted a similar application of the Ocean Shore to discontinue permanently its service as a common carrier on its southern division. This was the isolated road running from the City of Santa Cruz north to Swanton and separated from the northern division by a gap of approximately 26 miles. Manifestly the litigation over the Spring Valley lands had no bearing on the abandonment of this portion of the road.

At about the same time these applications were granted the Railroad applied to the Interstate Commerce Commission for leave of abandonment and stated, in answer to the Commission's question whether it was proposed to abandon all of the line of railroad, or the operation thereof: "All of said line of railroad and the operation thereof." In the same application the Railroad stated, in answer to a question: "Plan is to dispose of entire property, thus eliminating all charges in connection with the property proposed to be abandoned." And whether all "or any portion" of the line was to be replaced with a new line of railroad the answer was "No."

When these permits from the federal and state agencies were granted the Railroad forthwith removed all its tracks and ties, disposed of them along with the engines, passenger and freight cars, station ground, terminal facilities and other saleable assets. These voluntary acts had no relation to the litigation with the Spring Valley Water Company.

Indicative of the fixed intention of the corporation to abandon its line of railroad as well as its status as a public utility it sold, during this period of liquidation, its terminal facilities and parcels of the right of way held in fee, quitclaimed other parcels in which it held reversionary interests only, and suffered decrees to be entered on advice of its legal counsel quieting title to other portions in which it held conditional easements or reversionary interests.

Following these permits to discontinue, the corporation addressed some seventeen applications to the California Commissioner of Corporations for permission to distribute capital assets to the stockholders. These applications stated: "The said corporation is in liquidation and has been since 1920 and is not engaged in, nor does it propose to engage in business of any kind other than such as is appropriate or incidental to such liquidation." The roadway was left in disrepair for approximately

fourteen years, and no work was done on it until defendants learned the plans of the State to construct the highway. Then a few men were put to work on a portion of the old roadbed to create the impression that defendants still had a railroad which would be damaged by the State's new highway. (When the State, through cross-examination of the witness who directed these operations, endeavored to prove the cost, the witness had no recollection of what had been expended.)

Aside from the Chamberlain deal, reference to which is made in other portions of the opinion, the defendant corporations disclosed no other purpose at the time of the commencement of the trial than the purpose to liquidate the assets. Through successive conveyances they sold to a private individual all the remaining assets and rights of way of the portions here involved retained nothing but an empty franchise.

[33-35] This state of facts, which for all practical purposes is either conceded or proved by undisputable evidence, can only lead to the one conclusion that all possible rights of defendants to occupy a right of way through Sharp Park were abandoned. The rights which they could acquire on the basis of section 465 of the Civil Code were not of greater extent or more durable character than those they could acquire by prescription or condemnation, i. e., a right limited by the actual user and lost by nonuser or abandonment. Defendants argue that as the discontinuance of operation took place with authorization of the Railway Commission, section 468 of the Civil Code protects them from loss of franchise rights by abandonment or nonuser. This section cannot have that effect. It may be conceded that, as we held in Midstate Oil Co. v. Ocean Shore R. R. Co., 93 Cal.App. 704, 710, 270 P. 216, the penalty of forfeiture of the Ocean Shore Railroad Company's franchise under that section as it read before 1937 did not apply as the Railroad Commission had authorized it to terminate its services as a common carrier. However, plaintiff argues the loss of defendants' right, if any, to operate through Sharp Park independent from section 468, on the ground of nonuser or abandonment and section 468 does not purport to abolish as to railroads the accepted doctrine that easements can be lost in such way. (See for example section 811, Civil Code.) A similar problem was presented in Home Real Estate Co. v. Los Angeles Pac. Co., 163 Cal. 710, 713, 126 P. 972, where the parties had argued forfeiture under the terms of the statute of 1880—in 1905 incorporated in our section 468—but where the Supreme Court held that the facts supported the finding of abandonment of the easement of railroad right of way irrespective of the statute. The evidentiary facts which in that case were held to provide adequate support for the finding of abandonment were not stronger than those in the case at bar. The evidence relating to abandonment in this case, shows much more than cessation of operation with authorization of the Railroad Commission; the corporation voluntarily dissolved its status as a railroad carrier, sold all its movable property and equipment, distributed its assets to its stockholders, and sold, quitclaimed, or suffered final judgments against it, quieting title to large sections of its right of way. It may be that nevertheless defendants' franchise to be as a railroad corporation still exists under section 468, but it was for the trial court to decide, independent of that section, on the basis of the evidence described earlier in more detail, whether defendants had any rights of operation through Sharp Park left for which they were entitled to severance or consequential damages. Under the rule of People v. Ricciardi, 23 Cal.2d 390, 402, 144 P.2d 799, it was within the province of the trial court to determine what property, other than the strip of roadbed actually taken, would be damaged by the taking because of severance. Whether the interest, to which the defendants seek to attach their claim of severance or consequential damages, has been abandoned, conveyed, assigned or otherwise lost to them is a question of both law and fact. But, in so far as it is a question of fact, it is one of those issues which must be determined by the court in the absence of the jury. As stated before, the facts give ample evidentiary support to a finding that defendants had lost by non-

user or intentional abandonment whatever rights they might have acquired with respect to operation through Sharp Park.

[36, 37] Defendants assert that even if they had no rights whatever as to operation through Sharp Park, connecting their roadbed north and south of it, they would be entitled to consequential or severance damages also with respect to the southern part, because all the parts of their roadbed together as one unit had a special value for railroad purposes which was destroyed by the taking of the 3⅓ mile strip now under condemnation. They contend that the right of compensation for the destruction of such unity of use is protected by the Fifth Amendment of the Federal Constitution, citing Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 S.Ct. 622, 37 L.Ed. 463. The later United States Supreme Court cases do not bear out this contention. Especially United States ex. rel. Tennessee Valley Authority v. Powelson as quoted, supra, holds that not all losses from taking by eminent domain are compensable under the Fifth Amendment and that no payment is required for frustration of opportunities which the owner may lose. The Monongahela case is distinguished as concerned with the appropriation and not the destruction of a going concern, whereas also an element of estoppel is mentioned based on special facts not at all applicable to our case. In California the question has been decided against defendants in Oakland v. Pacific Coast Lumber & Mill Co. 171 Cal. 392, 398, 153 P. 705, 707, which rejects "unity of use" as the determinative factor in the solution of the question whether or not separate pieces of property constitute one parcel within the meaning of section 1248 of the Code of Civil Procedure. It is only where physically contiguous property is injured by the taking that damages by reason of the severance are allowed under that section. To the same effect Atchison, T. & S. F. Railway Co. v. Southern Pac. Co., 13 Cal.App. 2d 505, 520, 57 P.2d 575; County of San Mateo v. Christen, 22 Cal.App.2d 375, 381, 71 P.2d 88.

[38] Appellant also argues that the taking of the 3⅓ mile strip north of the park cut off the access to the roadbed farther south and that therefore there is a damaging of that southern roadbed for public use for which section 14, article I of the California Constitution requires just compensation, citing Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818; Beals v. City of Los Angeles, 23 Cal.2d 381, 144 P.2d 839; People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799. However these cases only hold compensable damage to an actually existing abutter's easement of access, whereas defendants do not have such right through Sharp Park.

[39, 40] The contentions that a unity of railroad use is destroyed or access to a continuous roadbed is cut off lack factual support. The defendants having lost by abandonment all the right of way through the Park, and having lost by transfer, reversion, or judicial decree other portions of the right of way, they did not possess at the time suit was filed a contiguous right of way for any railway. They held at the most a paper franchise to operate a railway and isolated portions of the old roadbed. All these rights were conveyed by the corporation to a private individual in November, 1933. At the time this sale was made the corporation had disposed of so many other portions of the old roadbed that those portions lying south of Sharp Park could not under any method of reasoning be held contiguous to the isolated portion here sought to be condemned. This leaves the defendants in this position—owning certain portions of the old right of way south of Sharp Park they might possibly by future negotiations procure a right of way connecting them with the portion sought to be condemned. But, whenever a claim for damages is asserted, the burden is on the landowner to prove actual, rather than ethereal, damage to his property. Here there is no severance of a contiguous right of way. There is no proof of consequential damage. To the contrary the proof is that a new railroad over these rights of way is an economic improbability as evidenced by the fact of forty years of financial failure and the daily increase of automotive freight and passenger traffic.

From the foregoing we conclude that the trial court properly found that defendants were not entitled to severance or consequential damages by reason of their holdings south of Sharp Park.

[41-43] Defendants' appeal from the order granting a new trial on the issue of damages is without merit. The jury returned a verdict for $485,190 for the property to be taken and for $30,000 severance damages. Defendants concede that there was a wide conflict in the estimates given by the different witnesses ranging from $3,200 to $5,200 by plaintiff's witnesses to $800,000 to $1,376,000 by defendants' witnesses. This wide divergence in the estimates of the witnesses is based to some extent on the theories of the various witnesses as to the proper measure of damages—plaintiff's witnesses valued the land as an abandoned railroad right of way for its use for other than transportation purposes; defendants' witnesses valued the land on the basis of reproduction costs less depreciation for its highest possible use—a railroad right of way. Though we do not concede the soundness of defendants' theory as applied to the circumstances of this case, nevertheless if we assume it to be correct, there is still a wide conflict in the other evidence of the market value of the portion of the roadway to be taken as well as the severance or consequential damage to that not taken. Indicative of the conflict in values is the conflict in theories upon which these values were based. The physical facts disclosed an abandoned roadbed overgrown in part with shrubbery, washed out by rains, and destroyed by erosion. Notwithstanding these conditions defendants contend that they were entitled to a valuation based on the original cost of constructing a railroad roadbed, less the depreciation. Plaintiff was, of course, not seeking to condemn a railroad roadbed for railroad purposes. It was seeking to condemn a vacant strip of land 60 feet wide and 3⅓ miles long which had formerly been used as a railroad right of way but had been abandoned and unused as such for more than fourteen years. Much evidence was offered by the defendants to show the value of this old roadbed in the way of saving to the State in its plan to construct a public highway over that territory. This tendered a false issue. It was so held in United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 280, 87 L.Ed. 336, 343, 147 A.L.R. 55, where the court said: "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemner as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." Hence the value of the property to the owner, or the loss suffered by him through the taking is the basis upon which the jury must determine the amount which the condemner must pay. The expenditures of the defendants' predecessor in interest advanced in the construction of the roadway for railway purposes has no bearing on the question of the "loss" which they would suffer by the taking of the old roadbed for highway purposes. If the value of the existing roadbed for its highest probable use (such as the construction of another railway over the same route, as defendants argue) should be the measure of damages, the evidence as to the probability or improbability of such use was in sharp conflict. The trial court had before it the undisputed evidence that the defendants had stated to the Interstate Commerce Commission that they had abandoned "all of said line of railroad," that they planned "to dispose of entire property" and that it did not plan to replace it because a railway over that line could not be operated profitably. It also had the evidence that as early as 1920 the railroad conceded that motor vehicle freight and passenger traffic had rendered the operation of a railroad in that territory impractical.

[44-46] The formula of cost of reproduction less depreciation as a measurement of damages is not applicable here. Evidence that reproduction of the railroad roadbed for railway purposes has been made impracticable by defendants' voluntary abandonment of railroad operations and by their disposal of the connecting links of its right of way by sale, abandon-

ment, judgment, or reversion renders the question of possible reproduction one of fact. The defendants own an abandoned railroad right of way and they may still have possessed the hope of operating a future railway. In order to distribute the proceeds of their saleable assets among their stockholders they represented to the appropriate state and federal agencies that they had no intention of again operating a railway. There is no evidence of any possibility of any other taking over the right of way for the purpose of operating a railway (except the Chamberlain group, reference to which will be made later). Unimpeachable evidence of the economic infeasibility of such operation practically demonstrated its impossibility as a factor of valuation. Under these circumstances the measure of damages for the taking of this 3⅓ mile strip is the "loss" which defendants will suffer, and not the "gain" to the plaintiff. What the defendants in reality claim is that, in assessing the damages to this portion of the old roadbed, the jury should have allowed them the "strategic value" to the State for highway purposes. That this is not a proper measure of damages in condemnation proceedings was held in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct. 667, 678, 57 L.Ed. 1063, 1082, where the Supreme Court said: "A 'strategic value' might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse, as the price suited. But in a condemnation proceeding, the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes. Lewis, Em.Dom. 3d ed. § 706; Moulton v. Newburyport Water Co., 137 Mass. 163, 167; United States v. Seufert Bros. Co., [C.C.], 78 F. 520; Alloway v. Nashville, 88 Tenn. 510, 514, 13 S.W. 123, 8 L.R.A. 123; United States v. Honolulu Plantation Co., 58 C.C.A. 279, 122 F. 581."

[47] Defendants emphasize a quotation from the opinion in Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 759, 18 P.2d 413, 419, stating that "the cost of reproduction of such improvements becomes a factor in the determination of market value." The sentence immediately following should have also been quoted to make the meaning clear. It reads: "This does not mean, however, that such cost of reproduction is the market value of the land, for other factors, including demand, enter into the ultimate determination of market value." Concededly the cost of reproduction becomes a factor in determining the true market value. But the real test is what some purchaser other than the condemnor would be willing to pay for the property and what it is worth to the owner in the open market—not what the necessities of the condemnor require him to pay for his special project.

Incident to the question of damages to the 3⅓ mile strip of roadway is the final judgment in Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 18 P.2d 413. There the Ocean Shore Railroad Company and an individual owner obtained a judgment for $112,000 as damages for the taking of five miles of the roadbed lying south of the property here involved, and south of Sharp Park. In affirming that judgment the court said: (at page 749 of 128 Cal.App., at page 415 of 18 P.2d) "It is not disputed that the property here involved constitutes the only practical railway gateway into the territory referred to above and that the grading thereon constitutes 95 per cent. of the work necessary to complete a roadbed for either a railroad or a highway."

Now if five miles of "the only practical railway gateway" were worth only $112,000, it is difficult to conceive how 3⅓ miles of the same roadbed are worth $515,000 unless the jury applied the universally discarded formula that the condemnor should pay for what he gains rather than for what the owner loses.

In granting the motion for a new trial the court had knowledge of this final judgment as it was frequently referred to by both parties throughout the trial; it had knowledge of the opinion of the court reviewing that judgment, and, as defend-

ants herein repeatedly contend, such judgment is now res judicata.

[48] We find no error in the admission of evidence tending to prove that defendants' right of way was only an abandoned roadbed. That was an issue properly raised by plaintiff with respect to the proof of the loss which defendants might suffer as a result of the condemnation. Defendants argue that evidence with respect to the value as an abandoned roadbed should be excluded because Ocean Shore Railroad Company v. Spring Valley Water Co., supra, Midstate Oil Company v. Ocean Shore Railroad Co., supra, and Joint Highway District No. 9 v. Ocean Shore Railroad Company, supra, had established that the Ocean Shore rights of way had not been abandoned. We have distinguished those cases in earlier parts of the opinion where the argument had some semblance of justification. With respect to the new trial as to the amount of compensation the argument is misleading. An abandoned roadbed in that respect is not one the rights to which have been abandoned—the question treated in those prior cases—but one the operation of which has been permanently discontinued. There can be no doubt that the evidence with respect to the permanent abandonment of operation was both competent and decisive.

[49-51] The failure of the trial judge to accompany the jury in its view of the premises did not preclude him from granting a new trial on the ground of insufficiency of the evidence. Southern California Edison Co. v. Gemmill, 30 Cal.App.2d 23, 27, 28, 85 P.2d 500. Defendants try to distinguish the Gemmill case because of the special importance of the visible elements in the case at bar. However, as suggested by plaintiff, the viewing by the jury could serve no useful purpose as they were merely shown a newly constructed state highway without any possibility of determining the condition of the roadway at the time the suit was commenced and the conditions in accordance with which the damages had to be determined. At any rate defendants can not complain of the absence of the trial judge on this appeal as they acquiesced in his action. County of San Luis Obispo v. Simas, 1 Cal.App. 175, 182, 81 P. 972. The record discloses that before the jury left to view the premises counsel for both sides expressly stipulated that the court need not accompany them. This must be deemed a waiver of the presence of the trial judge for all purposes—including the right to grant a new trial on the issue of damages.

[52, 53] Inasmuch as the case must be remanded for a new trial on the issue of damages it is appropriate to direct attention to another matter which is referred to in the briefs of both parties but upon which the recorded evidence is not clear. The defendants state in their brief "On October 16, 1929, Chamberlain obtained the final option to purchase the said roadbed which was to extend until the final determination of the Spring Valley litigation and to continue until a six months' notice had been given to Chamberlain that the option be exercised to protect his rights under said option." In November, 1933, this option was exercised and thereafter the option price was paid to the Railroad. Again they state: "* * * the Chamberlain Associates held and exercised an option on it." The plaintiff cites in one of its briefs as indicative of the value of the property taken, "the option to sell all of the right of way in San Mateo County for $100,000. Such an option was in force from 1929, until exercised in 1934, covering a right of way variously estimated from 15 to 20 miles in length."

It seems from the manner in which the subject is treated in the briefs that all parties take for granted that the evidence of these options and dealings with the Chamberlain group was all before the jury. The plaintiff cites it as bearing upon the question of the unreasonableness of the verdict. The defendants cite it as bearing upon the issue of abandonment and the asserted plan of rehabilitation of the railroad. The reporter's transcript discloses that on the closing days of the trial and while the jury was absent viewing the premises, the court took up the question of admissibility of documentary evidence regarding the option to Chamberlain and its assignment to Middleton. No entry is made

either in the reporter's or the clerk's transcript as to what ruling was made on the offer but it does appear that in the cross-examination of Middleton by counsel for defendants he stated that an option running to Chamberlain dated in 1929 had been "received" in evidence and questions were then directed to the same witness relative to a letter of 1934 and an agreement in the same year between Middleton as purchaser and the Ocean Shore Railroad Company. The latter agreement appears in the file as Plaintiff's Exhibit 62 with the notation in the margin by the clerk of the court, "in evidence for admissibility of evidence matter." The same notation appears as to the letter of February 20, 1934. These documents evidenced the sale by the railroad company to George Middleton, as assignee of the Chamberlain options, of: "all of the seller's right, title, and interest in and to said roadbed and right of way for railroad tracks and other railroad requirements, * * * owned or formerly operated by the Ocean Shore Railroad Company, lying between the westerly line of Junipero Serra Boulevard in said City and County of San Francisco and Davenport in the County of Santa Cruz."

There is no dispute in the record that the portion of the right of way thus disposed of was between 15 and 20 miles in length. The purchase price of all this property was fixed at $100,000, evidence of the payment of which appears in the record. The option was originally granted for the price of $100,000 on October 16, 1929, and extended and new options of the same nature were granted until on November 10, 1933, notice was given of the intention to exercise it. After that date the time for payment of the option price was first extended and then on February 20, 1934, payment in instalments permitted and further privileges with respect to acquisition of the stock of defendant Ocean Shore Railroad Company granted. The instalment payments originally amounting to $25,000 yearly were cut down by an agreement of April, 1935, to $16,000 yearly so that the last payment took place on February 21, 1938. Nevertheless in those different agreements the price to be paid remained practically the same (except that the purchasers agreed to pay taxes amounting to some $2,500 per year).

It is generally accepted that sales, options, and offers for the sale of the land under condemnation made by the owner if sufficiently near the time of the taking to be of service to the jury, are admissible against him as admissions against interest and in those jurisdictions such as California, where the measure of damages for the taking is the fair market value of the property at the time of the taking they are held competent evidence as having "a substantial bearing" on the question of such market value. Assuredly such evidence is not conclusive proof of the market value of the property taken but it is relevant to show "what a willing buyer would pay in cash to a willing seller." United States v. Certain Parcels of Land, etc., 3 Cir., 144 F.2d 626, 629, 155 A.L.R. 253; Springer v. City of Chicago, 135 Ill. 552, 26 N.E. 514, 12 L.R.A. 609; Houston v. Western Washington R. Co., 204 Pa. 321, 54 A. 166, 168; Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S.Ct. 442, 67 L.Ed. 809, 814; 18 Am.Jur. p. 993; 155 A.L.R.Ann. 273.

In their petition for a rehearing the defendants assert that these options were first entered into in 1921, that the final option was executed in 1929, and exercised in November, 1933. They argue from this that the time is too remote and cite authorities holding that sales, or offers of sale, made by the landowner within one, two or three years were held to be too remote as evidence of value. The cases are not helpful. The question must be decided by the trial court on consideration of all the circumstances of the particular case. There is no fixed formula determining when proffered evidence is not pertinent to the question of value because of the time element. Evidence having been tendered by the defendants that these options had been outstanding from 1921 to 1938, at least, the plaintiff sought to show that the agreed price for the sale of the entire northern portion of the railway had never been increased or decreased during the full period of seventeen years. Defendants argue that it was not admissible because the final option was

exercised at the beginning of the depression of 1929. But if the evidence shows that the price was fixed in 1921 and remained unchanged until 1933, it went through two depressions and one period of inflation without any change in the price.

Hence we hold that it was for the trial court to determine under all the circumstances of the case whether the proffered evidence was admissible. But, if this evidence was not admissible as bearing on the question of value at the time of the trial, it may have been competent as cross-examination of those witnesses who asserted throughout the trial a highly fantastic value of the small portion of the right of way under condemnation. In any event it was within the province of the trial court to determine its admissibility, and the record does not show what ruling was made.

[54] If the evidence of the option to sell, the exercise of the option, and the sale for $100,000 of the 15 mile portion of the railroad right of way went to the jury it was sufficient in itself to support the order of the trial court granting a new trial on the ground of excessive damages.

[55] After the appeal had been partially briefed the defendants moved for leave to offer additional evidence in this court consisting of tax rolls and other documents affecting the title to three of the parcels of land involved herein. This motion was made more than two years after the cause had been tried in the superior court and no good reason was given why the proffered documents, all of which were in defendants' possession, were not discovered in time for that trial. Since the proffered evidence is merely cumulative, relating to events occurring long prior to the trial, the motion made at this time must be denied. Baker v. Ferrel, 78 Cal. App.2d 578, 177 P.2d 973.

Judgment and order affirmed.

GOODELL, J., and JONES, J. pro tem. concur.

On Petition for Rehearing.

PER CURIAM.

Following the entry of the judgment of affirmance a controversy arose over the matter of the costs on appeal because of the cross-appeals and the rule respectinsg costs in condemnation proceedings. The parties have accordingly stipulated, without prejudice to any further proceedings on the merits of the appeal, as to a fair apportionment of these costs and in accord with such stipulation the judgment is modified to read that each party shall assume its own costs heretofore expended on appeal and that plaintiff will pay to defendants in addition the sum of $1,250 on account of defendants' costs.

The petition is denied.



80 Cal.App.2d 333

BEVELLE v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 15670.

District Court of Appeal, Second District, Division 2, California.

June 13, 1947.

1. Abatement and revival ⇐58
Divorce ⇐83

The death of a party to a suit for divorce or separate maintenance abates the action and terminates the jurisdiction of the court to proceed with the action or make any further disposition of property rights, alimony, costs or attorney's fees.

2. Abatement and revival ⇐58
Stipulations ⇐14(11)

Death of husband abated wife's action for separate maintenance and court had no jurisdiction thereafter to make an allowance for plaintiff's attorney's fees and costs, notwithstanding stipulation at hearing on order to show cause that attorney's fees and costs should be set at time of trial, since jurisdiction cannot be conferred upon a court by stipulation of parties.

Appeal from Superior Court, Los Angeles County; James M. Allen, Judge.

Suit for separate maintenance by Jeanette Bevelle against Joseph C. Bevelle, wherein Bank of America National Trust & Savings Association, special administrator of the estate of Joseph C. Bevelle, was substituted for defendant upon his death. From an order dismissing the suit without making an additional allowance for plaintiff's attorney's fees and costs, plaintiff appeals.

Order affirmed.

Paul R. Hutchinson, of Los Angeles, for appellant.

Lester William Roth, of Los Angeles (Leonard G. Ratner, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from an order dismissing an action for separate maintenance after the death of defendant without making an additional allowance for plaintiff's attorney's fees and costs.

Agreed Facts

Plaintiff filed a suit against her husband for separate maintenance. At a preliminary hearing on an order to show cause why attorney's fees and costs for the prosecution of the action should not be granted to plaintiff it was stipulated by the attorneys for the respective parties that the husband should be ordered to make a payment on account of such fees and costs and that the balance should be fixed by the trial court at the time of trial. Thereupon an order was made allowing plaintiff (a) $500 on account of attorney's fees and (b) $100 on account of costs. Subsequently trial of the case was commenced but before its conclusion defendant died, and upon motion of defendant's attorney the action was dismissed without any further order for attorney's fees or costs being made. Upon application of plaintiff the court made an order substituting the special administrator for the estate of the deceased in place of defendant.[1]

Agreed Question on Appeal

Was a stipulation at the hearing on the order to show cause that attorney's fees and costs be set at the time of trial a contract and a continuing order that survived defendant's death so that the dismissal of the action before the fixing of such fees and costs was improper?

[1] This question must be answered in the negative. The law is settled in California that the death of one of the parties to a suit for divorce or separate maintenance abates the action and terminates the jurisdiction of the court to proceed with the action or to make any further determination of property rights, alimony, costs or attorney's fees. (Kellett v. Marvel, 9 Cal. App.2d 629, 630, 51 P.2d 185, and cases cited therein; Kirschner v. Dietrich, 110 Cal. 502, 505, 42 P. 1064. See also McCurley v. McCurley, 60 Md. 185, 187 et seq., 45 Am.Rep. 717.)

In view of the foregoing rule the action herein abated upon defendant's death and the trial court properly dismissed the cause without taking any further action in the case.

[2] We may concede, without deciding, that the stipulation constituted a contract between the parties, which contract survived the death of the husband, and that plaintiff has a contractual claim for attorney's fees and costs based thereon, which claim may be presented to the administrator of the estate of decedent in the manner provided by law, and if refused that a action thereon against the representative of the estate may be maintained. However, it is clear that while it may have constituted a contract between the parties upon which plaintiff may proceed to file a claim in the estate of her deceased husband, such stipulation could not confer jurisdiction upon the court to proceed with a determination of attorney's fees and costs after the husband's death had abated the action, since the rule is established that jurisdiction cannot be conferred upon a court by stipulation of the parties. (Vaughan v. Roberts, 45 Cal. App.2d 246, 253, 113 P.2d 884; Miller v.

[1] In view of the statement in Kirschner v. Dietrich, 110 Cal. 502, at page 504, 42 P. 1064, it would appear that the trial court erred in ordering a substitution of the special administrator in the place and stead of the deceased defendant. See also McCurley v. McCurley, infra, 60 Md. at page 190, 45 Am.Rep. 717.

Miller, 52 Cal.App.2d 443, 444 et seq., 126 P.2d 357.)

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 443

In re CANFIELD'S ESTATE.
TITLE INS. & TRUST CO. v. CANFIELD.
Civ. 15558.

District Court of Appeal, Second District, Division 3, California.

June 18, 1947.

Rehearing Denied July 18, 1947.

Hearing Denied Aug. 14, 1947.

1. Trusts ⇐331

Probate court's orders settling nineteenth account current of successor trustee's immediate predecessor as trustee, and instructing it pursuant to Probate Code, became final and was conclusive on all persons in interest, including judgment creditor of principal beneficiary of the trust. Civ.Code § 859; Probate Code, §§ 1120, 1123.

2. Trusts ⇐243

Where original trustee of spendthrift trust was an institution and its discretion was expressly delegated by will to its president or general manager for the time being, testator intended discretion of trustee to be ex officio, and therefore order of appointment of successor trustee clothed successor trustee with all discretionary powers of original trustee with respect to allocation of net income of trust.

3. Trusts ⇐243

The powers of an original trustee attach to the office rather than to the person of the trustee unless the trust provides otherwise.

4. Trusts ⇐280

In absence of specific language one way or the other, the question whether a trustee's discretion as to allocation of net income of trust is personal or ex officio, turns on the intention of the trustor, as disclosed by the terms of the trust.

5. Wills ⇐684(10)

Will directing trustee to pay annually to testator's son $1,200 in monthly instalments, directing trustee to pay, in addition to $1,200 allowance, whatever sums it might deem proper for support and education of testator's granddaughter, permitting trustee, in exercise of its judgment, to ignore provision concerning testator's granddaughter and pay son increased payments up to entire net income of sum, and stating that absolute discretion was committed to the trustee, did not impose by implication a ceiling on the amount that trustee might allocate to granddaughter.

6. Trusts ⇐177

A trustee exercising discretion abuses it if he exercises it in bad faith or goes beyond the bounds of reasonable judgment, but generally where absolute discretion has been conferred, any unsoundness of the trustee's judgment cannot be deemed an abuse of discretion. Civ.Code, § 2269.

7. Trusts ⇐177

A court should not substitute its judgment for the judgment of a trustee.

8. Wills ⇐684(10)

Where will creating discretionary, spendthrift trust committed to the trustee absolute discretion as to, and full power and control over, the application of all net income of trust estate beyond sum of $1,200 payable annually to testator's son, successor trustee's absolute discretion in allocation of income, exercised in good faith, was not subject to control by the court as to its reasonableness.

9. Trusts ⇐325

The burden of proof of charge that trustee of discretionary, spendthrift trust abused its discretion in allocation of income, was on objector to trustee's account. Code Civ.Proc. § 1981.

10. Trusts ⇐325

On accounting by trustee of discretionary spendthrift trust, evidence sustained finding that trustee, in allocating income

to testator's granddaughter rather than to testator's son, did not abuse its discretion as contended by judgment creditor of son.

11. Trusts ⇐230

In a discretionary trust where trustee has absolute discretion in allocation of trust net income between two beneficiaries, each beneficiary has at most a mere expectancy, and therefore neither the beneficiaries nor their creditors can directly compel any allocation to any particular beneficiary.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Charles A. Canfield, deceased. From an order settling the account of the Title Insurance & Trust Company, trustee of a testamentary, discretionary, spendthrift trust, created by the deceased, and overruling the objection thereto of Pearl S. Canfield, a judgment creditor of the principal beneficiary of the trust, she appeals.

Affirmed.

R. M. J. Armstrong and J. A. Pardini, both of San Francisco, and Maidman & Plattner, of Los Angeles, for appellant.

Julius V. Patrosso, of Los Angeles, for respondent.

Walter H. Robinson, of Los Angeles, for beneficiary, Charles O. Canfield.

SHINN, Acting Presiding Justice.

This is an appeal by Pearl S. Canfield, a judgment creditor of Charles O. Canfield, the principal beneficiary of a testimentary, discretionary, spendthrift trust, from an order settling the 24th account current of the respondent trustee and overruling appellant's objection thereto. Appellant objects to the change made by respondent in the 24th year in its allocation of trust net income between the two beneficiaries, the said Charles Canfield, and Laura Pierce, his daughter. Previously it had been the practice of the respondent to allocate to the two beneficiaries sums for their support and then to allocate to Charles Canfield the balance of the trust net income. Under section 859 of the Civil Code, appellant's lien attached to this balance upon its allocation to Charles Canfield. Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 31, 87 P.2d 830. In the 24th year, however, respondent allocated to Canfield merely the sum which had theretofore been judicially determined to be necessary for his support, and allocated to Pierce the entire balance of the trust net income. This change in allocation prevented appellant's lien from attaching; consequently appellant objects thereto upon the ground that respondent abused its discretion.

The trust here involved was created by the will of Charles Canfield's father. Under this will, $900,000 was bequeathed to the original trustee, a bank, for the benefit of Charles Canfield and his two children, only one of whom, Laura Pierce, now survives. The decree of partial distribution of March 30, 1914, embodies practically verbatim the provisions of the will relating to this trust. The decree directs the trustee to use and apply the net income of the trust as follows:

"(a) Out of said income to pay, in monthly installments, twelve hundred dollars ($1200.00) per annum only to and into the proper hands of said Charles O. Canfield, a son of said Charles A. Canfield, deceased, and not by way of anticipation, nor to any assignees of my said son, nor to or upon any order which my said son shall give, whether such assignment or order be the voluntary contractual act of said Charles O. Canfield or be made pursuant to or by virtue of any legal process in attachment, execution, bankruptcy, or otherwise.

"(b) Out of said net income, in addition to said annual income of twelve hundred dollars ($1200.00), to pay and apply, as said trustee shall deem advisable in the judgment of its president or general manager for the time being, and through such agencies as it may select, and from time to time, whatever sums said trustee may deem proper for the support, maintenance and education of Orville and Laura Elaine Canfield, grandchildren of said Charles A. Canfield, deceased, and children of said Charles O. Canfield, in a manner suitable to their station in life, during their respective lives. This provision shall be given a broad interpretation, to the end that both said

grandchildren of said Charles A. Canfield, deceased, shall be given liberal educations, including travel abroad if deemed expedient in the judgment of the said trustee exercised by its said officers for the time being. Said trustee shall, with respect to such expenditures, counsel and advise with Florence E. Whitney and Daisy Canfield Danziger, daughters of said Charles A. Canfield, deceased, or in case of their deaths, with surviving other daughters or daughter of said deceased.

"(c) If, in the judgment of said trustee, to be exercised by its present or general manager for the time being, said Charles O. Canfield, son of said Charles A. Canfield, deceased, shall hereafter prove himself worthy of being entrusted with the expenditure of a larger annual income or allowance than that above given him, said trustee may, in such event, at any time, and in such proportions and at such time as to payments as it shall deem advisable in the discretion of its said officers, increase the said allowance and pay over such increase to said Charles O. Canfield up to the full limit of the net income of the said trust estate and unexpended income which may have accumulated in the hands of the trustee, notwithstanding the provision above made as to payments out of the income for the maintenance and education of said Orville and Laura Elaine Canfield, grandchildren of said Charles A. Canfield, deceased.

"(d) The foregoing provisions as to the application of the income of said trust estate are intended to commit to said trustee absolute discretion as to, and full power or control over, the application of all of the net income of said trust estate beyond the said sum of twelve hundred dollars ($1200.00) per annum."

Analysis of the quoted terms of the trust governing the allocation of the net income of the trust is instructive. Paragraph (a) directs the trustee to pay annually to Charles Canfield $1,200 in monthly installments. Paragraph (b) directs the trustee to pay, in addition to the $1,200 allowance, whatever sums it may deem proper for the support and education of the two children of Charles Canfield. Paragraph (c), however, permits the trustee, in the exercise of its judgment as to the increased trustworthiness of Charles Canfield, to ignore paragraph (b) and to pay to Charles Canfield increased payments up to the entire net income of the trust. Paragraph (d) states that paragraphs (a), (b) and (c) are intended to commit to the trustee absolute discretion as to the application of the net income of the trust, aside from the mandatory annual allowance of $1,200 to Charles Canfield.

[1–4] This absolute discretion as to the allocation of the net income of the trust in excess of $1,200, vested in the trustee by paragraph (d), was expressly recognized in the findings, conclusions, and order of the probate court settling the 19th account current of respondent's immediate predecessor as trustee, and instructing it pursuant to section 1120 of the Probate Code. Such order, having become final, is conclusive upon all persons in interest, including appellant. Probate Code, sec. 1123; Security-First Nat. Bk. v. Superior Court, 1934, 1 Cal.2d 749, 756, 37 P.2d 69. Appellant, however, contends that respondent could not succeed to the discretion entrusted to the original trustee. But the order of appointment of respondent's immediate predecessor as trustee, made on March 28, 1940, expressly endowed it with all the powers conferred by the terms of the trust and declared in the already partly-quoted decree of partial distribution. That such an order clothed respondent's immediate predecessor with all the discretionary powers of the original trustee has long been settled in this state. Fatjo v. Swasey, 111 Cal. 628, 635, 636, 44 P. 225. Respondent succeeded to all the powers of its immediate predecessor as trustee upon the merger of that predecessor into respondent in 1942. Bank Act, Deering's General Laws, Act 652, § 31b. Moreover, independent of the order, normally the powers of the original trustee attach to the office rather than to the person of the trustee unless the trust provides otherwise. Restatement, Trusts, sec. 196. In the absence of specific language one way or the other, the question whether the discretion is personal or ex officio turns upon the in-

tention of the trustor, as disclosed by the terms of the trust. 3 Bogert, Trusts and Trustees, § 553; Note 126 A.L.R. 931. Where, as here, the original trustee is an institution and its discretion is expressly delegated to "Its president or general manager for the time being," the inference is plain that the trustor intended the discretion of the trustee to be ex officio. In re Boutwell's Estate, 112 Vt. 159, 22 A.2d 157, 160; Scott, Trusts, sec. 196. Accordingly, we hold that respondent, upon its assumption of the trusteeship, succeeded to the discretion entrusted to the original trustee.

The interest which appellant here asserts in the allocation of the net income of the trust arises solely from the judgment in her favor entered on September 27, 1939, following the retrial ordered by our Supreme Court in the Canfield case cited at the outset of this opinion. The provisions of that judgment therefore warrant close examination. It specifically provides that: (1) the size of the allocation to Charles Canfield is a matter resting in the discretion of the trustee and consequently outside of the control of the court; (2) appellant's equitable lien comes into existence only upon the allocation by the trustee to Charles Canfield of income in excess of $14,500, the amount judicially determined to be necessary for his support, and appellant's lien then attaches to this surplus income; (3) appellant's equitable lien shall not interfere with or impair the exercise of the trustee's absolute discretion as to the size of its allocation to Charles Canfield; (4) appellant's equitable lien shall not attach to or affect the amount of income which the trustee may allocate or pay to or for the other beneficiary, Laura Pierce. It would seem from a consideration of these enumerated provisions that the court, in framing that judgment, which defines and limits the extent of appellant's lien upon and interest in the income of this trust, was extremely careful to protect to the utmost the absolute discretion vested in the trustee by paragraph (d).

To sum up, paragraph (d), the order of appointment of respondent's immediate predecessor as trustee, the order settling the 19th account, and the judgment in which appellant's lien is defined, unite to compel the conclusion that respondent's discretion as to the annual allocation of net income of the trust in excess of $1,200 has always been absolute.

Appellant contends that respondent has abused this absolute discretion in several respects. She asserts that in the distribution of the entire net income of the trust each year, there being no provision for accumulation, respondent may not allocate to Laura Pierce under paragraph (b) more than the sum reasonably necessary for her support in her station in life, her years of education being long since past. She points out that in the 24th year Laura Pierce made no demand for an increase in her allocation and that respondent had no discussion with her about it. From these facts she infers that respondent made no inquiry into the relevant circumstances bearing upon the requirements of Laura Pierce as a proper exercise of its discretion required it to do. She argues that respondent breached the terms of the trust in the manner indicated and that it made its allocations of income to the two beneficiaries in a thoroughly arbitrary and capricious manner, in the mistaken belief that its discretion therein was uncontrollable by any court. Appellant also alleged in her objection that the allocation was made in collusion with certain named members of the Canfield family. She claims that she was prevented from introducing evidence in support of this allegation by the trial court's erroneous determination that respondent's discretion was not subject to its control.

[5] To determine whether respondent has abused its absolute discretion in any of the specified particulars requires a delineation of the scope of that discretion. Its outer limits are set by the terms of the trust (Ainsa v. Mercantile Trust Co., 174 Cal. 504, 511, 163 P. 898), namely, paragraphs (a) through (d). Appellant contends that paragraph (b) imposes by implication a ceiling on the amount that may be allocated to Laura Pierce. This ceiling is the amount reasonably necessary for her support in her station in life. We cannot agree. Paragraph (c) negatives the idea that this trust is, so far as Laura Pierce is

concerned, one for her support, since it permits the trustee in its discretion to ignore her in its allocation of income. Moreover, such a maximum limitation upon the amount that could be allocated to Laura Pierce would interfere with and impair the exercise of the trustee's discretion as to the size of the allocation to Charles Canfield. What income the trustee does not allocate to Laura Pierce, it must allocate to Charles Canfield. Yet paragraph (c) requires that the size of Charles Canfield's allocation be governed not by what is left after Laura Pierce's allocation has been made, but by the trustee's judgment as to the trustworthiness of Charles Canfield, the principal beneficiary of the trust. Finally, the plain and unambiguous language of paragraph (d), setting forth the absolute discretion of the trustee as to the allocation of income and containing a single express limitation thereon, is utterly at variance with any such implied limitation upon that discretion. The allocation to Laura Pierce was not unauthorized.

[6-8] There remains the question whether respondent abused its discretion, although it acted within the terms of the trust. A trustee exercising discretion abuses it if he exercises it in bad faith or goes beyond the bounds of reasonable judgment. Restatement, Trusts, sec. 187, Comment e; 3 Bogert, Trusts and Trustees, § 560. This general proposition is subject to the established exception that where absolute discretion has been conferred, any unsoundness in the trustee's judgment cannot be deemed to be an abuse of discretion. Civil Code, sec. 2269; Neel v. Barnard, 24 Cal.2d 406, 417, 150 P.2d 177; Campbell v. Folsom, 70 Cal.App.2d 309, 313, 160 P.2d 906; Restatement, Trusts, sec. 187, Comment j; Scott, Trusts, sec. 128.3. But the basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor. Restatement, Trusts, sec. 187, Comment j; Scott, Trusts, sec. 187. The primary purpose of the trustor in setting up the trust before us undoubtedly was to prevent the dissipation of the trust property and the income therefrom among the creditors of his son, Charles Canfield, the principal beneficiary of the trust. To this end not only were elaborate spendthrift provisions incorporated, but the allocation of all the annual net income of the trust aside from $1,200 was placed within the absolute discretion and control of the trustee. In short, the trustor established not merely a spendthrift trust but a discretionary trust as well. For the trustee to allocate the income between the beneficiaries so as to prevent the lien of a creditor of the son from attaching is exactly what the trustor contemplated that the administrator of his trust should do. The use of the words "absolute discretion" plainly indicates that the trustor intended that the judgment of the trustee exercised in good faith should control. A court should not substitute its judgment for the one chosen by the trustor. Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 464, 165 P.2d 15, 163 A.L.R. 838; Estate of Marré, 18 Cal. 2d 184, 190, 114 P.2d 586. The absolute discretion of the trustee, exercised in good faith as shown below, is not subject to control by the court as to its reasonableness in the allocation of income.

Appellant failed to prove any of the particulars alleged by her as a basis for the charge that the trustee acted in bad faith. It appeared that during the 24th year, Laura Pierce had no discussion with respondent about her allocation and made no demand upon respondent for an increase in her allocation, but these facts do not establish appellant's contention that respondent failed to make inquiry into the relevant circumstances before increasing her allocation. The record shows that pursuant to paragraph (b), respondent informed two of the three surviving daughters of the trustor of its proposed action. Furthermore, in the years immediately preceding the one under review Laura Pierce had persistently sought increases in her allocation by litigation and otherwise. See Miller v. Pierce, 66 Cal.App.2d 126, 152 P.2d 24. The trust officer of respondent in charge of this trust testified at the trial but appellant failed to avail herself of this opportunity to examine him exhaustively concerning the basis for the trustee's decision to change the amounts of the alloca-

tions made to the two beneficiaries. Finally, the record is utterly devoid of evidence suggesting collusion between respondent and certain members of the Canfield family, as charged by appellant. Appellant's claim that the trial judge prevented her from offering evidence in support of this charge is completely without foundation. Early in the trial the judge expressed himself as willing to hear any such evidence, and yet no offer of it was ever forthcoming from appellant.

[9, 10] The burden of proof of the charge of abuse of discretion was clearly on appellant. Code of Civ.Proc. sec. 1981. Respondent trustee is entitled to the benefit of presumptions of regularity and good faith on its part. Consequently it was not required to anticipate and defend against charges of dereliction of duty and malfeasance. Like any other plaintiff, appellant had the burden of proving her charges. Neel v. Barnard, supra, 24 Cal.2d 406, 420, 421, 150 P.2d 177. This she failed to do. We are of the opinion that the findings and conclusion of the trial court to the effect that respondent acted in good faith and did not abuse its discretion are amply supported by the evidence.

[11] It seems clear to us that appellant is here seeking to do indirectly through control of the discretion of the trustee what she may not do directly. In a discretionary trust where the trustee has absolute discretion, as here, in the allocation of the trust net income between the two beneficiaries (aside from a negligible portion thereof), each beneficiary has at most a mere expectancy. Bogert, Trusts and Trustees, § 226. Consequently neither the beneficiaries nor their creditors can directly compel any allocation to any particular beneficiary. Canfield v. Security-First Nat. Bk., supra, 13 Cal.2d 1, 31, 87 P.2d 830; Restatement, Trusts, sec. 155. No basis exists, therefore, for permitting a creditor to accomplish this same and indirectly through control of the trustee's discretion. Herzog v. Com'r of Int. Rev., 2 Cir., 1941, 116 F.2d 591, 594; Scott, Trusts, sec. 155.1; Griswold, Spendthrift Trusts, 2d Ed. 1947, sec. 428. The position of appellant in this suit is quite different from the one she occupied in the Canfield case just cited. There our Supreme Court held that the immunity enjoyed under the terms of this trust by an allocation of trust net income to a debtor beneficiary does not extend as against actions brought under Civil Code section 859 by creditors of that particular beneficiary beyond a sum reasonably necessary for that beneficiary's support (13 Cal.2d at page 17, 87 P.2d at page 838). Consequently, notwithstanding the absolute discretion of the trustee, the payment of sums allocated is controlled by this statutory limitation. But by its terms, Civil Code section 859 operates only in favor of creditors of the beneficiary whose surplus trust income is sought and not in favor of creditors generally or creditors of other beneficiaries of that trust. Appellant is not a creditor of Laura Pierce, but of Charles Canfield. Accordingly, no basis exists for appellant's attempted assumption with respect to Laura Pierce's trust income allocation of the beneficial status accorded her as a creditor of Charles Canfield's with respect to his allocation.

Appellant's objection to finding No. II, which negatives her allegation that she has a lien on allocations to Charles Canfield in excess of $14,500, is not valid. The finding clearly relates only to the allocations made during the particular accounting period as shown by the account.

The order settling the 24th account of respondent trustee is affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.

80 Cal.App.2d 458

PEOPLE v. GARRISON.

Cr. 2449.

District Court of Appeal, First District, Division 2, California.

June 19, 1947.

Hearing Denied July 17, 1947.

1. Criminal law ⇐878(4)

Verdict of guilty of conspiracy to commit an illegal abortion was not inconsistent with verdict of not guilty of murder, allegedly caused by abortion produced pursuant to alleged conspiracy. Pen. Code, §§ 274, 954.

2. Criminal law ⇐511(2)

Evidence corroborating accomplice, to be sufficient to sustain conviction, must be of an inculpatory character and must tend without aid of testimony of accomplice to implicate defendant in commission of crime. Pen.Code, § 1111.

3. Criminal law ⇐511(1)

In prosecution for conspiracy to commit an illegal abortion, evidence corroborating testimony of accomplice was insufficient to sustain conviction. Pen.Code, §§ 274, 1111.

4. Criminal law ⇐511(4)

Defendant's refusal to discuss $100 check before grand jury was exercise of constitutional privilege which did not of itself directly and immediately tend to connect him with charged offense of conspiracy to commit an illegal abortion and was insufficient to corroborate testimony of accomplice. Pen.Code, §§ 274, 1111.

5. Criminal law ⇐1169(7)

Appellate court has no alternative but to set aside conviction where testimony of accomplice is not corroborated in accordance with statute. Pen.Code, § 1111.

6. Criminal law ⇐507(1)

The fact that witness of her own accord administered quinine and castor oil to girl for purpose of producing a miscarriage did not in itself constitute witness an accomplice of defendant, charged with conspiracy to commit an illegal abortion, if witness did not associate with defendant and participate with him in commission of crime charged. Pen.Code, § 1111.

7. Conspiracy ⇐47

Proof of a single alleged overt act by one of conspirators is sufficient to support verdict of guilty of conspiracy.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Lloyd H. Garrison was convicted of conspiracy to commit an illegal abortion and he appeals.

Reversed and remanded for a new trial.

J. R. Deasy, of Oakland, and Simeon E. Sheffey, of San Francisco, for appellant.

R. N. Howser, Atty. Gen., and Miriam E. Wolff, Dep. Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals from a judgment of conviction based on a verdict finding him guilty of a conspiracy to violate section 274 of the Penal Code and from the order denying his motion for a new trial.

The indictment, in two counts, charged defendant Garrison and Joseph Sieff, both chiropractors, in the first count with murder of Angelina Dambrosio, in the second count with a conspiracy to treat said Angelina Dambrosio with the intent to procure an illegal abortion. The theory of the People with respect to the murder count was that the death of Angelina Dambrosio was caused by an abortion produced by appellant Garrison pursuant to the alleged conspiracy.

During the trial the indictment as to the defendant Sieff was dismissed pursuant to the provisions of section 1099 of the Penal Code. The court instructed the jury that Joseph Sieff and the witnesses for the prosecution, Green, Menezes, Minasian and Vukman, who according to their own testimony were friends of the deceased and had each tried in some way to assist her in getting rid of her pregnancy were accomplices as a matter of law with respect to the provisions of section 1111, Penal Code.

The jury found defendant Garrison guilty on the conspiracy count and not guilty on the murder count.

[1] Appellant contends that the verdict of guilty of a conspiracy to commit an illegal abortion is inconsistent with the verdict of not guilty of murder, because the latter verdict negatives treatment for the purpose of illegal abortion as the cause of death. There is no merit in this contention. Normally a verdict of acquittal of one of several counts is not deemed an acquittal of any other count. Sec. 954, Penal Code. The fact that the jury in this case was not sufficiently convinced that the death was the result of an unlawful treatment did not imply a finding that no such treatment with unlawful intent pursuant to a conspiracy had taken place even without causing death. Compare People v. Guerrero, 22 Cal.2d 183, 189, 137 P.2d 21.

Appellant's main contention is that there is not sufficient evidence in the record to sustain his conviction on the conspiracy charge also because of lack of corroboration of the testimony of the accomplices. It must be conceded that the inculpatory evidence in this case is mostly given by witnesses designated as accomplices by the trial judge. Respondent points out certain corroborating evidence, mostly from testimony of appellant as witness in his own defense, which according to respondent fulfills the requirements of section 1111, Penal Code.

Appellant testified that he had examined and treated the girl, who was sent to him by Dr. Sieff in the early part of March, 1946, for an inflamation of the vagina. Treatment was given with different apparatus in defendant's office and with instruments also in the girl's home in Oakland when she had a fever. Instruments used included a speculum, spongesticks and forceps. He also gave her vitamin pills. She paid him $40 of a fee of $150 agreed on for the whole treatment. He talked about the case three times with Dr. Sieff on the telephone and once at a meeting which they both attended. He also treated her for influenza. He did not consult with a physician when her condition became very serious. Because of the inflamed condition he could never make a complete internal examination, but such examination as he could make did not show that she had recently suffered an abortion. With respect to a check of $100 which Dr. Sieff testified to having received from him for the purpose of making a refund to the witness Minasian who allegedly had procured the money for defendant's treatment, defendant testified that he had given the check, blank as to the name of payee, to Dr. Sieff as a loan, not for Minasian whom he did not know. Before the grand jury he refused, in accordance with advice of counsel, to discuss the check as it might incriminate him.

Dr. Ernest Jackson, physician, and J. W. Newfeld, Director of Berkley Clinical Laboratory, testified that at the end of January, 1946, a Friedman pregnancy test made with a specimen taken from Angelina Dambrosio was positive, which result usually (except for two percent of error) proves pregnancy. Dr. Jackson also testified that he gave her penicillin because she insisted that she had gonorrhea, although he could not demonstrate it. His examination did not indicate medical necessity of an abortion.

Dr. V. E. Koerper, assistant resident at Highland Hospital, testified that when in the evening of March 21, 1946—this was the last day on which she visited defendant—the girl was received in the hospital she was in a most serious condition because of a generalized peritonitis of which she died on the 10th of April, 1946.

Dr. Gertrude Moore who performed the autopsy testified that the generalized peritonitis which caused the death was caused by a ruptured ovarian abscess caused by colon bacilli which had entered the ovary from the outer genitalia in consequence of a trauma (injury). The most frequent causes for such trauma were first childbirth and next abortion, but there were also other causes. There was no evidence of pregnancy. If an abortion had been performed a few days before death her examination would have revealed it.

[2] Although the decisions with respect to the scope and degree of corroboration required by section 1111, Penal Code, are

in conflict and confusion (People v. Collier, 111 Cal.App. 215, 228, 295 P. 898) the decisions of our Supreme Court leave no doubt that to be sufficient the corroborative evidence in itself must be of an inculpatory character and must tend without aid of testimony of accomplices to implicate the defendant in the commission of the crime. People v. Shaw, 17 Cal.2d 778, 802, 803, 112 P.2d 241; People v. Hoyt, 20 Cal. 2d 306, 312, 125 P.2d 29; People v. Davis, 210 Ca. 540, 555, 293 P. 32.

[3] We are compelled to hold that without the evidence of the accomplices the evidence, available as corroboration, has no substantial connection with any crime and is consistent with an innocent lawful treatment of the patient by defendant and a termination of the pregnancy, unconnected with his treatment, at any time after the end of January. There is in the corroborating evidence nothing that would indicate that treatment for an inflamation of the vagina was improbable, or which connects the character of the treatment or of the instruments used as testified to by appellant with an intent to cause an abortion thereby. Neither is there in the corroborating evidence any indication that the understanding between defendant and Dr. Sieff with respect to the patient related to any illegal purpose. The fact that appellant did not consult a practicing physician and surgeon, notwithstanding the serious condition of his patient, cannot be said to point in itself to the covering up of a crime as such attitude is as a matter of experience not confined to cases in which any crime is involved.

"Circumstances which are consistent with an innocent purpose cannot be said to have a tendency to connect and implicate the defendant with the commission of the offense charged." 8 Cal.Jur. 180; People v. Robbins, 171 Cal. 466, 470, 154 P. 317.

[4] Without the aid of testimony of accomplices there is no indication whatever of any relation between the check of $100 which defendant testified to have given to Dr. Sieff, and the crime charged. Appellant's refusal to discuss this check before the grand jury was the exercise of a constitutional privilege, which does not of itself directly and immediately tend to connect him with the crime charged against him. See People v. Sawaya, 46 Cal.App.2d 466, 471, 115 P.2d 1001.

[5] This court is given no alternative but to set aside the conviction where the testimony of the accomplices is not corroborated in accordance with section 1111 of the Penal Code as that statute has been interpreted by the courts. People v. Shaw, supra, 17 Cal.2d at page 804, 112 P.2d 241; People v. Robbins, supra, 171 Cal. at page 469, 154 P. 317.

[6] Respondent does not concede that the instruction that the witnesses Green, Menezes, Minasian, Vukman and Sieff were accomplices was proper but he does not press this point. As the jury was bound by and presumed to have followed the instruction given we see no reason to investigate its correctness at this time. However, the same question will probably come up, not necessarily with respect to exactly the same facts, on the new trial which must be ordered. We therefore think it useful to point out that the fact mentioned by appellant that the witness Elain Vukman, of her own accord, administered quinine and castor oil to the girl for the purpose of producing a miscarriage does not in itself constitute her an accomplice of defendant, if she did not associate with defendant and participate with him in the commission of the crime charged. See People v. Frahm, 107 Cal.App. 253, 263, 290 P. 678.

[7] Appellant's further argument that no overt acts were proved has no separate significance. Appellant conceded that he treated the girl and on or about the 9th day of March, 1946, used medical and surgical instruments on her in her home in Oakland. If it had been proved by sufficiently corroborated evidence that he did so in pursuance of the alleged conspirary and to effect the object thereof, this treatment would have constituted one of the overt acts alleged. No more than proof of a single alleged overt act by one of the conspirators is necessary to support the verdict. People v. Shurtleff, 113 Cal.App. 739, 741, 742, 299 P. 92.

The judgment and order appealed from are reversed and the cause is remanded for new trial.

GOODELL and DOOLING JJ., concur.



80 Cal.App.2d 391

WONG v. WONG HING YOUNG.

Civ. 13264.

District Court of Appeal, First District, Division 1, California.

June 18, 1947.

1. Bastards ⇐13

Where father did not receive illegitimate child into his family and otherwise treat child as legitimate, illegitimate child was not legitimated under the statute. Civ. Code, § 230.

2. Bastards ⇐13

Section of Probate Code making every illegitimate child an heir of mother and of the person who acknowledges himself to be the child's father in a witnessed writing is not a full legitimation statute but a statute of succession, so that a verified pleading by child's father in action to have father declared to be the father and for support of child which admitted parentage did not legitimate the illegitimate child. Probate Code, § 255; Civ.Code, § 196a.

3. Bastards ⇐92

Judgment erroneously stating illegitimate child to be defendant's legitimate child in action to have defendant declared father of illegitimate child and for support of child did not require reversal on appeal since conclusions and judgment could be modified in accordance with the evidence and the findings. Civ.Code, § 196a.

4. Bastards ⇐19

In action by minor illegitimate child through child's mother as guardian ad litem to have defendant declared child's father and for support of child, the award is for the child who is the real party in interest and the mother is not a necessary party. Civ.Code, § 196a.

5. Bastards ⇐78

In action by minor illegitimate child through child's mother as guardian ad litem to have defendant declared to be the child's father and for support of child, trial court could properly have appointed a general guardian of the child for the purpose of handling monthly payments awarded for child's benefit. Civ.Code, § 196a; Code Civ.Proc. § 372.

6. Bastards ⇐78

In action by minor illegitimate child through child's mother as guardian ad litem to have defendant declared child's father and for support of child, court properly ordered payments for support of child payable to child's mother. Civ.Code, §§ 137–140, 196a.

7. Bastards ⇐92

In action by minor illegitimate child through child's mother as guardian ad litem to have defendant declared child's father and for support of child, reversal of judgment requiring payment to support child of $125 monthly would not be required even if evidence did not support finding that father received income of $250 monthly from laundry business if father's income as a whole was sufficient to make $125 monthly reasonable. Civ.Code, § 196a.

8. Bastards ⇐16
Parent and child ⇐3(1)

A child, legitimate or illegitimate, is entitled to be supported in a style and condition consonant with the position in society of its parents, and the father's duty of support does not end with the furnishing of mere necessities if the father is able to afford more.

9. Bastards ⇐78, 92

In action by minor illegitimate child through a guardian ad litem to have defendant declared child's father and for support of child, the sole issue after paternity is established is the amount for

support that is reasonable under the circumstances, and in fixing the amount the trial court has a wide discretion which will not be interfered with unless there has been an abuse of discretion. Civ.Code, § 196a.

10. Bastards ⇐65

In action by minor illegitimate child through child's mother as guardian ad litem to have defendant declared child's father and for support of child, evidence sustained finding that $125 monthly was reasonable amount of support. Civ.Code, § 196a.

Appeal from Superior Court, San Francisco County; Lile T. Jacks, Judge.

Action by Juanita Lynne Wong (a minor), by Leong Gwai Sin Young, guardian ad litem, against Wong Hing Young, also known as Sing Lee, to have defendant declared the father of Juanita Lynne Wong and to compel the father to contribute to her support. From an adverse judgment, defendant appeals.

Judgment affirmed as modified.

Frank J. O'Brien, of San Francisco, for appellant.

Bussey & Cofer and Margaret Cofer, all of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by a minor child through her mother as guardian ad litem, to have defendant declared her father, and to compel the father to contribute to her support as provided in § 196a of the Civil Code. The complaint alleged that the child was that of defendant and was born out of wedlock. It prayed for a declaration of paternity, $250 per month for support and attorney's fee. The answer admitted that defendant was the father of plaintiff as charged, and alleged that the $50 a month that the defendant was then contributing towards the child's support was a reasonable sum. The only issues at the trial related to the amount of support that should, under the circumstances, be paid to plaintiff, and the amount of the attorney's fee. The trial court, based either on admissions in the pleadings, or on uncontradicted evidence, found that the guardian ad litem is the mother, and defendant the father of plaintiff; that plaintiff's mother and defendant had once been married but were divorced in February, 1943; that in September, 1943, they resumed living together and continued to so live until November, 1944; that from February, 1943, until November, 1944, they were not married; that in January, 1945, the child was born as a result of that relationship.

On the issue of defendant's ability to pay, the court found that he owns and operates a laundry in Santa Rosa from which his net monthly income is $250, and that he also owns and operates a lottery agency. The court then found that $125 per month is a reasonable sum for the support and maintenance of plaintiff, and that $250 is a reasonable attorney's fee.

After making these findings, as one of its conclusions of law the court declared "that the plaintiff is entitled to a judgment and decree declaring that the plaintiff is the legitimate daughter of the defendant." That this was not a mere inadvertence is indicated by the judgment in which it is "ordered, adjudged and decreed that the plaintiff herein is the legitimate daughter" of defendant, and defendant was ordered to pay to the "mother of plaintiff" $125 per month for support and $250 attorney's fees. From this judgment the defendant appeals.

The first contention made is that, in so far as the trial court concluded and adjudged that plaintiff is the legitimate daughter of defendant, such determination is not supported by the evidence and is contrary to the findings. This contention is clearly correct. The pleadings, the findings, and the evidence are based on the theory of illegitimacy. These parties were divorced, apparently in Reno, in February, 1943. In September, 1943, without being remarried, they again started to live together and continued this relationship until November, 1944. The child was conceived during this period, and was born in January, 1945. No attack has been made on the validity of the divorce. This being so, the child was illegitimate.

[1] Plaintiff urges that there was a legitimation under § 230 of the Civil Code.

Under that section, to accomplish a legitimation, there are four essential requirements. They are: (1) The legitimator must be the natural father of the child; (2) he must publicly acknowledge that fact; (3) he must receive the child into his family; and (4) he must otherwise treat it as his legitimate child. See Estate of Flood, 217 Cal. 763, 21 P.2d 579; cases collected 1 Cal.Jur. p. 455, § 35. The first and second requirements are here satisfied, but the third and fourth have not been met. This being so, there was no legitimation under § 230.

[2] Plaintiff next contends that, even if there were no legitimation under § 230 of the Civil Code, there was such legitimation under § 255 of the Probate Code. For the purposes of that section all that is required is an acknowledgment in writing of the relationship signed in the presence of a competent witness. While it is undoubtedly true that the admission of paternity in a verified pleading satisfies that section, the fallacy of plaintiff's position is that § 255 of the Probate Code is not a full legitimation statute but simply a statute of succession. Estate of Magee, 63 Cal. 414; In re Jessup, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594; Estate of Loyd, 170 Cal. 85, 148 P. 522; Estate of Lund, 26 Cal.2d 472, 159 P.2d 643, 162 A.L.R. 606; see note 6 Cal.Law Rev. 158.

[3] This error in the conclusions and judgment does not require a reversal. This court has full power to modify the conclusions and judgment in accordance with the evidence and findings. Cowdery v. London etc. Bank, 139 Cal. 298, 73 P. 196, 96 Am. St.Rep. 115; cases collected 2 Cal.Jur. p. 969, § 570. The interests of justice require that that power be exercised in this case.

[4-6] It is next argued by defendant that it was error for the trial court to have ordered the support money payable to the mother of the minor child, the mother being the guardian ad litem. The defendant correctly points out that the mother is not a necessary party to such an action, that the award is for the minor, and that the minor is the real party in interest. Kyne v. Kyne, 38 Cal.App.2d 122, 130, 100 P.2d 806. There can be no doubt that the trial court, under § 372 of the Code of Civil Procedure, could have appointed a general guardian of the child for the purpose of handling the monthly payments for her benefit. In many cases that may be a proper procedure. But that is not the only procedure provided by law. It must be remembered that the judgment did not award this money to the mother absolutely. The judgment provides that the defendant shall pay the $125 per month to the "mother of the plaintiff, * * * as and for the support and maintenance of the plaintiff." The mother was before the court as guardian ad litem. This action was brought under § 196a of the Civil Code, which provides that a minor illegitimate child may maintain an action for support against the father, and that such action may be maintained "by his mother or guardian, or by a guardian ad litem." It is then provided that "in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." Of course, in a divorce action, under the sections above enumerated, the court is empowered to order payments by the father to the mother having custody of their children for the maintenance and support of the children. Here the mother has such custody, and, since under § 196a, the court has "power to order and enforce performance" of its order of support the same as in divorce actions, it follows that the trial court, at least where, as here, the mother is before the court, has the power to make such payments payable to the mother.

[7-9] The last contention of defendant is that the award is excessive. It will be remembered that the trial court found that defendant's net income from his laundry was $250 per month, and that, in addition, he operated a lottery. It is urged that the finding as to the income from the laundry is not supported. It should be noted that even if the precise finding that the net income from the laundry was $250 per month is not supported by the evidence, that fact would not require a reversal if the evidence shows that the father's income as a whole is sufficient to make the award of $125 reasonable under the circumstances. A child,

legitimate or illegitimate, is entitled to be supported in a style and condition consonant with the position in society of its parents. The father's duty of support does not end with the furnishing of mere necessities if he is able to afford more. Bailey v. Superior Court, 215 Cal. 548, 555, 11 P.2d 865; Kyne v. Kyne, 70 Cal.App.2d 80, 83, 160 P.2d 910. The sole issue, after paternity is established, is the amount for support that is reasonable under the circumstances. In fixing the amount the trial court has a wide discretion, and the appellate court will not interfere with the amount fixed unless there has been an abuse of discretion. Gambetta v. Gambetta, 30 Cal.App. 261, 157 P. 1141; Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 135 P.2d 184; Hale v. Hale, 55 Cal.App.2d 879, 132 P.2d 67; Kyne v. Kyne, 70 Cal.App.2d 80, 160 P.2d 910; cases collected 9 Cal.Jur. p. 809, § 147. Therefore, the real question presented is whether, under the evidence, the trial court abused its discretion in fixing the monthly allowance at $125. In determining this question, whether the finding as to the laundry income is supported is immaterial, if, on the evidence as a whole, the finding fixing the amount of the allowance is reasonable.

[10] An examination of the record discloses that the finding that the laundry income of defendant is $250 per month is supported by the evidence of defendant himself, although his evidence on the subject is conflicting. While he was testifying as a witness on his own behalf and under direct examination by his own counsel the following occurred:

"Q. You are in business in Santa Rosa? A. Yes, laundry.

"Q. What is your income—your average income per month? A. About two hundred and fifty.

"Q. Is that your present income? A. Yes."

While it may not be the only possible inference from that testimony, it is certainly a reasonable inference from it that defendant meant to testify that his income from the laundry was $250 per month. That testimony, and the reasonable inferences therefrom, support the finding in question. It is true that defendant, on cross-examination, attempted, with the assistance of his counsel, to cast doubts on this evidence. He was asked by counsel for plaintiff if he had not testified on direct examination that his income from the laundry was $250 per month. Immediately his counsel interrupted to state that that sum was his total net income. He then admitted running the lottery, and stated that his income from the lottery was about $50 to $100 per month. When asked what his income from the laundry was he stated that it was about $150. These conflicts were for the trial court.

In addition to this testimony there is some evidence in the record that the lottery earnings of defendant were very substantial. The mother of plaintiff testified that defendant told her that his income from the lottery was sometimes over $1,000 a night. The father (or step father) of the mother testified that he heard defendant tell his then wife, the mother of plaintiff, that his income from the lottery was between $800 to $1,000 per day. A private detective, who was called on behalf of plaintiff, testified that he visited the lottery establishment of defendant three different times just before the trial; that the place stayed open from 12:30 in the afternoon to 7 or 7:30 in the evening; that there were four clerks employed; that drawings were had every twenty minutes; that thirty or forty dollars were placed on each drawing; that he estimated the daily take at about $700. In view of this testimony it is quite clear that the finding that appellant can reasonably afford $125 per month for plaintiff's support is amply supported by the record.

The conclusions and judgment are modified by striking therefrom the word "legitimate" wherever it appears, and inserting in lieu thereof the word "illegitimate." As so modified the judgment is affirmed; plaintiff to recover her costs on this appeal.

WARD and BRAY, JJ., concur.

STICKEL et al. v. SAN DIEGO ELECTRIC RY. CO. et al.*

Civ. 3626.

District Court of Appeal, Fourth District, California.

June 16, 1947.

Rehearing Denied July 3, 1947.

Hearing Granted Aug. 14, 1947.

1. Automobiles ⇐245(14)

Whether driver of colliding bus was negligent in failing to see automobile which allegedly proceeded past a stop sign into intersection without stopping, was for jury. Vehicle Code, §§ 552, 577.

2. Judgment ⇐199(3)

Where motion for judgment notwithstanding verdict was a joint motion, all evidence would be considered although some evidence had been received against only one of the movants.

3. Appeal and error ⇐994(3), 1012(1)

The weight to be given evidence, and the credibility of witnesses, are matters for the trier of fact and not for the Appellate Court.

4. Automobiles ⇐224(8)

One who knowingly rides with an intoxicated driver of motor vehicle may be guilty of independent negligence which will bar recovery by him if injured.

5. Appeal and error ⇐1067
Automobiles ⇐246(58)

In action for personal injuries sustained in motor vehicle collision and for damages on account of expenses incurred by reason of fatal injuries sustained by wife in same collision, where the question of contributory negligence of plaintiff in knowingly riding with intoxicated wife as driver was one of the principal defenses and the case was a close one on the facts, they were entitled to have jury instructed on the subject and refusal of requested instruction was prejudicial error. Const. art. 6, § 4½.

6. Automobiles ⇐243(17)

In action for personal injuries resulting from motor vehicle collision and for damages on account of expenses due to fatal injuries sustained by wife in same collision, that plaintiff had been convicted of four misdemeanors involving drunkenness in the period of eleven years prior to the accident was properly excluded as not bearing on his sobriety on the evening of accident.

7. Trial ⇐110

Counsel should not ask questions which carry derogatory implications unless he believes in good faith he can follow them up with competent evidence supporting the implications.

8. Appeal and error ⇐1048(3)

The asking of questions carrying derogatory implications was not prejudicial where appellant established that the implications had no foundation.

9. Appeal and error ⇐782

Attempted appeal from verdict from which no appeal lay would be dismissed. Code Civ.Proc. § 963.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Harris Stickel and others, as heirs of Essie Stickel, for damages resulting from death of decedent, and action by Harris Stickel for personal injuries sustained in motor vehicle collision and for moneys expended and to be expended for hospital, physicians, nurses' bills, etc., in treating injuries of the decedent, Essie Stickel, and plaintiff, and in paying the decedent's funeral expenses. From verdict of jury and a judgment for Harris Stickel for $7,500 on account of personal injuries and in favor of Harris Stickel for $3,000 on account of expenses, and from order denying defendants' motion for a judgment notwithstanding the verdict, the defendants appeal.

Attempted appeal from verdict dismissed, order denying motion for judgment notwithstanding the verdict affirmed, and portions of judgment in favor of plaintiff for personal injuries and expenses reversed.

Huntington P. Bledsoe, of San Diego, for appellants.

* Subsequent opinion 195 P.2d 416.

Edgar B. Harvey, of San Diego (Henry F. Walker, of Los Angeles, of counsel), for respondent.

MARKS, Justice.

This is an appeal "from the verdict of the jury and the judgment made and entered thereon * * * as to the second and third causes of action only, and from the order of the Court denying defendants' motion for a judgment notwithstanding the verdict of the jury as to the second and third causes of action."

Plaintiff and Essie Stickel were husband and wife. They were seriously injured in a collision between a Chevrolet pick-up truck and a bus belonging to the San Diego Electric Railway Company. The pick-up truck was being driven by Mrs. Stickel westerly on K Street, and the bus was being driven by Robert D. Amos southerly on Twelfth Avenue in the city of San Diego. Amos was the employee of the San Diego Electric Railway Company. Mrs. Stickel died from her injuries a short time after the accident. Plaintiffs Leo A. Flynn, Iona Talkington and Waneta Southerland were the adult children of Mrs. Stickel by a former marriage, and with her husband were her heirs at law, though her children were not dependent on her for any support.

The complaint sets forth three causes of action. In the first all the plaintiffs, as heirs at law of Mrs. Stickel, sought damages resulting from her death. The second sought damages suffered by Mr. Stickel as a result of his personal injuries. The third sought recovery by Mr. Stickel of moneys expended, and to be expended, in paying for hospital, physicians' and nurses bills and other such expenditures in treating the injuries of Mrs. Stickel and himself and in paying her funeral expenses.

Defendants deny negligence in the operation of the bus, denied the damages alleged, and alleged that the accident was proximately caused by the negligent operation of the Chevrolet pick-up truck by Mrs. Stickel and by her contributory negligence. In a supplemental answer defendants alleged contributory negligence of Mr. Stickel in riding with his wife as driver when he knew she was intoxicated to the point of being unable to operate the Chevrolet in a prudent manner, and while operating it in a careless and negligent manner due to her intoxication.

The jury returned a verdict in effect as follows: In favor of plaintiffs on the first cause of action "in the sum of $0—..."; in favor of Harris Stickel on the second cause of action in the sum of $7500.; in favor of Harris Stickel on the third cause of action in the sum of $3000. Judgment was entered accordingly. Defendants' motions for judgment notwithstanding the verdict and for new trial were denied and this appeal followed.

The accident happened at about 10:40 o'clock P.M. on January 27, 1945, in the intersection of Twelfth Avenue and K Street in the city of San Diego. Both are public streets of the city, are 52 feet wide between curbs, and intersect at right angles. Twelfth Avenue runs north and south. It is a through street and is protected by stop signs on K street. The one at the northeast corner is set back about fifty feet from the property line of Twelfth Avenue and a white line is painted across the north half of K street forming an extension of the east property line of Twelfth Avenue. The word "STOP" is painted on the K Street roadway about an equal distance between the white line and the stop sign. Both Mr. and Mrs. Stickel had driven on K street across the intersection many times so they were familiar with it.

The only witness for plaintiffs, describing the accident, was Mr. Stickel. He testified that he and his wife lived near Encanto about seven or eight miles easterly from the intersection; that neither he nor his wife had been in any bar on the day or evening of the accident and had not had anything to drink; that they left their home on the evening of January 27th and were on their way to get dinner in a San Diego cafe; that Mrs. Stickel was driving and he was sitting to her right with his body and head turned partly towards her; that as they proceeded west on K Street and approached Twelfth Avenue his wife stopped the car opposite the east curb line

of Twelfth Avenue; that she looked to her right, shifted gears and proceeded into the intersection; that when the Chevrolet was nearly across the intersection he saw headlights in front of him; that the collision occurred and he was rendered unconscious and knew nothing more about the accident.

The only other evidence produced by plaintiffs as to the cause of the accident is found in the testimony of two police officers who investigated it. They both testified defendant Amos told each of them the first he knew of the impending collision was when glass from the windshield of the bus flew into his face; that he later told each of them that the Chevrolet did not make any stop before entering the intersection and when he realized it was coming through it was too late to stop the bus or avoid the collision although he did attempt to apply the brakes.

It is clear that the evidence of one of the officers as to these conversations was limited to Amos and was excluded as to the San Diego Electric Railway Company. The record is not so clear as to the testimony of the other officer. Part of his evidence was so limited, but other parts apparently were admitted without objection or limitation.

Evidently the Chevrolet was hit between the front of the right door and the right front wheel. The vehicles locked together with the right of the Chevrolet hooked to the left side of the bus which dragged it south on K Street to a point about 120 feet south of the intersection. Amos testified that the jar of the collision partly unseated him and threw his foot from the brake pedal; that as soon as he could regain his seat he got control of the bus and brought it to a stop. This was corroborated by another witness. The evidence indicates that the bus was not traveling at a speed of more than 25 miles an hour, probably between 22 and 24 miles an hour in entering the intersection which was in a business or residential district. The speed of the Chevrolet was variously estimated at between 6 and 35 miles per hour.

Two officers of the city of San Diego who arrived with the ambulance removed Mr. and Mrs. Stickel from the Chevrolet and took them to a hospital. They testified that Mr. Stickel was slumped on the seat behind the steering wheel of the left hand drive of the car with his head against the left door with Mrs. Stickel on the seat to his right; that they smelled alcohol on both of them. Mr. Stickel had no driver's license. The pleadings admit Mrs. Stickel was driving the car.

Passengers on the bus testified that they saw the Chevrolet approaching the intersection; that it made no stop but proceeded across Twelfth Avenue and into the bus or its path.

Many questions are argued in the briefs by both parties. Some of them are too technical to need notice. Others pertain to the judgment on the first cause of action from which no appeal was taken so they cannot affect our decision and need no attention here. Among them is the argument that Mr. and Mrs. Stickel were not married. As the pleadings admit they were husband and wife that question should not have been raised by defendants without amendments being made. The record does not show any request to amend the pleadings in that respect.

The main grounds for reversal of the order denying the motion for judgment notwithstanding the verdict and the judgment are these: (1) That the evidence failed to show any negligence of Amos, the driver of the bus; (2) that the sole cause of the accident was the negligence of Mrs. Stickel in failing to make the required stop before entering Twelfth Avenue, as required by Section 577 of the Vehicle Code, and in failing to yield the right of way to the bus which was the only vehicle approaching the intersection on a through highway and so close as to constitute an immediate hazard (Sec. 552 Vehicle Code); (3) that Mrs. Stickel was guilty of contributory negligence as a matter of fact; (4) that Mr. Stickel was guilty of contributory negligence in knowingly riding with a driver too intoxicated to operate a motor vehicle with any care, and in this connection the refusal to give a requested instruction on this subject; (5) the rejection of evidence offered by de-

fendants; and (6) misconduct of counsel for plaintiffs.

[1, 2] It must be admitted that the evidence of negligence on the part of Amos is very meager. However, his admission to the officers that he did not see the Chevrolet until the glass from the windshield flew into his face might support the inference that he was not vigilant in looking for other vehicles on the highway which has been held to be negligence under some circumstances. The trial judge took this view of the case and we are not disposed to disturb that conclusion here especially as the record indicates that some of the evidence concerning those admissions was admitted against both defendants without objection. In making this statement we need not consider the question of whether or not that admission was part of the res gestae. The motion for judgment notwithstanding the verdict was not made by each defendant separately but by both jointly. For similar reasons it was properly denied.

[3] Passengers on the bus testified that the Chevrolet did not make a boulevard stop before entering Twelfth Avenue. This was contradicted by the evidence of Mr. Stickel alone who was thoroughly impeached on other matters as will appear later. Had the jury concluded that the negligence of Mrs. Stickel was the sole proximate cause of the accident or that her negligence proximately contributed to it, a study of the record indicates that such a conclusion would have had the support of what seems to be a considerable preponderance of the evidence. The weight to be given evidence and the credibility of witnesses are matters for the trier of fact and not for an appellate court.

[4] As we have pointed out the answer set up the special defense of the contributory negligence of Mr. Stickel in knowingly riding with his wife as driver when she was intoxicated to the point of being unable to properly operate a motor vehicle. That so riding with such a person may constitute independent negligence of a passenger that will bar his recovery is well established. In Lynn v. Goodwin, 170 Cal. 112, 148 P. 127, L.R.A.1915E, 588, it was said:

"Metcalf's recklessness in driving was the direct, proximate and primary cause of the collision, and Metcalf when so driving and when the accident occurred was under the influence of liquor and was drunk. Plaintiff, his companion, knew this, and a reasonably prudent person would not have ridden in the automobile with Metcalf in his condition of inebriety. * * *

"While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery (Bresee v. Los Angeles Traction [Co.], 149 Cal. 131, 85 P. 152, 5 L.R.A.,N.S., 1059), yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence upon the plaintiff's part, apart from the driver's negligence barring the right of recovery." See also, Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662; Reposa v. Pearce, 11 Cal.App.2d 517, 54 P.2d 475; Price v. Schroeder, 35 Cal.App.2d 700, 96 P.2d 949.

Mr. Stickel testified that neither he nor his wife had been in any bar nor had either of them consumed any intoxicants on the day or evening of the accident. The physician who attended them in the hospital at about midnight after the accident testified that he smelled no liquor on either of them.

On the other hand defendants produced several witnesses on the same subject. The evidence of the two officers who took Mr. and Mrs. Stickel to the hospital has been mentioned. H. V. Lindamood testified that he knew Mr. and Mrs. Stickel; that on January 27, 1945, he was in the Last Round-up Cafe in Encanto when Mr. and Mrs. Stickel came in about 9:30 P. M.; that Mrs. Stickel was intoxicated—drunk; that they went to their Chevrolet and asked him to go down town to get something to eat; that he declined and said to them, "I think we have all had enough. Why don't we go home"; that Mrs. Stickel was then drunk. Harry Walker testified that

he was bar tender at the Last Round-up Cafe; that Mr. and Mrs. Stickel came in after nine and before ten o'clock on the evening of January 27, 1945, and both of them asked for drinks.

"Q. What was the condition you observed Mrs. Stickel in when she entered the barroom? A. I would say it was intoxicated; that is why I refused them a drink.

"Q. Describe her condition. What makes you think she was intoxicated? A. She was hilarious and in a happy frame of mind and a little bit on the staggering side, so I refused them a drink. That was the rules of the house out there."

He further testified that Mrs. Stickel mixed with the customers, and then he instructed the waitress not to serve her any drinks. Leon Cesmat testified that he was a special officer on duty at the Last Round-up Cafe; that in January, 1945, he worked there Saturday and Sunday nights; that he knew Mr. and Mrs. Stickel. Concerning the condition of Mrs. Stickel in the Last Round-up Cafe on the evening of January 27, 1945, he testified as follows:

"A. When I first saw her on this Saturday night I was busy. I was generally stand at the door, and I answer trouble in the house. I went to the back room where they had some trouble there and I squared that trouble up and Mrs. Stickel —Sandra, who runs the place told me that Mrs. Stickel, put her out.

"Q. Now, what time was that? A. Around between 9:00 and 10:00 o'clock, as far as I can remember.

"Q. Where did you see Mrs. Stickel? A. I seen her on the floor, talking to two sailors.

"Q. Did she leave? A. She didn't leave until I told her to leave. I ordered her out of the house.

"Q. And what was her condition? A. Well, she didn't say anything; she was just talking with them two sailors and went out; went out around the barroom and walked out.

"Q. Had Mrs. Stickel been drinking? A. Yes, she was pretty well intoxicated.

"Q. Is that why you asked her to leave? A. That is the reason I called her to leave.

"Q. Did you see her leave? A. Yes, sir. I escorted her out the door."

Sandra Slayton testified that she was manager and part owner of the Last Round-up Cafe; that she knew Mr. and Mrs. Stickel; that they were in the cafe on one Saturday night in January, 1945, which was the night prior to the Sunday she learned they had been injured in an automobile accident; that she saw them about 9:30 o'clock and had them put out about 10 P. M.; that Mrs. Stickel was intoxicated but that Mr. Stickel "wasn't so bad * * * He was drinking"; that Mrs. Stickel walked from table to table picking up drinks and drinking them; that she asked Mrs. Stickel to leave and that she became very abusive and the doorman put her out.

These witnesses, except Mrs. Slayton, were subjected to severe cross-examination as to how they fixed the date of January 27, 1945, as the night that Mr. and Mrs. Stickel were in the Last Round-up Cafe. While they could not be positive on the date being January 27, they were all clear that they heard on Sunday morning that Mr. and Mrs. Stickel had been injured in an automobile accident the night before and that it was that Saturday night between 9:00 and 10:00 o'clock P. M. that the couple had been in the Last Round-up Cafe.

Defendants proposed the following instruction which the trial court refused to give:

"If you find that at the time and place of the accident the deceased, Essie Stickel, was then and there under the influence of intoxicating liquor to such an extent as to prevent her from exercising the care and caution in the operation of her automobile which she, as a sober and ordinarily prudent person would have exercised under the same or similar circumstances, and the alcoholic liquor which she had been drinking had then and there so far affected her nervous system, brain and muscles as to impair, to an appreciable degree, her abil-

ity to operate the vehicle in the manner that she, as an ordinarily prudent person in the full possession of her faculties would have operated and driven the automobile had she not been so under the influence of intoxicating liquors, and if you should find that such intoxication of the deceased, Essie Stickel, contributed in any degree, as a proximate cause of the accident, then and in such event, if you further find that the plaintiff, Harris Stickel, who was riding in the automobile with his wife, Essie Stickel, had actual knowledge or must have known of the intoxicated condition of his wife, Essie Stickel, you are instructed that the plaintiff, Harris Stickel, was guilty of contributory negligence and cannot recover from the defendant."

[5] No other instruction was given covering this subject. The usual instructions on contributory negligence did not do so and they were chiefly directed at the contributory negligence of Essie Stickel. It is clear that the question of the negligence or the contributory negligence of Mr. Stickel in knowingly riding with his intoxicated wife as driver was one of the principal defenses of defendants. They were entitled to have the jury instructed on this subject and it was error to refuse the requested instruction.

Mr. Stickel was impeached by proof that he had been convicted of felonies twice, once in Ohio and once in San Diego under the name of Ralph West. He admitted that he had used various names over a period of years and was known as Ralph West in Encanto.

[6] Defendants, as further impeachment of Mr. Stickel, offered to prove that on specified occasions he had been convicted in San Diego of drunkenness, drunk and disorderly conduct, and drunk driving. The offer was made to sustain the contention that Mr. Stickel was an inebriate and an habitual drunkard. It was not made as bearing on the value of the loss of the society of his wife nor upon the life expectancy of one habitually over indulging in intoxicating liquors. The fact that Mr. Stickel had been convicted of four misdemeanors involving drunkenness in the period of eleven years prior to the accident were properly excluded as not bearing on his sobriety on the evening of January 27, 1945.

[7, 8] The alleged misconduct of counsel for plaintiff occurred during the cross-examination of defendants' witness Lindamood. It was vigorous to say the least. The really objectionable part of this cross-examination seemed to be for the purpose of laying the foundation for impeachment. The witness had testified that he was in the Last Round-up Cafe on the Sunday following the accident which happened on Saturday night, January 27, 1945. Counsel asked him if he did not know that the cafe was closed on Sundays during the latter part of January, 1945; if he did not know it was closed for repairs or remodeling during the latter part of January and the early part of February, 1945, and other questions of like import to which the witness returned negative answers. Plaintiff introduced no evidence tending to support the implications in the questions. Counsel should not ask such questions unless he in good faith believes he can follow them up with competent evidence supporting the implications contained therein. However, we can see no great prejudice in this conduct as defendants were able to establish by witnesses, including Sandra Slayton, part owner and manager, that the Cafe was open for business on Sunday, January 28, 1945, and every other Sunday during that January and also the early part of the following February.

In view of the evidence before the jury which discloses a very close case on the negligence of Amos, and the negligence or contributory negligence of both Mr. and Mrs. Stickel, we cannot regard lightly the refusal to give the requested instruction on the contributory negligence of Mr. Stickel in riding with his intoxicated wife as driver. This resulted in the failure to instruct the jury on a principal defense which was supported by very substantial evidence. Under such circumstances we must regard the error as prejudicial and not as cured by Section 4½ of Article VI of the Constitution.

Defendants disclaim any intention of appealing from the verdict of the jury,

from which no appeal lies. Sec. 963, Code Civil Procedure. The notice of appeal is before us with such an appeal indicated.

[9] The attempted appeal from the verdict is dismissed. The order denying the motion for judgment notwithstanding the verdict is affirmed. The portions of the judgment in favor of Harris Stickel on the second and third causes of action are reversed. Appellants will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



80 Cal.App.2d 256

In re KANE'S ESTATE.

KANE v. KANE et al.

Civ. 13363.

District Court of Appeal, First District, Division 1, California.
June 11, 1947.

Rehearing Denied July 3, 1947.
Hearing Denied Aug. 7, 1947.

1. Husband and wife ⇐264

Evidence sustained finding that parcels of realty were community property and were not held by husband and wife as tenants in common, on ground that such realty was acquired subsequent to marriage by joint efforts of the husband and wife. Civ. Code, § 164.

2. Appeal and error ⇐1010(1)

The findings on community property interest are accepted if there is some evidence of substance to sustain the finding.

3. Appeal and error ⇐901

Widow appealing from judgment which found that parcels of realty constituted community property and were not owned by widow and deceased husband as tenants in common was required to show that there was no other inference as a matter of law than that disputed portion of property was the separate property of the widow.

4. Husband and wife ⇐249

A business conducted by husband and wife through their own personal direction, activity, and ability is regarded as community property. Civ.Code, § 164.

5. Husband and wife ⇐254

An investment of community assets in a business or in a partnership remains community property, and a transfer of investment from partnership to a corporation does not change its status. Civ.Code, § 164.

6. Appeal and error ⇐1184

Where it came to attention of District Court of Appeal that appellant had died since argument and submission of the cause, a judgment would be ordered filed nunc pro tunc as of day prior to appellant's death.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Thomas J. Kane, also known as T. J. Kane, deceased, wherein Thomas J. Kane, Jr., objected to the account filed by Henrietta D. Kane and Wells Fargo Bank & Union Trust Company as administrator with the will annexed of the estate of Thomas J. Kane, also known as T. J. Kane, deceased, substituted in place of Henrietta D. Kane as executrix of the estate of Thomas J. Kane, also known as T. J. Kane, deceased. From a judgment, defendants appeal.

Affirmed.

W. L. A. Calder and S. A. Riley, both of San Francisco, for appellants.

Tobin & Tobin and Charles B. Collins, all of San Francisco, for respondent.

WARD, Justice.

This appeal involves the ownership of three parcels of real property. The deeds show ownership in "Thomas J. Kane and Henrietta D. Kane, his wife." The question to be determined is whether the three parcels were community property or were held by the husband and wife as tenants in common. The trial court determined that the property was held as community property. From that determination the wife appeals.

The marital relationship between the parties commenced on April 30, 1921, and continued until the death of Thomas J. Kane on November 30, 1943. Their financial relationship may be divided into three periods; the first from on or about the date of their marriage in 1921 until some indefinite date in the early part of 1927; the second from the early part of 1927 until October, 1936; the third ran until the death of Thomas J. Kane in 1943. Their last period is better understood when considered in connection with the second; the first period is merely explanatory of certain features of the events which followed.

As regards the facts, there will appear references to Henrietta D. Kane's sisters, to Thomas J. Kane's sisters, and to his two sons by a former marriage; John, who died prior to the death of his father, and Thomas J. Kane, Jr., the plaintiff and respondent herein. To avoid confusion, the husband of Henrietta will be referred to as Thomas, Sr., the son, as Thomas, Jr., and Henrietta will be referred to as Henrietta, as in the respective briefs of the parties hereto.

Thomas, Sr., and Henrietta met in Chicago, Illinois, during the month of November, 1920. He was a supervising head of one of the departments in a store designated as "Stop and Shop." Previously Henrietta had worked for a telephone company in Chicago. Her duties seem to have consisted of visiting cities and towns in the company's territory and acting as "trouble shooter" for the female employees of the company. Her health required a cessation of such activities. She took a long vacation and thereafter accepted work under the direction of Thomas, Sr., who was then fifty-three years of age; Henrietta was then fifty. They were married on April 30, 1921. At the time of their marriage Henrietta possessed money and securities of a value of approximately $10,000. Thomas, Sr., appears to have been without substantial funds. There was a pre-marital understanding, according to Henrietta's testimony, that they would come to California and go into business; "it was to be a fifty-fifty proposition; we were to be partners." After the marriage there was a reassertion of the "fifty-fifty" partnership agreement in the conduct of their business, as appears from the testimony of Henrietta.

On May 5, 1921, the couple left Chicago for San Francisco. It was not until October 17, 1921, that a suitable location for the conduct of a cafe was procured. This was on Haight Street in San Francisco. In the meantime the honeymoon of the couple, traveling expenses and costs incurred in preliminarily investigating locations, and in starting the business, were borne by Henrietta, who advanced to Thomas, Sr., $5,197.44. Toward the financing of the cafe Nora, a sister of Thomas, Sr., and his wife Henrietta each invested $3,000. Living quarters nearby were selected and occupied by Thomas, Sr., his wife, his sister Nora, and his son John, all of whom worked in the cafe. Henrietta, in addition to her other duties, paid the bills of the cafe and of the home from the proceeds of the business. No salaries were paid the participants; when they needed money for clothes or for any other purpose, money was taken from the cash register and a notation made of such withdrawal. After approximately two years and eight months of profitable business the place was sold for $8,000, and Nora and Henrietta received their respective investments, plus interest. The balance was divided equally between Thomas, Sr., Henrietta, Nora and John, less the individual withdrawals of each.

After the disposition of the Haight Street business, Thomas, Sr., decided that he would like to go into the mining business. Several months passed in an effort to locate a suitable property. In company with his son John and an engineer, Thomas, Sr., visited many sites and finally located in Tombstone, Arizona, A large portion of his money had been used in investigating various mining properties, and Henrietta's money in great part was used in the purchase of an interest in one. It was but a short time when, as the result of the gold mining venture, Thomas, Sr., and Henrietta found themselves with $300 in cash and an automobile. In response to a call from a sister who was ill, Henrietta went to Chicago, and Thomas, Sr., used the car to return to San Francisco.

In 1926 Henrietta's sisters pursuaded her to ask Thomas, Sr., to return to Chi-

cago. They offered to loan $5,000 to Henrietta so that she and her husband could go into business there. With this understanding between husband and wife a promissory note, bearing five per cent interest, was executed by the parties in exchange for the $5,000. On February 17, 1927, a restaurant was purchased on Roosevelt Way in Chicago for a sum in excess of the amount of the loan. Where the additional money or security was obtained is not mentioned in the transcript of evidence. This business was sold in less than a year and a half for $10,500. Henrietta's sisters were repaid, and with the profit from the business another restaurant was purchased in Chicago—on Sheridan Road. The record is not clear as to the amount of the purchase price, but it indicates that it was operated at a profit although it was sold at less than its purchase price.

About March 1932, Henrietta and Thomas, Sr., returned to San Francisco and subsequently $6,700 in their names with a Chicago bank was transferred to their credit with a San Francisco bank. For some months Henrietta worked for John, one of the sons of Thomas, Sr., in a restaurant conducted by him on Third Street, at a purported salary of $125 a month, which salary she never received, however.

Late in December 1932, Thomas, Sr., and Henrietta started a restaurant business at Turk and Mason Streets in San Francisco under the name of Kane's Log Cabin. The financing of this business is not made clear in the record, but as soon as it was opened John seems to have taken over the management. About the same time Thomas, Sr., Henrietta and John became partners in the Third Street restaurant. Thomas, Sr., closed the Third Street place for several months for renovation. Henrietta claimed that the remodeling cost, approximately $23,000, and so stated in a deposition, was paid out of the profits of the business. The record discloses that John, in previously operating the Third Street restaurant, borrowed $8,000 from his aunts, the sisters of Thomas, Sr. Shortly after John took over the Turk and Mason restaurant, it was agreed that such business would be incorporated; Thomas, Sr., and Henrietta were to receive approximately an equal number of shares of stock. The stock was never issued and the corporation was subsequently dissolved. Less than ten months thereafter, John died, leaving his one-half interest in the Third Street restaurant and a $10,000 life insurance policy to Thomas, Sr. The insurance was deposited in the joint commercial account of Thomas, Sr., and Henrietta, but subsequently Thomas, Sr. transferred $8,000 of it to his personal savings account. John had been purchasing pastry from the Third Street restaurant for use in the Turk Street place of business and had so incurred a debt of $3,000. After his death, John's wife paid $4,000, and Thomas, Sr. and Henrietta the balance, of John's indebtedness to his aunts.

On December 23, 1935, a corporation was organized to take over the Third Street business. Thomas, Sr., received fifty-one per cent of the stock and Henrietta forty-nine per cent. On October 20, 1936, the business and assets were reassigned to Thomas, Sr., and Henrietta no salary was poration dissolved.

During all of the business association of Thomas, Sr., and Henrietta no salary was paid either spouse. Personal expenses were met by resort to the cash register, with a notation of the withdrawal, or checks were made out against the commercial bank account of the parties.

About this time the Third Street restaurant was sold for $45,000 and $2,500 for stock on hand. After the sale, Thomas, Sr. desired to invest in a gold mine. Henrietta testified: "I told him I was going to take my money out of the [joint] account, and put it in my own [savings] account because none of my money was going into a gold mine." To this Thomas, Sr., said nothing. The bank accounts showed that on October 22, 1936, the first payment of $5,000 on the purchase price of $47,500 for the restaurant was deposited in Thomas Sr.'s personal savings account. A $20,000 payment made on October 31, 1936, was deposited in their joint commercial account, and on the same day $10,000 was withdrawn and deposited in Henrietta's personal savings account, and $5,000 was withdrawn and deposited in Thomas Sr.'s personal savings account. The next payment of $2,603.19, made November 21, 1936, was

deposited $1,000 in Thomas Sr.'s savings account, $1,000 in Henrietta's savings account, and $603.19 in their joint commercial account. The succeeding payments of $7,516.25 were similarly divided. Thus about twenty-one thousand dollars was deposited in each of the two savings accounts and about five thousand dollars was deposited in their joint commercial account. The latter was used for traveling and living expenses. Thomas, Sr., and Henrietta discussed how they should invest the money received on the sale of the Third Street restaurant. Henrietta testified that she wanted to invest in San Francisco property rather than in gold mines. It appears that Thomas, Sr., took charge of the selection of suitable pieces of property, and that the cost of properties purchased was met by withdrawing approximately one-half of the purchase price from the savings account of each. Their bank books showed withdrawals from the two savings accounts; deposits from income were placed in their joint commercial account. They purchased a hotel at First and Folsom Streets for $17,000, a drug store on Steiner Street for $12,500 and a filling station at Cortland Avenue and Anderson street for $13,500. The properties were all located in San Francisco. The first two parcels were paid for in cash; a portion of the purchase price of the filling station was met by promissory notes signed by Thomas, Sr., and Henrietta. The form of receipt, which may be designated as a receipt for money and documents, used by the three different title insurance companies in the three transactions are similar but not identical in their instructions. The insertions in the first two forms provide that the property was to be deeded to "Thomas J. Kane and Henrietta D. Kane, his wife, tenants in common." In the third receipt the words "tenants in common" were omitted. All three deeds read to Thomas J. Kane and Henrietta D. Kane, his wife."

Some light is thrown upon these transactions in an original deposition of Henrietta, which was presented by respondent, as evidence in the proceeding. The following appears:

"I take it, you and your husband, Mrs. Kane, had no discussions as to whose name the properties should go into when they were purchased, isn't that correct? A. Oh yes, we did, because I insisted upon having my name on every deed. * * *

"Q. All right. A. And my name was put on all of the deeds afterward.

"Q. What was the discussion you had with reference to the hotel property? A. Well, only that I should have my name on it, and not have it in his name alone, because that would leave me out altogether.

"Q. How did you first learn that the hotel property was going into your husband's name alone? A. When I saw the deed.

"Q. Where did you see the deed? A. He brought it home.

"Q. Where did you see it? A. When I saw it at home. I took care of all the papers, and all of the writing. All writing that had to be done I did, and the bookkeeping.

"Mr. Calder [attorney for appellant]: Q. Do I understand he brought a deed home showing that the title went to him alone? A. Yes, I think he did.

"Mr. Calder: Q. And then what happened? A. Well, I made him put my name on it, or had my name put on it; and it is recorded in the City Hall, too, with my name on it."

One of the title company's receipts is signed "Henrietta D. Kane" and "T. J. Kane." There is no evidence in the record that Thomas, Sr. or Henrietta knew the legal differences or subtleties between the designations of joint interest, partnership interest, interest in common or community interest. There is evidence to show that Henrietta proposed to protect her rights as she understood them, and there is evidence that it was Henrietta who deposited the income from the three pieces of property in the bank accounts.

On November 30, 1943, Thomas, Sr., died. His last will, signed December 4, 1942, provided in part: "Whatever estate I may die possessed of will be community property of myself and my beloved wife, Henrietta D. Kane. I confirm and allocate to her one-half thereof in recognition of her rights. In addition thereto, I give and bequeath her the sum of One Thousand

Dollars ($1,000.00)." Other bequests were made to four sisters, but two-thirds of the balance of his estate he bequeathed and devised to his son Thomas J. Kane, Jr. The will further provided: "I hereby nominate and appoint as executrix of this, my Last Will and Testament, my said wife, Henrietta D. Kane, and I direct that no bond be exacted of her by any court at any time in connection with the probate of this will or the administration of my estate.

"* * * I hereby direct that my said executrix shall have full power to sell any property belonging to my estate without obtaining any order of court therefor, but any and all such sales shall be returned to and confirmed by the court having jurisdiction of the probate of my will and the administration of my estate."

On February 1, 1944, Henrietta filed an inventory as executrix of the estate of her deceased husband. Included therein were a deposit of $1,729.92 with Wells Fargo Bank and "an undivided one-half interest in" three parcels of real property. July 24, 1944, Thomas, Jr., filed a "Petition to Determine Ownership of Property," in which he alleged that said real property was the community property of Thomas, Sr., and Henrietta, and that under the will Henrietta was entitled to one-half thereof plus $1,000; he prayed that the court so order and direct her to file an inventory setting forth Thomas Sr.'s estate as the owner of the entire property. Henrietta filed her answer to said petition August 15, 1944, denying that the whole of the real property was community property and alleging that she owned an undivided one-half of each of the three parcels.

October 23, 1944, Henrietta filed "her first and final account of her administration" in which she listed rents received and taxes and insurance paid. This showed that a balance of $1,231.16 was due her "for advances on account of disbursements." At the same time Henrietta petitioned for final distribution of the estate. The petition set forth the terms of the will and that Thomas Sr.'s estate owned an undivided one-half interest in three parcels of real property. May 24, 1945, Henrietta filed a supplemental statement showing that a balance of $1,542.53 was due her.

May 24, 1945, Thomas, Jr., filed his objections to the first and final account and to the petition for distribution. His objections were based upon the facts that Henrietta claimed Thomas, Sr., owned only one-half of the real property; that the account included only one-half of the rent of said properties, and that said account was uncertain.

The court found, referring to the money used to purchase the three parcels of real property: "That all the property described in the preceding paragraph hereof up to and at the time of the death of the said Thomas J. Kane, also known as T. J. Kane was the community property of said Thomas J. Kane and Henrietta D. Kane, his wife, and all of said property was acquired by said Thomas J. Kane and Henrietta D. Kane subsequent to their said marriage and by their joint efforts, and no part or portion of any of said property was owned by said Henrietta D. Kane before her said marriage or was thereafter acquired by her by gift, bequest, devise or descent and said Henrietta D. Kane did not contribute to any part of the purchase price of any of said property from any property or funds owned by her before her said marriage or thereafter acquired by her by gift, bequest, devise or descent or from the rents, issues or profits of any such separate property; that no part or portion of any of said property particularly described in the preceding finding hereof, or any interest therein, is now or at any of said times or at any time whatever, was or is the separate property of said Henrietta D. Kane."

It appears necessary herein to relate, at length, the history of the marital and financial relations of the parties from the time of their marriage in order to throw light upon subsequent events. It is not necessary to decide the legal interests of the parties up to the time of the gold mine disaster. It is sufficient to say that all that remained —three hundred dollars and an automobile —was disposed of to the satisfaction of Thomas, Sr., and Henrietta. So far as the record shows, no claim or demand was ever made by Henrietta upon Thomas, Sr., for the return of the money used immediately after marriage for the honeymoon trip or in looking for a business loca-

tion, or for that invested or earned in the San Francisco Haight Street cafe. Everything was dissipated in the Tombstone mine. Referring to the Haight Street business, the transcript shows:

"Q. And how much did you put in of money out of your moneys? A. I put in $3,000, in the business; but that wasn't all we spent. I had been spending all the other thousands of dollars before.

"Q. That is before—A. Before we got into business.

"Q. That is, all of the expense that was incurred by Mr. Kane and yourself in looking for a place of business? A. In living.

"Q. And your living was paid out of the money which you had? A. Yes, sir.

"Q. Did or did not Mr. Kane pay any part of that? A. No, he did not, because he didn't have anything. That was all right with me, too."

The source of the money used in the purchase of the three parcels of property in San Francisco consisted of profits obtained through investment of the $5,000 procured from two of Henrietta's sisters as a loan. It has been suggested that the sisters of Henrietta fixed the character of the original source of the property as the separate property of Henrietta in that they would not have loaned the money except upon the theory that Henrietta would repay the loan. The above promissory note was executed by the wife and the husband. Civil Code, sec. 167. It was known that Thomas, Sr., would be the director and manager of any property purchased. This loan, plus the interest, was paid during the period that Thomas, Sr., and Henrietta conducted restaurants in Chicago. The benefits derived from the loan were later mingled as between the spouses, and intermingled with property of John, the son of Thomas, Sr.

Appellant cites cases which may be differentiated. In Re Estate of Ellis, 203 Cal. 414, 264 P. 743, the decedent husband had acquired stock upon the faith and credit of his separate property. It was held that the stock was his separate property. Unlike the present situation, the spouse of Ellis was not even known in the transaction. In Dyment v. Nelson, 166 Cal. 38, 134 P. 988, it was held that a yacht purchased with the separate property of the wife was her separate property, and the fact that her husband joined in promissory notes used in its purchase did not alter the status of the property in that respect. Subsequently the husband attempted to sell the yacht. In the present case, at the time the note to Henrietta's sisters was signed by her and her husband, there is no evidence that any separate property existed. The money was to be used in the purchase of a restaurant business. Previous experience showed that Thomas, Sr. was expected to make profits sufficient to pay the loan. It is admitted in appellant's opening brief that he was "a man of wide business experience." In Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 138 P.2d 693, the court was discussing Civil Code, sec. 164 as it read in 1914.

[1] The question—is there evidence to support the findings?—should be answered in the affirmative. The trial court had the right to conclude that Henrietta, as a witness, seemed at times to be keenly alert; on other occasions her memory appeared to be poor. Her attorney found it necessary to propound many leading questions. Some of the exhibits contained notations which Henrietta claimed, in fact insisted, she had written at the time of making or executing the instruments, but the language used on one exhibit was the past tense—for instance, "8000.00 of this was mine." Decedent's declarations as to the nature of the property has not been shown to be untrue. In addition, decedent declared to his sister the general contents of his will. Thomas, Jr., testified as to a conversation with Henrietta, following his father's death, but before his will was read, in which she outlined the contents of the will; she further stated that she was to have one-half for "her folks" and the other half was to used for her husband's family.

It is possible to draw a reasonable inference that when a husband and wife instruct a title company to prepare a deed to them as tenants in common, but the title company names only the husband as the grantee, and the wife objects and a new deed is prepared, as in this case, to "Thomas

J. Kane and Henrietta D. Kane, his wife," the wife has waived any right to a tenancy in common, and it is mutually understood that the real property is to be community property.

[2, 3] That findings on community property interest are invariably accepted if there is some evidence of substance to sustain the finding, see Fontes v. Menke, 32 Cal.App.2d 303, 89 P.2d 669; Baylis v. Baylis, 48 Cal.App.2d 674, 120 P.2d 89; Williamson v. Kinney, 52 Cal.App.2d 98, 125 P.2d 920. To prevail, appellant must show that there is no other inference, as a matter of law, than that the disputed portion of the property was the separate property of Henrietta.

It has been suggested that Thomas, Sr., made a gift of or relinquished about half of the money received on the sale of the Third Street property to Henrietta. The record discloses that John by will left his interest in the Third Street business to his father. However, the evidence is not clear as to the amount of John's indebtedness to Thomas, Sr., also the percentage of the Turk and Mason Street business belonging to Thomas, Sr., or Henrietta or John is not definitely fixed in the record. Whatever amount, if any, of John's share, Thomas, Sr., relinquished to Henrietta, his conduct did not indicate that it was to be Henrietta's separate property, and she does not testify to such fact.

[4, 5] Thomas, Sr., and Henrietta received income from the three parcels of property. A business conducted by a husband and wife through their own personal direction, activity and ability is regarded as community property. In re Estate of Barnes, 128 Cal.App. 489, 17 P.2d 1046; In re Estate of Caswell, 105 Cal.App. 475, 288 P. 102; McCall v. McCall, 2 Cal.App. 2d 92, 37 P.2d 496. "In accordance with the presumption existing where a married woman invests in a partnership business, that the transaction is with community funds, * * * unless she can trace her separate funds, the interest in the business thus acquired goes to the community, and, where the partnership is with her husband, additional difficulty in tracing her interest arises by reason of the commingling of her funds with his, so that the funds so invested usually become community property.

"An investment of community assets in a business or in a partnership remains community property, and a transfer of the investment from a partnership to a corporation does not change its status." 41 C.J.S., Husband and Wife, § 497, p. 1067. As upholding the last statement just made, see In re Estate of Duncan, 9 Cal.2d 207, 224, 70 P.2d 174.

Section 164, Civil Code provides in part: "* * * except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife." Appellant contends that disputable inferences and presumptions are the weakest and least satisfactory character of evidence, citing Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 270 P. 672, wherein Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 P. 922 is cited, a case in which one of the questions was—Did the parties follow the ordinary course of business? Code Civ.Proc., sec. 1960, subd. 2. Appellant relies on In re Bauer's Estate, 79 Cal. 304, 21 P. 759, in which it was held that proof of ownership of funds at the time of marriage, establishes the ownership thereof, together with profits therefrom. Both spouses joined in a declaration of homestead and inserted therein (79 Cal. at page 310, 21 P. at page 761,): "'We further declare that said property was to the extent of $3,000 acquired and improved with the separate estate of Charles Bauer.'" The court then said: "This declaration or recital was on the part of Mrs. Bauer self-dissevering, and can be used against her, especially as she is claiming under her husband, with whom in the homestead she was a tenant in common."

Mr. Witkin in his Summary of California Law (1936) states (pp. 687, 686): "(a) C.C. 164, as amended in 1935, states that if property is acquired 'by such married woman *and* any other person the presumption is that she takes the part acquired *by her*,

as tenant in common.' (b) Formerly it was held that they became tenants in common, the interest of the *wife being separate property,* and that of the *husband, community property.* Dunn v. Mullan, 1931, 211 Cal. 583, 296 P. 604, [77 A.L.R. 1015]. [In re] Estate of Regnart, 1929, 102 Cal.App. 643, 283 P. 860. The statute (C.C. 164) now provides, however, that when property 'is acquired by husband and wife by an instrument in which they are *described as husband and wife,'* the presumption is that the property is *community.*" "Property acquired by either spouse during the marriage is presumed to be community property, and this presumption can only be overcome by strong evidence to the contrary."

In Re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174, 179, the court said: "At the very outset, contestant was confronted in opposition to her claim by the well-established presumption that all property left by decedent, acquired after marriage, is presumed to be community property. This presumption is fundamental to the community property system. 3 Cal.Jur.,Supp., 553. This presumption has greater force in cases where the marriage has been a long-continued relation than in cases where the marriage was entered into shortly before the acquisition of the property. [Cases cited.] The burden of producing clear and satisfactory proof that the property was the separate property of decedent was upon the contestant as the respondent was entitled to rely upon the presumption that it was community property. [Citing cases.] It is, of course, not necessary that the clear and satisfactory proof required should amount to a complete demonstration, for it has been held that to counterbalance the naked legal presumption only that degree of proof is necessary which ordinarily produces conviction in an unprejudiced mind."

In 3 Cal.Jur., 10 yr. Supp., p. 537, sec. 48, it is said: "While a few cases inadvertently refer to the wife's earnings as her separate property, it is an essential part of the community system that the earnings of both spouses are community property, and the decisions clearly recognize the fact." See Note 5. Under these circumstances the finding that the property was community property is amply supported by the presumption and was not rebutted, as a matter of law, by the evidence.

[6] Since the argument and submission of this cause, it has come to the attention of the court that appellant Henrietta D. Kane has died. It is ordered, therefore, that this judgment be filed nunc pro tunc as of June 4, 1947, the day prior to her death. In Re Holman v. Stockton Sav. & Loan Bk., 49 Cal.App.2d 500, 510, 122 P.2d 120; In Re Estate of Randall, 194 Cal. 725, 230 P. 445; In re Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795; 2 Cal.Jur. 974.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



80 Cal.App.2d 347

SOOY v. KUNDE et al.

Civ. 7336.

Sac. 5806.

District Court of Appeal, Third District, California.

June 13, 1947.

Rehearing Denied July 8, 1947.

Hearing Denied Aug. 7, 1947.

1. Specific performance ⇐121(8)

In action for specific performance of purchase option contained in lease, evidence sustained finding that no unfair advantage had been taken of lessor and that she knew and understood that lease contained an option to purchase.

2. Specific performance ⇐121(8)

In action for specific performance of purchase option contained in lease, evidence sustained finding that lessor was in full possession and control of normal, physical and mental powers at time of executing lease and fully understood transaction.

3. Specific performance ⇐105(3)

Lessee for term of 30 years with option to purchase at any time during the term was not barred by delay from seeking spec-

ific performance of option 10 years after lease was executed, since option was exercised within time specified in lease.

4. Specific performance ⇐121(3)

In action for specific performance of purchase option contained in lease, evidence sustained finding that the sum of $1,000 specified in lease as purchase price was at the time of the execution of lease and at time of action in excess of the fair and reasonable value of the property, excluding improvements made by lessee. Civ. Code, § 3391.

5. Specific performance ⇐121(3)

In action for specific performance of purchase option contained in lease, evidence sustained finding that consideration for lease and option was just and equitable.

6. Appeal and error ⇐989

Argument as to weight of the evidence and credibility of the witnesses is properly addressed to trial judge, whose duty it is to weigh the evidence, but it serves no useful purpose in an appellate tribunal which may not concern itself with mere conflicts in evidence.

7. Appeal and error ⇐989

Where judgment is attacked as being unsupported by evidence, power of an appellate court begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

8. Specific performance ⇐57

In action for specific performance of purchase option contained in lease, contention that lessee had an adequate remedy because he might at termination of lease sue for breach of contract, stated no defense.

9. Evidence ⇐498½, 546

The determination of the qualifications of a witness to testify concerning value of land is largely within sound discretion of trial judge.

10. Appeal and error ⇐971(2)

The determination of a trial judge that a witness is or is not qualified to testify as to the value of land will not be disturbed on appeal in absence of clear abuse of trial judge's discretion.

11. Evidence ⇐601(4)

The value of land is essentially a question of opinion to be established by expert testimony.

12. Evidence ⇐543(3)

It is not sufficient that a farmer may have general knowledge of real estate values, to qualify him to testify as to value of land, but he must be familiar with market price of similar land in the same neighborhood and should be acquainted with property involved in the action and should possess special knowledge regarding the particular land in question which should enable him to form an intelligent and fairly accurate estimate of the actual market value of the land.

13. Evidence ⇐546

In action for specific performance of purchase option contained in lease, excluding testimony of neighboring rancher who stated that he was not an expert on land values but that he was familiar with three sales of improved land in general area, was not an abuse of discretion.

14. Appeal and error ⇐1048(2)

Where defendants produced three witnesses whose qualifications were not challenged and who testified as to value of the property, excluding the testimony of a fourth witness as to value of the property was not prejudicial.

15. Appeal and error ⇐688(1)

Where there was insufficient evidence to justify any finding that lessor was incompetent or incapable of understanding the lease, the fact appearing from the record that trial judge had himself seen lessor on a number of occasions did not establish prejudicial error, in absence of anything in the record to support conclusion that judge relied upon his own knowledge or took judicial notice thereof.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Daniel W. Sooy against Marie Kunde, also known as Mrs. Charles Louis

Kunde, also known as Mrs. Louis Kunde, and others, for specific performance of option to purchase land. Judgment for plaintiff and defendants appeal.

Affirmed.

J. N. DeMeo and M. K. Taylor, both of Santa Rosa, for appellants.

Charles Dal Sooy, of San Francisco, and John Moskowitz and Geary & Tauzer, all of Santa Rosa, for respondent.

SCHOTTHY, Justice pro tem.

This is an appeal from a judgment for the specific performance of an option to purchase 75.5 acres of land in Sonoma county.

On December 24, 1936, Marie Kunde, by an instrument in writing, leased the property in controversy to respondent for a term of thirty years at a yearly rental of $25. Included in the lease was an option to purchase said real property at any time during the term of the lease for the sum of $1,000, the recited consideration for the option being $1.

Thereafter, on February 27, 1937, Marie Kunde entered into an agreement for the sale of a larger parcel of land which included the leased property hereinbefore referred to, to her son, appellant Arthur Kunde, for the sum of $7,000. On June 27, 1944, appellant Arthur Kunde paid off the balance of $6,584.68 then due under said agreement of sale.

On August 4, 1944, respondent exercised his option to purchase said 75.5 acres by mailing letters so stating to Marie Kunde and Arthur Kunde. By a deed dated August 8, 1944, and recorded August 9, 1944, Marie Kunde conveyed to appellant Arthur Kunde the property described in said agreement of sale, including the 75.5 acres leased to respondent. Thereafter respondent filed this action against Marie Kunde, Arthur Kunde and Catherine Kunde, wife of Arthur Kunde, but Marie Kunde having died prior to the commencement of the action, the executrix of her will was substituted in her stead.

Appellants in their answer did not deny the execution of the lease by Marie Kunde but denied that she knew of the option to purchase contained therein. Appellants denied also that the option agreement was fair and reasonable and alleged affirmatively that Marie Kunde was at the time of the execution thereof an elderly woman, in ill health and without sufficient mental capacity to enable her to understand the term of said lease and particularly the option contained therein.

The trial court found that following the execution of said lease respondent entered into possession of said 75.5 acres and constructed improvements thereon of the value of $30,000; that the option to purchase was exercised by respondent on August 4, 1944; that appellants Arthur Kunde and Catherine Kunde knew of and participated in the negotiation leading up to the execution of the lease; that subsequent to the exercise of his option to purchase by respondent and the demand for a conveyance made upon her by respondent, Marie Kunde conveyed all of her interest in said premises to appellant Arthur Kunde and Catherine Kunde; that the sum of $1,000 was at the time of the execution of the lease and now is in excess of the fair and reasonable value of the property, excluding the improvements made by respondent; that no unfair advantage was taken of Marie Kunde; that she was represented by her own counsel; that she was in full possession and control of normal and mental physical powers at the time of the execution of said instrument and that she knew and understood that the lease contained an option to purchase and discussed same with appellant Arthur Kunde and her attorney, and that the lease and option agreement was just and equitable.

Appellants make a vigorous attack upon the findings and the judgment and contend that the evidence is insufficient to support them. Before discussing the specific contentions of appellants we shall summarize briefly the facts shown by the record, disregarding all conflicts in the evidence and indulging in all reasonable inferences to support the judgment.

Some time in the spring or early summer of 1936 Dr. Sooy first met Arthur Kunde and inspected the real property here involved. He learned that Marie Kunde,

Arthur's mother, owned an undivided one-half interest in the "Clark Ranch", and Arthur Kunde owned a life estate in the other one-half interest with the remainder vested in his several children, then minors. After some discussion between Dr. Sooy and Arthur Kunde about a lease of a portion of the Clark Ranch, a meeting was arranged between H. W. A. Weske, the Kunde family attorney of long standing Dr. Sooy, Marie Kunde and Arthur Kunde. At this meeting, which took place in August 1936, four months before the lease was signed, a partition of the Clark Ranch was discussed. Weske advised Dr. Sooy that Marie Kunde, widow of Charles Louis Kunde, and Arthur Kunde and Arthur's heirs had acquired the Clark Ranch from Charles Louis Kunde upon the latter's death. The interests of Arthur's minor children made a lease impractical, so the parties discussed a division of the ranch which would give Arthur Kunde and his children the valuable flat part of the ranch containing the vineyard, orchard, redwood grove and buildings, and give Marie Kunde the larger share but less desirable hill land a portion of which Dr. Sooy wished to lease. Subsequently Weske brought and concluded the friendly partition suit which effected a division of the undivided interests in the Clark Ranch, as above outlined. This was satisfactory to all parties, especially since it furthered Marie Kunde's wishes to give her son Arthur and his children the valuable part of the ranch and also because Dr. Sooy agreed to pay all the expenses of survey and the attorney's fees incurred in the partition suit. After the partition, Dr. Sooy caused a proposed lease and option to purchase to be drawn and submitted it to Arthur Kunde and Marie Kunde in a meeting held December 18, 1936 with Weske in Santa Rosa. At this meeting Weske read the proposed lease, paragraph by paragraph, in the presence of Arthur Kunde, Marie Kunde and Dr. Sooy. At this time no option price was filled in and the lease provided for the signature of both Arthur Kunde and Marie Kunde as lessors. There was a discussion of several portions of the proposed lease at this meeting of December 18, 1936. A grant of easement for telephone and power lines across the land awarded to Arthur Kunde was contained in the proposed lease and option. This was taken out of the final lease and made the subject of a separate grant of easement. The amount of the rental was set and agreed upon. There was also a discussion of certain hunting rights which Arthur Kunde wished to reserve to himself and his children in the lease. On this same day, December 18, 1936, there also was considerable discussion regarding the purchase price of the 75.5 acres to be inserted in the option provision. Arthur Kunde said $10 per acre or $755 would be about right and Dr. Sooy said the amount might well be the round figure of $1,000. Marie Kunde assented to this amount and Arthur Kunde made no objection.

After the amendments to the first draft of the lease Weske redrafted the lease and prepared the separate grant of easement. The same parties met again with Marie Kunde's attorney Weske, on December 24, 1936, at which time Weske again read the final lease and option agreement to Dr. Sooy and Marie and Arthur Kunde.

The lease and option to purchase was signed, acknowledged and delivered December 24, 1936.

The area of the entire Clark Ranch was approximately 180 acres. The portion Marie Kunde received on the partition was 128.5 acres, of which Dr. Sooy leased 75.5 acres. This 128.5 acres is the land which Arthur Kunde on February 27, 1937 agreed to purchase from his mother after the lease to Dr. Sooy was signed and recorded. The greater portion of the 53 acres of this 128.5 acres, which was not leased to Dr. Sooy, was flat tillable land, accessible to a county road and had some vineyard on it. The other portion of the Clark Ranch which was awarded to Arthur Kunde in the partition action was about 50 acres in extent and contained more vineyard, an orchard, a redwood grove and buildings.

Arthur Kunde granted Dr. Sooy an easement for power and telephone lines over his 50 acre portion of the Clark Ranch. Dr. Sooy's right of way was on the property owned by the lessor, Marie Kunde,

and was contained in the lease. The grant of easement was made at the same time and place the lease was signed.

The property at the time of the execution of the lease was unimproved country land, mostly hilly, removed from the highway, without water or other utilities, and unsuited for grazing or cultivation.

After the execution of the lease and option Dr. Sooy entered into possession and during the period of almost nine years made valuable and permanent improvements, at a total cost to him of approximately $30,000. All this work was done with the full knowledge of appellant Arthur Kunde, who raised no objection.

Other facts will be set forth in the course of this opinion.

[1] Appellants' first contention is that Marie Kunde did not realize that the option to purchase was in the lease agreement. To support their contention appellants refer to the testimony as to conversations between Arthur Kunde and respondent prior to the execution of the lease when Arthur Kunde stated that the property was not for sale because he had a life estate as to an undivided one-half interest therein. They also point to testimony that Marie Kunde later sold the property to her son and that the attorney who drew up the lease also prepared the later contract of sale. Respondent in reply cites evidence that the lease was read twice to all parties, that there was discussion by the parties as to the option price, that the lease was recorded and that prior to the execution of the lease there was a friendly suit between Marie Kunde and appellant Arthur Kunde in order that a part of the property could be sold. The evidence further shows also that Weske, the attorney who drew the lease, was Marie Kunde's attorney and had been the attorney for the Kunde family for many years. There certainly is nothing in the record to justify the assertion of appellants that Marie Kunde did not understand the transaction or that any unfair advantage was taken of her, and the findings of the trial court negativing those contentions are fully sustained by the record.

[2] Appellants next contend that the physical and mental condition of Marie Kunde was such at the time of the execution of the lease that she was unable to handle her affairs. Appellants do not contend that Marie Kunde was insane at the time but assert that her condition was such that she could not fully comprehend the transaction. Appellants point to evidence introduced by them as to paralytic strokes suffered by Marie Kunde, to her age of 71 years, and that her daughter did her bookkeeping. It must be stated that the evidence tending to show any mental incapacity of Marie Kunde is exceedingly weak and that it is contradicted by the testimony of respondent, a physician, that she was fully competent at the time. It is clear, therefore, that there is ample evidence to sustain the finding of the trial court that Marie Kunde was in full possession and control of normal, physical and mental powers at the time of the execution of said instrument and fully understood the transaction.

[3] Appellants contend also that respondent delayed too long before exercising his option. It is a sufficient answer to this contention to state that the option was exercised within the time specified in the written agreement.

[4] Appellants next contend that specific performance should be denied upon the ground that the consideration was inadequate. It is of course true that under section 3391 of the Civil Code, specific performance will be denied "If he has not received an adequate consideration for the contract." Appellants then argue that the property was worth more than the $1,000 option price on the date of the lease and is worth much more now. They point to evidence of the scenic value of the property and to evidence of their expert witnesses and of appellant Arthur Kunde that the property was worth in excess of $3,500. They concede that respondent's witnesses placed the value at less than $1,000 but assert that these witnesses assumed that there was no adequate water supply. However, there was conflicting evidence also as to the extent of the water supply, and taking the entire evidence upon the issue of the adequacy of the consideration, we can only conclude that it is highly conflicting and that the finding of the trial court that "the

sum of One Thousand Dollars ($1,000.00) * * * was at the time of the execution of the lease * * *, and it is now in excess of the fair and reasonable value of the said property, excluding the improvements made by plaintiff", finds substantial support in the record.

[5] Appellants also contend that the consideration for the option was inadequate because the rental paid for the premises was too insignificant to support a right to purchase, that it was less than the rental value of the property, and that the consideration of $1 for the option is divisible from the lease. But here again appellants are confronted with a conflict in the evidence as to the rental value of the land, and there is ample evidence to support the conclusion that at the time the lease and option were executed the land in question had little, if any, rental value in its then state.

[6, 7] The foregoing contentions of appellant deal with the asserted insufficiency of the evidence and, in urging them, appellants argue the weight of the evidence and the credibility of the various witnesses rather than the insufficiency of the evidence. Notwithstanding the apparent earnestness of counsel for appellants, we are constrained to state that such an argument is properly addressed to a trial judge whose duty it is to weigh the evidence, but that it serves no useful purpose in an appellate tribunal which may not concern itself with mere conflicts in evidence. The most casual reading of the record will show that there is ample evidence to sustain the findings of the trial court and it is elementary that when a judgment is attacked as being unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886; De Young v. De Young, 27 Cal.2d 521, 526, 165 P.2d 457.

[8] Appellants' contention that respondent has an adequate remedy because he may at the termination of his lease sue for breach of contract, is so utterly without merit as to require no comment.

[9-12] Appellants next contend that the trial court committed prejudicial error in excluding the testimony of the witness Irving Shepard as to the value of the property in controversy.

The court refused to permit the witness Shepard, who was called by appellants, to testify as to the value of the property upon the ground that he was not qualified. The witness was a rancher who lived several miles from the property in question and was the manager of the Jack London estate which borders on both sides of the property in question. The witness stated that he was not an expert on land values but that he was familiar with three sales of improved land in the general area. The trial judge, in explaining his ruling excluding the evidence, stated: "I don't understand the rule to confine it to ownership of property touching the borders of the property sold, nor did I base my ruling upon the ground that he is not the holder of a real estate license, entitling him to act as a broker or salesman. I realize that people can be expert within the purview of the law governing expert testimony without having to be owners of the property in question themselves, without having to own property touching upon its borders, and without having to be engaged in the profession involved. But here your foundation was that he had been engaged in farm management of properties in the general vicinity, that he was familiar with three sales which he had conducted himself from the properties which he had managed, and one sale of property that he had made himself, improved farm property on a county road some three miles distant, that he himself stated he didn't pretend to be a real estate expert on real estate values. In other words, that he was just a farmer in the neighborhood in general and I didn't think that he was qualified to permit the Court to properly exercise its discretion to admit the opinion evidence. I think it would be quite dangerous to do so, because the foundation laid, indicated very strongly that his principal opinion, was based upon a specific transaction. The law is quite definite in

saying that evidence of a specific transaction cannot be received as a part of the evidence in chief on proof of values, nor, by the same token, can the testimony of experts, who based their opinion on certain specific transaction. I think the ruling was correct on the basis of the foundation laid."

The determination of the qualifications of a witness to testify concerning the value of land is addressed to the trial judge and is largely subject to his sound discretion. In the absence of clear abuse of that discretion the determination of the trial judge that such a witness is or is not qualified to testify as to the value of the land in question will not be disturbed on appeal. The value of the land is essentially a question of opinion to be established by expert testimony. It is not sufficient that a farmer may have general knowledge of real estate values. He must be familiar with the market price of similar land in the same neighborhood and he should be acquainted with the property involved in the action. He should possess special knowledge regarding the particular land in question which should enable him to form an intelligent and fairly accurate estimate of the actual market value of the land.

In Vallejo & Northern R. Co. v. Reed Orchard Company, 169 Cal. 545, at page 575, 147 P. 238, 252, the court said: "The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. Fairbank v. Hughson, 58 Cal. 314. It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions on questions of fact by a trial court, his ruling thereon is a matter of discretion, and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. Howland v. Oakland etc. Co., 110 Cal. [513], 521, 42 P. 983; Mabry v. Randolph, 7 Cal.App. [421], 427, 94 P. 403."

[13] It is true, as stated by appellants, that a witness need not be an expert in the strict sense in order to be competent to express an opinion as to land values. As stated in 18 Am.Jur. at page 999: "Opinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values and are more able to form an opinion on the subject at issue than citizens generally. This rule is liberally applied in the case of farm lands, as other evidence is often not easily obtained and neighboring farmers are able to judge value with reasonable accuracy, if acquainted with the physical surroundings and the character of the soil."

But upon the record here we do not believe that the trial court abused its discretion in excluding the opinion of the witness Shepard as to the value of the land.

[14] Furthermore the record shows that appellants produced three other witnesses whose qualifications were not challenged and who testified as to the value of the property. In view of the fact that the trial was before the court without a jury it is difficult to understand how appellants could be prejudiced by the exclusion of Shepard's opinion as to value, even if such exclusion was erroneous.

[15] The final contention of appellants is that the trial court committed prejudicial error in considering his purported personal knowledge of the condition of Marie Kunde. Upon an objection to the manner of stating a question asked by the trial judge of the appellant Arthur Kunde, the judge stated: "I happen to have known this woman and I would like to examine on this score." Some of the questions which follow this remark indicate that the judge had seen Marie Kunde on a number of occasions.

Appellans cite 10 Cal.Jur. 697, sec. 24, where it is stated: "Actual knowledge by a trial judge of a fact, and that the fact is indisputable, does not justify him in taking notice thereof, unless the fact is also a matter of common knowledge."

Appellants also cite 113 A.L.R. 258, where it is stated: "Individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted

to for the purpose of supplementing the record."

The mere fact that the trial judge may have known Marie Kunde and observed her on a number of occasions does not indicate tthat he relied upon such knowledge or took judicial notice thereof and there is nothing in the record to support such a conclusion. It certainly was not necessary in the instant case for the trial judge to rely upon any personal knowledge, because we do not believe that there is sufficient evidence in the record to justify any finding that Marie Kunde was incompetent or incapable of understanding the agreement she signed.

In view of the foregoing we conclude that the record supports the findings and judgment of the trial court, that no prejudicial error has been committed and that the judgment should be and is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



80 Cal.App.2d 397

DAVIS v. RUDOLPH et al.

Civ. 13379.

District Court of Appeal, First District, Division 1, California.

June 18, 1947.

As Modified July 14, 1947.

1. Assignments ⇐123, 129

An assignee of interest in pending action has option of being substituted in action or continuing it in name of assignor and has right to control further proceedings in the action. Code Civ.Proc. § 385.

2. Abatement and revival ⇐47

Where cause of action is assigned and no substitution is asked, case will go on in name of original party as if no transfer had been made, and no application to, or action by, court is necessary. Code Civ.Proc. §§ 284, 385.

3. Attorney and client ⇐76(1)

Client has right to discharge attorney at any time except where attorney has interest in subject matter of suit, even though a contingent fee has been agreed on, or an irrevocable power of attorney given, or client is indebted to attorney for services or money advanced. Code Civ.Proc. § 284.

4. Attorney and client ⇐75(1)

Though client has absolute right to discharge attorney at any stage of proceeding, substitution of attorney of record can only be made in manner provided in code. Code Civ.Proc. § 284.

5. Attorney and client ⇐88

An attorney of record has exclusive right to appear in court for client and to control court proceedings so that neither party himself nor another attorney can be recognized by court in conduct or disposition of case. Code Civ.Proc. § 284.

6. Attorney and client ⇐75(1)

Where defendant, with knowledge that plaintiff had assigned his interest in cause for collection after his attorney had filed suit to renew unpaid judgment and that defendant had received no notice of substitution of attorneys by assignee, made no objection to substituted attorney taking full charge of proceedings, and thereafter defendant appeared with substituted attorney and stipulated that plaintiff might take judgment, defendant was estopped from claiming that substitution did not comply with code provision governing substitution of attorneys. Code Civ.Proc. § 284.

7. Assignments ⇐106

The assignee of a chose in action is under no obligation to employ attorney for assignor.

8. Attorney and client ⇐75(1)

Even if plaintiff's attorney had been given notice of substitution of attorney by plaintiff's assignee for collection of judgment, he could not have prevented assignee from selecting his own attorney. Code Civ. Proc. § 284.

9. Attorney and client ⇐75(1)

As between assignee of plaintiff's interest in cause of action after filing of suit to renew unpaid judgment and defendant, assignee's failure to formally substitute attorney for attorney originally employed by plaintiff was mere irregularity of which defendant could not complain, since assignee

had right to appeal either in his own name or that of plaintiff. Code Civ.Proc. § 284.

10. Appeal and error ⇐429

Prior to the new rule on appeal requiring notice on appeal to be signed by the attorney of record, the failure to do so would be waived by failure seasonably to object, and slight circumstances of acquiescence would show such waiver. Rules on Appeal, rule 1(a).

11. Appeal and error ⇐429

Where defendant, with knowledge that plaintiff had assigned his interest in cause for collection after his attorney had filed suit to renew unpaid judgment and that defendant had received no notice of substitution of attorneys by assignee, made no objection to assignee's substituted attorney taking full charge of proceedings and appeared with such attorney before court and stipulated that plaintiff might take judgment, defendant waived right to claim that notice of appeal was invalid because signed only by substituted attorney, who was not attorney of record. Code Civ.Proc. § 284; Rules on Appeal, rule 1(a).

12. Judgment ⇐306, 360

Where judgment, as pronounced by court, that judgment be entered in favor of plaintiff as prayed, was the correct judgment, but formal entry reducing it to writing recited that plaintiff's assignee have judgment in amount specified, such error was mere clerical misprision which should have been corrected by court below rather than by setting aside judgment for assignee. Code Civ.Proc. § 473.

13. Judgment ⇐306

A "clerical error" in a judgment which may be corrected by a nunc pro tunc order is literally one made by a clerk or some subordinate agent, but may be extended to include an error that has been made by the judge or by the court. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

14. Attorney and client ⇐76(1)
Judgment ⇐243

An attorney's remedy for wrongful discharge is by independent action against his former client, and this could not be determined in action to renew unpaid judgment prosecuted by plaintiff's assignee and such assignee's attorney not properly substituted, as required by code, for original plaintiff's attorney. Code Civ.Proc. § 284.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Action by Frank Davis against Violet Rudolph and another. Plaintiff recovered judgment against defendants. Plaintiff assigned such judgment to B. H. Freeman and or Freeman Adjustment Bureau for collection, and thereafter judgment was entered for B. H. Freeman, doing business as Freeeman Adjustment Bureau, against named defendant in the amount specified, with interest. From an order granting named defendants' motion to set aside the judgment and recall a writ of execution thereon on the ground that it was not given to plaintiff in the action, but was in favor of a stranger, the assignee thereof, Freeman, as assignee of original plaintiff, appeals.

Reversed with instructions.

Hauerken, Ames & St. Clair, of San Francisco, for Freeman, assignee.

Joseph A. Brown, of San Francisco, for Frank Davis.

Walter H. Duane, of San Francisco, for respondents.

BRAY, Justice.

This appeal arises out of a rather unusual situation. The facts are not disputed. In 1939, a judgment was recovered in the sum of $2,721.25 in favor of plaintiff Frank Davis and against Violet Rudolph and John Bell. Joseph A. Brown was plaintiff's attorney of record in that litigation. The judgment being unpaid, Attorney Brown on July 18, 1944, filed suit on behalf of plaintiff to renew that judgment. On March 1, 1946, plaintiff Davis signed an assignment to "B. H. Freeman and or Freeman adjustment Bureau" (hereinafter referred to merely as "Freeman") of his interest in the "cause now pending." This assignment was for collection, and was filed in the action on March 7, 1946. The

same day Freeman signed and filed in this action an appointment of John Langer "as my attorney in the above entitled matter." Attorney Langer, the same day, filed an affidavit for writ of attachment in the usual form, stating that he was the attorney for the assignee of plaintiff. On April 3, an answer was filed on behalf of Violet Rudolph, now known as Violet Caraway. The writ was issued and later returned unsatisfied. On April 9 a "Memorandum to Set Cause for Trial" on behalf of "B. H. Freeman, doing business as Freeman Adjustment Bureau Assignee of Plaintiff," signed by John Langer as attorney for plaintiff's assignee, was filed, bearing endorsement of receipt of copy by Attorney Duane as attorney for defendant Rudolph. On May 20 "Notice of Time and Place of Trial" also bearing receipt of notice by Attorney Duane and signed by Langer as attorney for plaintiff was filed. On June 27, Attorney Duane and Attorney Langer appeared in open court and stipulated that judgment be entered in favor of plaintiff and against the defendant Violet Rudolph, now known as Violet Caraway. The following minute order was entered: "Pursuant to stipulation entered into by and between respective counsel, it is ordered by the Court that judgment be entered herein in favor of plaintiff as prayed. Findings waived." The same day a judgment was entered, the title being "Frank Davis, Plaintiff" versus the original defendants. This judgment recited: "The above entitled cause coming on regularly to be heard * * * and John Langer, Esq., appearing as attorney for B. H. Freeman, doing business as Freeman Adjustment Bureau, assignee, of plaintiff Frank Davis, and Walter Duane, Esq., appearing as attorney for defendant, Violet Rudolph, sometimes called Violet Caraway, and defendant stipulating in open court to judgment as prayed against Violet Rudolph, sometimes called Violet Caraway. * * * It is ordered, adjudged and decreed: * * * 2. That B. H. Freeman, doing business as Freeman Adjustment Bureau have judgment against defendant Violet Rudolph, sometimes Violet Caraway, in the amount of Two Thousand Seven Hundred Twenty-One And 25/100 ($2,721.25), together with interest in the amount of Three Hundred Fifty Nine And 23/100 ($359.23), together with costs of suit in the amount of Nine and 50/100 ($9.50)." No judgment was obtained against John Bell, who was the other defendant in the original judgment, and although the title of this appeal includes him as a respondent, he actually is not a party to this appeal. It will be noted that while there had been no substitution of parties or of counsel, and the action was entitled in the original plaintiff, the judgment was ordered in favor of Freeman as assignee. On July 15 a writ of execution on that judgment was issued.

Thereafter defendant made a motion to set aside the judgment and recall the writ of execution on the ground "that the same is not given to the plaintiff in the above entitled action, but is a judgment in favor of a stranger to said action, to-wit: one B. H. Freeman * * *." The motion was heard on the affidavits of Attorney Duane and plaintiff Davis, and the testimony of Freeman. The gist of the affidavit of Attorney Duane was to the effect that when he consented to judgment against his client he believed that Attorney Langer was the attorney for plaintiff, and that the defendant wanted to pay the judgment, but required that the satisfaction of judgment be signed by Davis instead of Freeman. The affidavit of Davis was to the effect that he had assigned all his interest in the cause of action to Freeman and that the latter was "now the owner of said claim or judgment if judgment has been obtained therein." The examination of Freeman was unusual. Attorney Brown, claiming to act for plaintiff, cross-examined Freeman under section 2055 of the Code of Civil Procedure, notwithstanding that Davis, his own client, had filed an affidavit to the effect that he had assigned his interest in the judgment to Freeman and apparently did not want the judgment set aside. The long cross-examination of Freeman merely brought out the fact that the assignment was for collection, and that Freeman had known that Brown was the attorney of record for Davis in the suit, and practically added nothing that was not

already revealed by the record in the case. The court set aside the judgment and recalled the execution.

An appeal therefrom was taken by Freeman as assignee of plaintiff Davis. The appeal is resisted by the defendant and also by Attorney Brown who signs as "Attorney for Frank Davis" (not *plaintiff* Frank Davis).

The position of appellant Freeman is that the court had no power to set aside the judgment, as no motion was made under section 473. The answer of respondent to this is that the judgment was void on its face, because the stipulation for judgment upon which it was based was void, in that Attorney Langer had no standing in the court below, not being attorney of record, and his client Freeman not having been substituted as a party of record. Respondent for the same reason claims that appellant Freeman has no standing on this appeal.

The position of Attorney Brown is that the action below was "a manifest attempt * * * to frustrate the rights of a licensed attorney at law by a collection agency * * *." It is apparent that the real contest here is between Attorney Brown and Freeman. In his brief Attorney Brown avoids mentioning the position taken by his client Davis as well as the affidavit signed by Davis. In his brief, appears this language: "The facts of this case, as Frank Davis understands them *by and through his attorney, Joseph A. Brown* * * *." (Emphasis added.)

Defendant contends that she wants to pay the judgment but is afraid to pay the assignee, in spite of the fact that Davis, at the hearing of the motion to vacate the judgment, filed an affidavit that Freeman was the now owner of the judgment. A payment to Freeman would certainly protect defendant as against Davis.

All the questions raised by both defendant and Attorney Brown depend upon, first, the validity of the stipulation for judgment, and secondly, the effect of the action of the court in signing the judgment. If that judgment is completely void, then Freeman has no standing here, and the court's action setting it aside must be affirmed. If, on the other hand, the judgment was a mere irregularity, a different situation results.

[1] There is no claim made that Davis did not assign his interest to Freeman. An assignee of an interest in a pending action has the option of being substituted in the action or continuing it in the name of his assignor (Sec. 385, Code Civ.Proc.; Culley v. Cochran, 107 Cal.App. 525, 290 P. 484), and the assignee has the right to control the further proceedings in the action. Culley v. Cochran, supra; Harlan Douglas Co. v. Moncur, 19 Cal.App. 177, 124 P. 1053.

[2] "* * * if no substitution is asked for, the case will go on in the name of the original party, as if no transfer had been made; and to have it do so, no application to or action by the court is necessary." Cleverdon v. Gray, 62 Cal.App.2d 612, 616, 145 P.2d 95, 97, quoting from Malone v. Big Flat Gravel Mining Co., 93 Cal. 384, 28 P. 1063.

[3] It is well settled that a client has a right to discharge his attorney at any time, except where the attorney has an interest in the subject matter of the suit, even though a contingent fee has been agreed upon, or an irrevocable power of attorney given, or the client is indebted to the attorney for services or money advanced. 3 Cal. Jur. 628; O'Connell v. Superior Court, 2 Cal. 2d 418, 41 P.2d 334, 97 A.L.R. 918.

[4] While the client has an absolute right as above set forth to discharge his attorney at any stage of the proceeding, the substitution of an attorney of record can only be made in the manner provided in section 284, Code of Civil Procedure. 3 Cal.Jur. 639.

[5] "It is settled that the attorney of record has the exclusive right to appear in court for his client and to control the court proceedings, so that neither the party himself [citing cases], nor another attorney [citing cases] can be recognized by the court in the conduct or disposition of the case." Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 42, 152 P.2d 625, 628.

[6] Assuming that the action of Attorney Langer was irregular in proceeding in

the case without a formal substitution of attorneys, however, the question arises as to whether the defendant under the circumstances here can raise these questions. Is she not estopped to do so? Defendant knew of the situation as to Freeman and Attorney Langer. She knew that there was no substitution of attorneys or parties. After the assignment and the appointment of Langer as attorney for Freeman as assignee were filed, Attorney Langer filed an affidavit for attachment and a writ was issued. Defendant filed its answer and presumably served a copy on Attorney Langer. Thereafter defendant received a memorandum to set the cause for trial in which it stated that Freeman as assignee was filing the memorandum to set. Later defendant received from Attorney Langer a notice of time and place of trial. Not only did the defendant with full knowledge of what the record disclosed and of the fact that she had received no notice of substitution of attorneys, make no objection to Attorney Langer taking full charge of the proceedings in the case, but thereafter defendant appeared in court with Attorney Langer and made this statement: "I am stipulating that plaintiff may take judgment." In view of that situation how can defendant raise the question of the lack of substitution of attorneys? Had the judgment been entered in favor of plaintiff as stipulated, rather than in favor of the assignee, defendant could in no wise complain. While the proceedings by an attorney not of record might be irregular, still defendant was not injured thereby. As was held in Gill v. Southern Pacific Co., 174 Cal. 84, 87, 161 P. 1153, referring to a proceeding for substitution of attorneys, defendant had no direct interest therein.

Defendant's only interest is to be protected in the payment of the judgment which she professes she is ready and willing to pay. Had she paid the assignee under the judgment as entered, she would have been fully protected, for as soon as Davis made the assignment, Davis lost all control of the action. Davis makes no claim as against Freeman, and even tried to help Freeman by signing the affidavit before mentioned.

Actually, Freeman is not a stranger to this action. He is the owner of the cause of action and of the judgment intended to be rendered, and the one who has the full control of the proceedings. Also it is not a case where facts were concealed either from the court, the defendant, the plaintiff, or the attorney for plaintiff. All had knowledge of the fact that Freeman as assignee had taken full charge of the proceedings and appointed his own attorney to carry them on.

[7-9] The position of the defendant is somewhat contradictory. She moved to set aside the judgment on the ground that Freeman was a stranger to the action; yet on the hearing defendant without objection acquiesced in the action of Attorney Brown in putting Freeman on the stand and cross-examining him under section 2055 of the Code of Civil Procedure, expressly claiming that he was a "party to the record." Attorney Brown's position, too, is anomalous. Although his client wanted the judgment to stand, Attorney Brown joined forces with the defendant to get the defendant relieved from the judgment. Attorney Langer appeared for the assignee, who had the right to conduct the proceedings without further regard to the plaintiff. Also, the testimony shows that after the assignment was made, Attorney Brown informed Freeman that he would not represent him. Davis had the right to assign the judgment to Freeman; Freeman had the right to select his own lawyer, and had Freeman been formally substituted as plaintiff, Freeman could have appointed Langer as his attorney without a formal substitution. The assignee of a chose in action is under no obligation to employ the attorney for the assignor. Even had Attorney Brown been give notice of substitution he could not have prevented Freeman from selecting his own attorney nor could the claims of Attorney Brown against his client Davis be determined in this action. Overell v. Overell, 18 Cal.App.2d 499, 503, 64 P.2d 483. Under these circumstances, the failure of Freeman who was carrying on the proceedings in plaintiff's name to get a formal substitution of attorneys was a mere irregularity, as to which the defendant cannot complain, nor can he raise objection to Langer as attorney for Freeman carrying on this appeal, nor to the fact that the notice of appeal was by Freeman as assignee. As between de-

fendant and the assignee, who has the right to appeal either in his own name or that of the plaintiff, the failure to formally substitute is a mere irregularity of which defendant cannot complain.

[10, 11] Under our former rule (now changed by Rule 1(a) of the new Rules on Appeal, see Estate of Hultin, 29 Cal.2d 825, at page 832, 178 P.2d 756) requiring that a notice of appeal be signed by the attorney of record, it was nevertheless held "the failure so to do is *a defect which may be waived by the adverse party by failure seasonably to object thereto, and that slight circumstances of acquiescence are sufficient to show such waiver.*" Starkweather v. Eddy, 196 Cal. 73, 75, 235 P. 734. Emphasis added. In that case the attorney of record was Attorney Cook, who filed the original answer in the court below. An amendment to the answer not signed by any one as attorney for defendant, but which was written upon the stationery of Attorney Davis, was thereafter filed, bearing an endorsement acknowledging receipt of copy by counsel for plaintiff. An Attorney Dadmun associated with Attorney Davis tried the case. The findings of fact recite that the defendant was present at the trial with Dadmun, his attorney, and that a certain stipulation was entered into in open court by and between the attorneys for the respective parties. The opening brief was signed by Davis and Dadmun as attorneys for defendant and appellant, and bore an admission of service by counsel for plaintiff. The last-named attorneys obtained from plaintiff's counsel a stipulation extending time to file their reply brief. The court said, "* * * there is no room for doubt that he [plaintiff] has waived his right to have it [the rule abovementioned] applied to the present case."

In McDonald v. McConkey, 54 Cal. 143, the appeal was taken by an attorney not the attorney of record in the court below. The circumstance that respondent's attorney joined with him in certifying to the transcript was held sufficient to show such waiver. Respondent's acceptance of service of notice of appeal without objection was held sufficient to show such waiver in the following cases: Withers v. Little, 56 Cal. 370; Livermore v. Webb, 56 Cal. 489; Bashore v. Lamberson, 36 Cal.App. 233, 171 P. 968. To the same effect as to a notice of intention to move for a new trial, see Smith v. Smith, 145 Cal. 615, 79 P. 275; see also 30 Cal.L.Rev. 441.

"A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudication of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; *if the other party has notice of his participation, the other party is equally bound.*" Restatement, Judgments, sec. 84, p. 390; emphasis added.

The same rule set forth in the foregoing cases concerning appeals and motions for new trial must under the peculiar circumstances of this case be held to apply to the proceedings in the court below. Defendant by her conduct in acquiescing in the actions of Attorney Langer has waived her right to object to those actions.

[12] This brings us to the next question in the case, as to whether the judgment was void or merely a clerical misprision which should have been corrected by the court below rather than by setting aside the judgment. The stipulation was that *plaintiff* take judgment. The minute order was that "judgment be entered herein in favor of plaintiff as prayed." Thus the judgment as pronounced by the court was the correct judgment. It was only the formal document reducing that judgment to writing that is incorrect. It was held in Mann v. Haley, 45 Cal. 653, 654, where the names of some of the plaintiffs were omitted in the judgment, that the proper proceeding was for the court to amend the judgment and not to vacate it.

"Rendition and entry are separate acts and different in their nature. The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A

judgment is not what is entered, but what is ordered and considered." Freeman on Judgments, vol. 1, sec. 46, p. 75.

Freeman on Judgments, vol. 1, sec. 145, p. 281: "All courts have inherent power, independent of statute, to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered." (Page 283.) "The power extends to expunging in toto a mistakenly entered judgment and substituting the true one though exactly to the contrary. * * * It is immaterial in what the inaccuracy consists or how far the entry deviates from the judgment rendered."

In determining what are clerical errors (page 284.) "* * * 'clerical' is employed in a broad sense as contra-distinguished from 'judicial' error and covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In other words, the distinction does not depend so much upon the person making the error as upon whether it was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel or by the judge.

(Page 291) "* * * a judgment has been amended by inserting the names of the members of the partnership where their firm name only had been stated, and to show that it is against the members of a partnership rather than a corporation.

"Errors are not infrequently made with respect to the parties involved in the litigation, usually by the clerk in entering the judgment, in which event they are of course subject to correction. They may, however, be due to the judge or court and if they are inadvertent and not the result of judicial determination and discretion they may likewise be amended.

"Where through such mistake and inadvertence, whether of the clerk or court, the judgment is for the plaintiff instead of the defendant, or vice versa, as where the words 'plaintiff' and 'defendant' have been inadvertently interchanged, the error is regarded as clerical and may be amended. So where a judgment has, through such mistake or inadvertence, included a party who should have been excluded, or excluded a party who should have been included, it may be corrected by amendment to include or exclude such person, as the case may be."

(Page 295) "Where a party sues or is sued in one capacity only, whether individual or representative, judgment obviously should ordinarily be for or against him in that capacity and no other. Any departure from this rule would usually seem to be due to mistake of the clerk or inadvertence of the court, and where this is the fact the judgment or the record thereof may be corrected in this respect as a clerical error. This principal has been applied to a judgment against an executor or administrator personally when it should have been against him in his representative capacity, and vice versa, and likewise to judgments in favor of such persons when plaintiffs."

In City and County of San Francisco v. Brown, 153 Cal. 644, 649, 96 P. 281, 283, the court ordered judgment of nonsuit in favor of defendants and against plaintiff. Thereafter defendants presented to the clerk a judgment granting the nonsuit and also decreeing that the defendant Brown was the owner and entitled to the possession of the land involved in the case. On motion the court set aside this judgment on the ground that the entry of the judgment was a clerical error. "We cannot perceive how any claim that the entry of the judgment was judicial is maintainable. *There was no error in the judgment as rendered. The error was entering a different judgment from that which the court had ordered.* The entry of the judgment was a matter with which the court had nothing to do. It was a ministerial act to be performed by the clerk, and his duty was to enter only such judgment as the court had rendered." (Emphasis added.)

In Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491, a decision in favor of plaintiff was announced by the court and entered in the minutes in favor of Carrie A. Beach, the original plaintiff. Substitution of Samuel Crim as successor in interest of plaintiff Beach had been theretofore filed in the case. Subsequently the court made an order nunc pro tunc that

" 'Samuel Crim, the successor in interest of the plaintiff herein, be, and he is hereby, substituted as the plaintiff in this action, and that this action continue in his name as such plaintiff, in the place and stead of Carrie A. Beach, plaintiff therein.' " (89 Cal. at page 482, 26 P. at page 1074, 23 Am.St.Rep. 491) "All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself, or at the instance of any party interested in the matter." (89 Cal. at page 486, 26 P. at page 1076, 23 Am.St.Rep. 491) "Under the system of practice which prevailed in this state prior to the adoption of the codes in 1872, findings were not essential to the entry or validity of a judgment, (Prac.Act, § 180;) and under that system it was held that the entry in the clerk's minutes of the decision as announced by the court constituted the 'rendition of the judgment,' Gray v. Palmer, 28 Cal. 416; Genella v. Relyea, 32 Cal. 159. But under the provisions of the Code of Civil Procedure, whenever findings are required, there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system. In the case of Cook v. Cook, which was under consideration by this court in Estate of Cook, 77 Cal. 220, 17 P. 923, 19 P. 431, [1 L.R.A. 567, 11 Am.St. Rep. 267], the defendant, after service of the summons upon him, made default, and the referee to whom the matter had been referred to take the necessary proofs having made his report, the court upon the hearing thereof made an order, which was then entered in its minutes, decreeing a divorce between the parties to the action; and this court held that, inasmuch as, in case of a default, findings are not required, the entry in the minutes constituted the 'rendition of the judgment.' "

In Dreyfuss v. Tompkins, 67 Cal. 339, 7 P. 732, 733, a verdict found that plaintiff was the owner of the property described in the complaint and entitled to its return, or if a return could not be had, then for a money judgment. The clerk merely entered up a judgment for costs. The case was appealed to the Supreme Court, where the judgment and order were affirmed. After the remittitur was filed in the court below plaintiff moved to amend the judgment to provide that plaintiff was the owner of the property described and if a return could not be had for a money judgment.

"It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered. Swain v. Naglee, 19 Cal. 127; Freeman on Judgm., §§ 70, 71. And this may be done even after an appeal and affirmance of the judgment. Rousset v. Boyle, 45 Cal. 64.

"In this case the error complained of appeared on the face of the record, and it was the duty of the court to correct it on motion. The judgment and order should be affirmed."

In Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561, the suit was by plaintiffs as administrator and administratrix with the will annexed of the estate of the deceased. The judgment as entered gave judgment to the plaintiffs individually. After motion for new trial was made, the court corrected the judgment by including the representative capacity of the plaintiffs. It was held that this was a clerical mistake which could be corrected at any time. "It does not follow that it was not a clerical error because the judgment is signed by the judge." 124 Cal. at page 576, 57 P. at page 564.

In Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530, 531, after the case had been appealed and the judgment affirmed by the Supreme Court, it was discovered that the name of one of the defendants had been omitted from the judgment. The court corrected the judgment by adding the name of this defendant, "Dairy Delivery Company, Inc." This ac-

tion was upheld by virtue of the inherent authority of a court to make its records speak the truth.

In Benway v. Benway, 69 Cal.App.2d 574, 159 P.2d 682, a nunc pro tunc order was made correcting the interlocutory decree of divorce by adding an approval of the agreement settling property rights and custody of the children. It was there held (69 Cal.App.2d at page 579, 159 P.2d at page 684): "The great weight of authority is to the effect that a court may, at any time, and with or without notice, or on its own motion, correct a judgment by a nunc pro tunc order so as to make the judgment as entered conform to the *judicial decision* actually made." The court then goes on to say that *the signing of the judgment is merely a ministerial act to which the signature of the judge gives no additional validity.* To the same effect, Crim v. Kessing, supra, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; Takekawa v. Hole, 170 Cal. 323, 149 P. 593; In re Cook's Estate, 77 Cal. 220, 17 P. 923, 19 P. 431, 1 L.R.A. 567, 11 Am.St.Rep. 267.

[13] As said in Estate of Goldberg, 10 Cal.2d 709, 715, 76 P.2d 508, 511, "Ordinarily, although originally and in its literal significance, a 'clerical error' is one that has been made by a clerk or some subordinate agent, latterly the meaning has been broadened and extended so that it now may include an error that may have been made by the judge or by the court."

On the power of the court to amend its judgment to conform to the judgment pronounced, see 49 C.J.S., Judgments, § 236, p. 447, and sec. 237, p. 449; 14 Cal. Jur. p. 991, sec. 70; p. 993, sec. 71; p. 995, sec. 72. Section 473 of the Code of Civil Procedure provides: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, *so as to conform to the judgment or order directed* * * *." (Emphasis added.)

Since submission, respondent has called our attention to Mortimer v. Acquisition etc. Dist., No. 36, 79 Cal.App.2d 404, 180 P.2d 355, 356, which, however, is not in point here. That was a suit against Acquisition and Improvement District No. 36 of San Diego County. The county of San Diego was included as a defendant, but under a fictitious name. The county appeared by its true name and admitted that the defendant district held certain sums awaiting judicial determination of the proper payee. The complaint was not amended to show the county's true name, nor was any judgment given against the county. On appeal the district contended that the judgment was void "because taken against a party which has no legal capacity to sue or be sued and therefore is not such a legal entity as will permit a judgment to operate against it." Respondent admitted this contention, but urged that the county of San Diego (sued as Corporation One) was the real party in interest operating under the name of the district, and asked the appellate court to order "the complaint and the judgment 'amended as of a date prior to the entry of the judgment to express the true circumstances.'" The court held that it was without power to order the judgment amended by the substitution of the county of San Diego as judgment debtor in place of the district, and ordered the case remanded for a new trial on the question as to whether the county and the district compose one legal entity so as to entitle respondent to a judgment against the county "at which time the trial court may permit such amendments to the pleadings, findings and judgment as it sees fit." There was no contention made that the court had inadvertently signed a wrong judgment, nor any similarity between that case and the one at bar.

For the reasons hereinbefore set forth it is not necessary to discuss the cases cited by both defendant and Attorney Brown to the effect that a judgment in favor of a person not a party to the record is a nullity and void.

[14] If the judgment is corrected to follow the stipulation, the judgment rendered by the court and the minute order, both parties to this appeal are protected. Freeman, as assignee, owns the judgment, although it be rendered in the name of the original plaintiff. The original plaintiff, Davis, cannot complain (nor is he doing

so) as a judgment against defendant has been obtained, on payment of which, by defendant, his assignee for collection will account. Defendant cannot complain as such a judgment would meet the situation mentioned in her brief: "* * * counsel for respondents stipulated in open Court that plaintiff may take judgment and we abide by that stipulation and are ready and willing to pay the same when a valid judgment is rendered in favor of plaintiff, or at any time that plaintiff will execute a good and sufficient satisfaction of judgment." And "It will be seen from the foregoing that it was intended by the stipulation that plaintiff should have judgment." Nor can Attorney Brown complain. His client has obtained the thing that Attorney Brown started out to get for him, namely, a judgment against the defendant. Attorney Brown is fully protected in that his right to compensation for services rendered and for his wrongful discharge, if it be wrongful, is by an independent action against his former client. Echlin v. Superior Court, 13 Cal.2d 368, 90 P.2d 63, 124 A.L.R. 719. "* * * the attorney's remedy for a wrongful discharge is by an independent action." 13 Cal.2d at page 373, 90 P.2d at page 661, 124 A.L.R. 719. See also Wright v. Security First Nat. Bank, 13 Cal.2d 139, 88 P.2d 125. "In the event his discharge is improper or without just cause, adequate remedies are available to the attorney by which he may seek reimbursement for such services and outlays on behalf of the client." O'Connell v. Superior Court, 2 Cal.2d 418, 421, 41 P.2d 334, 335, 97 A.L.R. 918. While Attorney Brown claimed in the proceedings below that Freeman was a party for purposes of cross-examination under section 2055 of the Code of Civil Procedure, he now claims that he is not a party.

Attorney Brown is not a party to the proceeding, nor does he represent the original plaintiff as plaintiff. The brief filed by him only purports to represent Davis as an individual and not as a plaintiff, and as pointed out before is contrary to the expressed position of Davis as shown by his affidavit at the hearing of the motion to vacate the judgment.

Under the unusual circumstances of this case, justice will be best served by the simple procedure of correcting the formal judgment to conform to the judgment as rendered by the court.

The order vacating the judgment and recalling the writ of execution is reversed, and the trial court is instructed to correct the judgment in accordance with the views expressed herein. In the interests of justice, each party shall bear his own costs on this appeal.

PETERS, P. J., and WARD, J., concur.

30 Cal.2d 268

EASTERN COLUMBIA, Inc., v. WALDMAN.

L. A. 19878.

Supreme Court of California, In Bank.

June 13, 1947.

1. Trade-marks and trade-names and unfair competition ⇐97

Where plaintiff had used the trade name "Eastern Columbia" and acquired property rights and good will therein and the use of the name "Western Columbia" in defendant's business misled the public and would result in passing off of defendant's product as those of plaintiff's, and use of the name "Western Columbia" was found to have been with intent to infringe plaintiff's trade name right without any commercial necessity for defendant to use the name, defendant was absolutely enjoined from using the words "Western Columbia".

2. Trade-marks and trade-names and unfair competition ⇐97

Where words have acquired a fanciful meaning unconnected with their common meaning and are the subject of the good will and reputation of a business which they designate, little, if anything, distinguishes them from a trademark, a symbol, characters, or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to one who has the prior right is concerned, and such trade names are treated in the same category as trademarks where use of the words by a competitor is not necessary to describe the competitor's product.

3. Trade-marks and trade-names and unfair competition ⇐97

Use of a trade name may be absolutely enjoined where the user's conduct is unlawful.

4. Trade-marks and trade-names and unfair competition ⇐97

Injunction restraining use of another's trade name may be absolute or qualified depending upon the circumstances and it may enjoin all dominative use of the infringing use leaving defendant free to use it non-denominatively, or it may enjoin even a non-denominative use which is likely to lead to confusion, and conversely, it may permit a denominative use when it is accompanied by effective precautions to avoid confusion, it may enjoin only certain uses without mentioning those permitted or it may expressly state what uses are permitted and what precautions are to be taken by the defendant.

5. Trade-marks and trade-names and unfair competition ⇐97

In determining the scope of an injunction for infringement of a trade name, the manner in which the plaintiff is harmed, the possible means by which that harm can be avoided, justification advanced for defendant's conduct, inconvenience that would be caused to defendant by each of the several means of avoidance and their effects upon competition between goods of the plaintiff and those of defendant are generally important factors.

6. Trade-marks and trade-names and unfair competition ⇐97

Infringement of a trademark does not necessarily call for a broader injunction than does infringement of a trade name but in assigning values to the factors considered in determining the scope of the injunction, the differences between a trademark and a trade name are to be taken into account.

7. Trade-marks and trade-names and unfair competition ⇐97

Where defendant's use in his business of his own name or name of place in which his goods are manufactured is claimed to infringe plaintiff's trade mark or trade name an absolute injunction may not be necessary to afford plaintiff adequate protection, and appropriate relief may be given by injunction permitting defendant to continue use of the name but requiring the taking of precautions against deception of prospective purchasers, but if the name is not that of defendant or of the place in which his goods or their ingredients are produced, an absolute injunction is appropriate.

8. Trade-marks and trade-names and unfair competition ⇐100

Scope of injunction against infringement of a trade name was a question of law where the ultimate facts were undisputed,

and the Supreme Court could determine the question without regard to the conclusion of the trial court.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Unfair competition action by Eastern Columbia, Inc., a corporation, against Jules Waldman, doing business under the name of Western Columbia, and Jules Waldman, individually. From the judgment, the plaintiff appeals.

Affirmed as modified.

Prior opinion, 175 P.2d 934.

Benjamin, Lieberman & Elmore, of Los Angeles, for appellant.

Hugh B. Rotchford, of Los Angeles. for respondent.

CARTER, Justice.

Plaintiff is a corporation and it and its predecessors have been engaged for many years in the retail merchandising business in Los Angeles, including the handling of furniture, wearing apparel and household equipment under the trade name of "Eastern," "Columbia," and "Eastern-Columbia." The corporation bearing the latter name resulted from a merger of Eastern Outfitting Company and Columbia Outfitting Company. The two predecessors acquired a right in the names "Eastern" and "Columbia" respectively, and since 1939, plaintiff has used the trade name "Eastern Columbia" and acquired property rights and good will therein.

In 1944 defendant commenced in Los Angeles a retail furniture upholstery and decorating business under the name of Western Columbia Decorators. Thereafter defendant dropped the word "Decorators" from his business name and has continued under that name to conduct a retail furniture and household appliance business. The trial court found that the use by defendant of that name is "misleading, confusing and deceptive to the public generally; that it has, does and will, lead the public into believing that in dealing with defendant at his said place of business it is and will be dealing with plaintiff and that plaintiff is conducting a branch store at defendant's said place of business; that the use and appropriation of said trade name by defendant in connection with his said business constitutes unfair competition and already has and will continue to result in irreparable damage to plaintiff."; that defendant used the name "with the express design and purpose of defrauding plaintiff, its customers and patrons, and the public generally, and with the express design and purpose of appropriating for his use and benefit the good will and business and reputation of the plaintiff and to divert the same from the plaintiff to the defendant; that the appropriation and use by the defendant of the word "Columbia" in combination with the word "Western" as his trade name is similar and identical to the use of the word "Columbia" in combination with the word "Eastern"; that in visual appearance and sound the appropriation and use of the combination of words "Western Columbia" suggests the words "Eastern Columbia" and constitutes unfair competition and that the same is inequitable and unjust and constitutes a fraud upon the public and will cause injury to the plaintiff's business and good will."

Injunctive relief was awarded plaintiff restraining defendant "from using, in any manner, the words Western Columbia alone as the name or designation of his business" and "from using, in any manner, the words Western Columbia as the name or designation of his business, jointly or in conjunction with any other word or words, unless such other word or words shall be of the same size type or lettering, and of the same design or style, as the words Western Columbia."

Plaintiff appeals from the decree, asserting it is improperly limited in its scope and that defendant should have been enjoined from using "Western Columbia" as the name of his business either alone or in combination with other words.

[1] The findings establish that the plaintiff owns the trade name of "Eastern Columbia"; that the use of the words "Western Columbia" by defendant in his business, misleads and deceives the public and invades plaintiff's right in that trade name;

that the defendant used such words with the intent of impairing and infringing upon plaintiff's trade name right and defrauds it and the public; that the use of the words "Western Columbia" will confuse and deceive the public and result in a passing off as plaintiff's business. Under these circumstances it is difficult to find any justification for permitting defendant to use those words at all in his business whether alone or in conjunction with other words. There is no commercial necessity for him to use them. They are not necessary to describe his business or the products he sells such as there might be if they had other than a fanciful meaning with no geographic significance. The court found that they had acquired a fanciful rather than a geographic meaning. If, as the court found, they are deceptive and misleading, it is apparent that they would continue to be so even though used in conjunction with other words descriptive of the business. It would accomplish nothing to enjoin defendant from making a use of the words which would deceive the public, and then permit such use. That is precisely what the court did in the case at bar. Practical relief should have been given. It is obvious that the requirement that subject matter be added to the words in question to the effect that there was no connection between the two businesses would be ineffective. It would be fraught with the practical danger of abuse in the many and varied ways that the words are used in a business such as advertising, answering telephone calls and the like.

[2-4] It is asserted by defendant that an absolute injunction will not be granted for the infringement of the right to use a word in what is called a "secondary meaning" as distinquished from a technical trademark. Where words have acquired, as is established beyond dispute in this case, a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background. Otherwise no right to use them to the exclusion of others would have been acquired. When, however, words have acquired such a sense and are the subject of the good will and reputation of a business which they designate, there is little if anything left to distinguish them from a trademark, a symbol, characters or words which have no common meaning and which are artificial, insofar as the scope of protection afforded to the one who has the prior right. An absolute injunction is proper where defendant's conduct is unlawful. (Callmann, Unfair Competition and Trade Marks, Vol. 2, pp. 1501, 1502.) The protection afforded trade names which have acquired the status here reached is treated in the same category as trade marks, where it is not necessary that the competitor use the words to describe his product. (See, Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412, 413, 36 S.Ct. 357, 60 L.Ed. 713; U-Drive-It Co. v. Wright & Taylor, 270 Ky. 610, 110 S.W.2d 449; Pecheur Lozenge Co. v. National Candy Co., D. C., 36 F.Supp. 730, reversed 3 Cir., 122 F.2d 318, vacated 315 U.S. 666, 62 S.Ct. 853, 86 L.Ed. 1103; Cleo Syrup Corp. v. Coca-Cola Co., 8 Cir., 139 F.2d 416, 150 A.L.R. 1067; Derenberg, Trademark Protection and Unfair Trading, p. 335; Rest., Torts, § 717 et seq.; 53 Har. L.Rev.1289; 30 Cal. L.Rev. 168, 183, 184.) An injunction may be granted restraining defendant from infringing plaintiff's trade name and "The injunction issued under the rule stated in this Section may be absolute or qualified. Its scope depends upon the circumstances of the case. It may enjoin all dominative use of the infringing designation, leaving the defendant free to use it non-denominatively. Or it may enjoin even a non-denominative use which is likely to lead to confusion. And, conversely, it may permit a denominative use when it is accompanied by effective precautions to avoid confusion. It may only enjoin certain uses without mentioning those permitted or it may expressly state what uses are permitted and what precautions are to be taken by the defendant. * * *

[5, 6] "In the determination of the scope of the injunction, the manner in which the plaintiff is harmed, the possible means by which that harm can be avoided,

the justification advanced for the defendant's conduct, the inconvenience that would be caused to the defendant by each of the several means of avoidance and their effects upon the competition between the goods of the plaintiff and those of the defendant are generally important factors. Thus, if the defendant acted in good faith, or if plaintiff's goods are sold in a market of expert buyers who subject the goods and their marks to careful inspection, or if absolute prohibition of defendant's conduct would prevent legitimate competition by him with the plaintiff, the scope of the injunction may be narrower than when the converse of these conditions exists. Infringement of a trade-mark does not necessarily call for a broader injunction than does infringement of a trade name; but the differences between a trade-mark and a trade name are to be taken into account in assigning values to the foregoing factors.

[7] "d. Personal and geographical names and descriptive words. Typical instances of the use of the qualified injunction are found in cases in which the defendant's use in his business of his own name or the name of the place in which his goods are manufactured is claimed to infringe the plintiff's trade-mark or trade name. In such cases the defendant has good reason to use the name and an absolute injunction may not be necessary to afford the plaintiff adequate protection. Appropriate relief may therefore be given by an injunction which permits the defendant to continue the use of the name but requires him to take precaution against deception of prospective purchasers by accompanying the name with a distinguishing legend or by other appropriate means. If, however, the name is not that of the defendant or of the place in which his goods or their ingredients are produced, there is no reason for the defendant's use of the name in the face of any danger of deception, and an absolute injunction is appropriate." (Rest., Torts, § 744, com. c-d.)

[8] It is urged that the scope of the injunction was a subject for the exercise of the trial court's discretion and there is no showing of abuse here. Whether a permanent injunction should issue becomes a question of law where the ultimate facts are undisputed and in such a case the appellate court may determine the issue without regard to the conclusion of the trial court. (Thompson v. Moore Drydock Co., 27 Cal.2d 595, 165 P.2d 901; Richards v. Dower, 64 Cal. 62, 28 P. 113; Isert v. Riecks, 195 Cal. 569, 234 P. 371; Carolina Pines, Inc., v. Catalina Pines, 128 Cal.App. 84, 16 P.2d 781.)

The judgment is therefore modified by striking therefrom the words "unless such other word or words shall be of the same size type or lettering, and of the same design or style, as the words Western Columbia," and as so modified, is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



30 Cal.2d 362

PEOPLE v. SLOBODION *

Cr. 4783.

Supreme Court of California.

June 24, 1947.

1. Criminal law ⇐1081

On motion to dismiss appeal from conviction of felonies for failure to file notice of appeal within statutory period, evidence warranted finding that notice of appeal was deposited in regular mail process of penitentiary within statutory period, but due to failure of such processes to function properly was not actually mailed until several days later. Rules on Appeal, rule 31.

2. Appeal and error ⇐356
Criminal law ⇐1069(6)

The time requirements for taking an appeal are mandatory both in civil and criminal cases, and appellate courts are without jurisdiction to consider an appeal taken after expiration of the statutory period. Rules on Appeal, rule 31.

* Subsequent opinion 186 P.2d 177.

3. Criminal law ⇐1081

Defendant's delivery of notice of appeal to state prison employees for mailing six days prior to expiration date for taking of appeal was constructive filing within the prescribed time limit, notwithstanding that prison employees negligently delayed in mailing notice until after expiration date. Rules on Appeal, rule 31.

4. Criminal law ⇐1104

Defendant's motion in reviewing court to compel trial court reporter to prepare the reporter's transcript of trial would be deemed abandoned where the transcript had meanwhile been filed.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

John Slobodion was convicted of two felonies, and he appeals. On respondent's motion to dismiss the appeal.

Motion denied.

Prior opinion, 176 P.2d 937.

William H. Quinn, of Oakland, for appellant.

Robert W. Kenny and Fred N. Howser, Attys. Gen., Clarence A. Linn, Asst. Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Respondent's motion to dismiss the appeal herein is before this court upon hearing granted after decision by the District Court of Appeal, First Appellate District, Division One. 176 P.2d 937. The motion is made upon the ground that the notice of appeal was filed too late. Appellant counters with the claim that the particular circumstances shown by the record in this case are such as to preclude dismissal of his appeal. We are of the opinion that appellant's position is well taken.

The following chronology is admittedly correct:

June 11, 1946–appellant was found guilty of two felonies.

June 13, 1946–judgments upon the verdicts were pronounced.

June 15, 1946–appellant was received at San Quentin Penitentiary.

June 28, 1946–clerk of the superior court received through the mails and filed appellant's notice of appeal from the judgments. The notice was postmarked San Quentin, June 27, 1946, and the prison records disclose that the document was in fact mailed that day.

Rule 31 of the Rules on Appeal (22 Cal.2d 1, 22) provides that "an appeal [in a criminal case] may be taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment." Here the clerk received appellant's notice of appeal on June 28, 1946, rather than on June 23, 1946—"fifteen days" rather than "ten days" after the rendition of the judgments. Respondent cites these dates as determinative of the tardiness of appellant's appeal and so requiring its dismissal.

In opposition to respondent's motion to dismiss in the District Court of Appeal, appellant—appearing there in propria persona—filed an affidavit reciting that he had in fact deposited the notice of appeal in the mail box at San Quentin as early as June 17, 1946, and that the failure to have the notice placed in the United States mail until June 27, 1946, was the fault of the prison employees. Counter-affidavits were filed by two prison employees in contradiction of certain averments made by appellant. By reason of such conflict, the District Court of Appeal appointed Hon. Andrew R. Schottky, Judge of the Superior Court of the County of Mariposa, referee to ascertain the true facts. Thereupon Judge Schottky held a hearing at San Quentin, at which appellant, the two employees in question, and a deputy attorney general were present.

At the hearing appellant testified that on June 17, 1946, he dropped the letter containing his notice of appeal in the prison mail box; that on the night of June 20, 1946, it was returned to him by the mailman without explanation; that on the next morning, June 21, 1946, he went to the mailing department and talked with William F. Kehoe, the sergeant in charge of the mail; that Mr. Kehoe, in appellant's

presence, interrogated several persons in an effort to determine why the letter had been returned; that no one seemed to know; that appellant told Mr. Kehoe of the nature of the document and the importance of having it mailed at once; that Mr. Kehoe took the letter and promised to "take care of it"; that appellant did not know of the subsequent mailing delay until the reporter refused to prepare the transcript on appeal. Not one word of appellant's testimony was contradicted by the two employees involved. Mr. Kehoe testified that he had no recollection of talking with appellant about the notice of appeal, but added that he was always so busy in the mailing department that he could not remember the various conversations with the inmates there; that while he did not recall the conversation with appellant, it may have occurred and he "wouldn't say it did not take place"; that all legal documents had to be cleared with the warden before they could be mailed; that the records of the prison do not show when documents are received from the inmates, but only show when they are in fact mailed after clearing with the prison officials; that on June 23, 1946, he went on his vacation; and that he could not explain why the document was retained and not mailed sooner, but it might take "one day or a week" for clearance with the warden. John W. Short, the Assistant Parole and Classification Officer, an employee of the prison who apparently discusses legal problems with the inmates and with whom appellant stated that he talked about the matter of his appeal, also testified. He stated that his record showed that an interview with appellant had taken place on the date mentioned by appellant, but that he had no recollection at all of what was discussed other than the general subject of appellant's right of appeal; that he was probably in error in his statement as to the contents of his conversation with appellant as recited in his affidavit previously filed in the District Court of Appeal "in opposition to issuance of record" pursuant to appellant's notice of appeal; and that he would not deny that the conversation had taken place as described by appellant.

On this evidence Judge Schottky found that "in view of the clear testimony of appellant and the indecisive and unsatisfactory testimony of the other two witnesses and after having heard the testimony and observed the witnesses as they were testifying, I must find that the evidence preponderates in favor of the statement of appellant Slobodion that he did deposit his notice of appeal in the regular mail processes of San Quentin Penitentiary on June 17th, 1946, and certainly not later than June 21st, 1946. I do not believe that there was any desire or intention on the part of any of the employees at San Quentin to deprive appellant of his right of appeal but that in some manner the ordinary and usual processes of receiving and sending out mail failed to function in this particular case."

[1] From the above review of the record of Judge Schottky's hearing, it is apparent that his finding in accord with appellant's "clear and positive testimony" is not only amply supported, but no other finding reasonably could have been made—and respondent so concedes. Accepting then such factual point of agreement, there remains this question for consideration: Should appellant—who was incarcerated by the state, who desired to appeal, who took every step he could possibly take to perfect his appeal, who delivered his notice of appeal to the prison authorities well within the statutory period with the request that they mail it but they carelessly and negligently failed to forward the notice so that it would be received by the "clerk of the superior court" within the time limitation specified by law—be deprived of his right of appeal? Both reason and justice compel a negative answer.

[2] Respondent cites the settled rule in this state, both in civil and criminal cases, that the time requirements for the taking of an appeal are mandatory, and that the appellate courts are without jurisdiction to consider an appeal which has been taken subsequently to the expiration of the statutory period. Estate of Hanley, 23 Cal.2d 120, 122, 123, 142 P.2d 423, 149 A.L.R. 1250, and cases there cited; People v. Lewis, 219 Cal. 410, 413, 414, 27 P.2d 73, and cases there cited. But adherence to this rule will not deprive appellant of his appeal under the distinct factual situation involved.

Here appellant, by reason of his imprisonment and desiring to appeal in propria persona, was wholly dependent on the prison employees for effecting the actual filing of his notice of appeal within the prescribed time. Without direct access himself with the "clerk of the superior court" wherein the judgments were rendered against him, appellant acted promptly in the only channel open to him in protection of his right of appeal—depositing his notice of appeal in the regular mail processes of San Quentin Penitentiary on June 17, 1946, in ample time to permit the prison employees to forward the notice in the United States mail so that it would reach the clerk by June 23, 1946, "ten days after the rendition" of the judgments against appellant—but the actual filing was made on June 28, 1946, five days late because the prison employees delayed in mailing the notice until June 27, 1946. In short, the situation presents these considerations: the state by law imposed the conditions governing the taking of an appeal; appellant incarcerated in a state institution was forced to comply with the state prison rules, which included the censoring of all communications of the inmates prior to mailing and which in the case of legal mail might require "one day or a week" before clearance was had; and the notice in question failed to reach the "clerk of the superior court" for actual filing within the prescribed time, not through any fault on the part of appellant but solely as the result of the negligence of the state's employees. In such circumstances no other conclusion is tenable but that appellant, by placing his notice in the hands of the state's employees for mailing six days prior to the final day allowed for its actual filing, met the time requirements governing his right of appeal insofar as it was possible for him to do so. Obviously, he was powerless to prevent any delay which might ensue after he delivered in prison his notice of appeal to the state employees for forwarding; any tardiness then occurring was attributable wholly to the state's employees. It would be absurd to hold in a criminal case that the state may extend the right of appeal contingent upon timely pursuit thereof and then deny such fundamental right because the state's employees were remiss in complying with the state's law. Such a paradoxical result would have no legal justification, and so it must be said here that when appellant timely deposited his notice of appeal with the state's employees as required by the state prison rules, such action constituted a constructive filing of the specified notice.

[3] Respondent calls attention to the rule, prevailing in both civil and criminal cases, that filing means actual delivery to the clerk at his place of business during office hours. Thus, in W. J. White Co. v. Winton, 41 Cal.App. 693, 694, 183 P. 277, it was held that "the appeal was not seasonably taken" where the notice was left at the clerk's office after closing hours on the last day allowed by law; and in People v. Englehardt, 28 Cal.App.2d 315, 82 P.2d 489, the same result was reached where the notice was left with the wife of the clerk at his home after office hours on the expiration date for taking the appeal. Likewise depositing the notice in the mail is not a filing, and it has been expressly held that section 1013 of the Code of Civil Procedure, providing that in case of service by mail the service is complete at the time of deposit, has no application to a notice of appeal. McDonald v. Lee, 132 Cal. 252, 64 P. 250; Estes v. Chimes, 40 Cal.App.2d 41, 104 P.2d 74. But these cases present no parallel considerations, for in each instance the failure to lodge the notice with the clerk in his office within the time limited by statute was the appellant's own fault. Also distinguishable in principle is the case of Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am.St.Rep. 68, where the so-called "disability" which prevented the appellant from complying with the appeal requirements was in nowise connected with any negligence on the part of employees of the state. While in perfecting his appeal "a convicted defendant serving a term of imprisonment in the state prison has no greater or additional rights because he is acting as his own attorney than if he were represented by a member of the bar" (Frey v. Superior Court, 5 Cal.App.2d 534, 536, 43 P.2d 342, 343), neither on the same basis will he be deemed to have fewer rights. So it is here that the state's failure, through its em-

ployees, to function in protection of appellant's exercise of his right of appeal, will not deprive him of such right after he has timely performed, as far as the state allows, all the steps required by the state law in perfection of his appeal. Accordingly, we hold that appellant's delivery of his notice of appeal to the state prison employees for forwarding six days prior to the expiration date for the taking of his appeal constituted a constructive filing within the prescribed time limit and satisfied the jurisdictional requirement as contemplated by law. Any other conclusion would run counter to the case of Cochran v. State of Kansas, 316 U.S. 255, 62 S.Ct. 1068, 1069, 86 L.Ed. 1453, where the Supreme Court of the United States declared that the claim that "officials of the state penitentiary enforcing prison rules there in effect had suppressed appeal documents [an inmate] had prepared, thereby making it impossible for him to perfect an appeal" during the time provided by the Kansas statute (316 U.S. at page 256, 62 S. Ct. at page 1070, 86 L.Ed. 1453), presented a situation involving "a violation of the equal protection clause of the Fourteenth amendment" of the Federal Constitution, in that "Kansas [would be refusing such inmate] privileges of appeal which it afforded to others." 316 U.S. at page 258, 62 S.Ct. at page 1070, 86 L.Ed. 1453.

[4] The record further discloses that while this matter was pending in the District Court of Appeal, appellant filed a motion to compel the trial court reporter to prepare the reporter's transcript of his trial. Since the transfer of this matter to this court for decision, the desired reporter's transcript has been filed here. Accordingly, appellant's motion to compel such action can serve no useful purpose and it may be deemed abandoned.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion, but since the rule announced therein is directly contrary to two recent decisions of this Court (Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, and People v. Lewis, 219 Cal. 410, 27 P.2d 73), I believe, for the sake of consistency and uniformity in the law, these cases should be overruled.

This case presents the simple issue of whether a person loses his right to appeal when the notice of appeal is filed late due to no fault on his part. There is no basis whatsoever for declaring one rule for civil cases and another for criminal cases, and as I read the majority opinion it does not attempt to make any such artificial distinction, although it is said therein: "It would be absurd to hold in a *criminal case* that the state may extend the right of appeal contingent upon timely pursuit thereof and then deny such fundamental right because the state's employees were remiss in complying with the state's law." [Emphasis added.] Why a criminal case is mentioned is hard to grasp. It would be equally absurd in a civil case.

This case presents one of the absurd results (denial of the right of appeal) which necessarily flows from the rule stated in Estate of Hanley, supra, and People v. Lewis, supra. In my dissenting opinion in Estate of Hanley, supra, I called attention to the absurd results which would flow from the rule there announced. That case holds (or states by way of dictum) that there are *no circumstances whatsoever which will save a person from losing his right of appeal in either a civil or criminal case where the notice is filed late.* See 17 So.Cal.L.Rev. 91. The Estate of Hanley, supra, is a civil case and it is there said (23 Cal.2d at page 122, 142 P.2d at page 424, 149 A.L.R. 1250): "In examining the appellant's position, it *is immaterial* whether the misrepresentations concerning the date upon which the order was filed *were wilful or inadvertent, whether the reliance thereon was reasonable or unreasonable,* or whether the parties seeking to dismiss are acting in good faith or not. *It may be assumed that the appellant has presented grounds for relief which would be sufficient if relief could be granted.* But the require-

ment as to the time for taking an appeal is mandatory, and the court is *without jurisdiction* to consider one which has been taken subsequent to the expiration of the statutory period. (Citations.) In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal (citation), even to relieve against mistake, inadvertence, accident, or *misfortune*. (Citations.) Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver. (citations) If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made." [Emphasis added.] In People v. Lewis, supra, a criminal case, it is said (219 Cal. at page 414, 27 P.2d at page 74): "The time for filing notice of appeal cannot be extended by stipulation or *other action of the parties* to the proceeding, or by order of the court. See cases cited, supra. The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice." [Emphasis added.]

Those cases in announcing that doctrine *stand practically alone in the United States*. See 149 A.L.R. 1261, note on Estate of Hanley; 32 Cal.L.Rev. 84. In fact in this state we have the well reasoned case of Moyle v. Landers, 78 Cal. 99, 106, 20 P. 241, 245, 12 Am.St.Rep. 22, where this court said:

"To allow this motion [the motion to dismiss where the delay in filing the notice was due to the fraud of respondent] to prevail under such circumstances, would be a *travesty on justice, and bring the administration of the law into just reproach.*

"We are met with the claim, on the part of the respondents, that this is a purely jurisdictional question; that this court can only obtain jurisdiction in the way provided by law; and that it cannot be conferred by the consent or voluntary submission of the parties; and, in support of this contention they cite Bonds v. Hickman, 29 Cal. [461], 462; Judson v. Love, 35 Cal. [463], 466; Shartzer v. Love, 40 Cal. [93], 96; Reed v. Allison, 61 Cal. [461], 465.

"As we have already said, the rule stated in these cases must be conceded to be the true one, but in our judgment they do not meet the case presented here.

"There was no question of fraud in either of the cases cited. The appellant simply failed to take the necessary steps to perfect the appeal, and in one of the cases there was a stipulation that the notice had been given, but this was contradicted by the certificate of the clerk and affidavit. We think it may very properly be questioned whether an express stipulation of the parties, waiving the steps necessary to perfect an appeal, or that such steps have been taken, made in good faith, should not be binding upon them, and confer jurisdiction. Hayne New Trial, & App. § 210, p. 642, and cases cited.

"But this is not the question before us. The question here is whether parties who have fraudulently prevented the service of the notice, by the concealment of material facts, and a failure to enter their objection to the jurisdiction of the court at the proper time, and, for the fraudulent purpose of preventing the proper service of the same, have delayed making their objection until it was too late to remedy the defect, should not now be estopped to attack the notice given, or to question the jurisdiction of the court.

"We are of the opinion that the respondents should not now be heard to question the jurisdiction of this court for the want of the service of a proper notice of appeal, under the circumstances of this case." [Emphasis added.]

The case at bar demonstrates the absurd results that may flow from the doctrine of the Estate of Hanley. Here we do not even have any fraud or intentional misconduct on the part of the state's employees. They were *merely negligent* in transmitting the notice of appeal to the clerk of the Superior Court. The situa-

tion is not distinguishable from that presented in the Estate of Hanley, yet a different result is reached. While I agree with that result, it is diametrically opposed to the Estate of Hanley, and that case must be overruled. Otherwise the decisions of this Court are inconsistent, and the law is in a state of hopeless confusion. The majority of this Court in the Estate of Hanley sought to ameliorate the dire consequences which would flow from the pronouncement of a rule that would result in a "travesty on justice" by suggesting that the injured party could seek equitable relief, a wholly inadequate remedy, as I pointed out in my dissent in that case. In the case at bar it must be and is admitted that such remedy is wholly useless, thus overruling, but silently, the Estate of Hanley on this phase of the problem.

The majority opinion does not discuss the effect of the late filing of a notice of appeal as depriving the appellate court of jurisdiction to hear the appeal. This was the basis of the decisions of this Court in People v. Lewis, supra, and Estate of Hanley, supra; that is, that unless a notice of appeal is filed within the time prescribed by statute, the appellate court lacks jurisdiction to hear and determine the cause, and that this is true regardless of the reason or cause for the failure to file such notice with the Superior Court. The gist of the majority opinion appears to be that where a notice of appeal in a criminal case is delivered to an employee of the state for filing within the time prescribed by statute for such filing, such delivery will be considered constructive filing. I cannot agree with this line of reasoning. In effect it makes every state, county and city employee, with whom a defendant may come in contact, a deputy county clerk, as the notice must be deemed filed when it is delivered to him. This is indeed a fiction which is equally as absurd as the reasoning in the Lewis and Hanley cases and may lead to just as dire consequences. No authority is cited in support of this unique theory, and I am sure none can be found. To my mind a much sounder theory on which to base the decision would be to hold that when the failure to file a notice of appeal is the result of fraud, mistake, inadvertence or neglect on the part of the adverse party and there is no negligence or lack of diligence on the part of the appellant, the time to file the notice of appeal is extended and the appellant loses no rights thereby. This is the general rule and is supported by a wealth of authority (See, 149 A.L.R. 1261, and 32 Cal.Law Rev. 84) including the two dissenting opinions in Estate of Hanley, supra.



30 Cal.2d 274

In re WUNDERLE'S ESTATE.

DI PAULO v. WITTMER et al.

L. A. 19710.

Supreme Court of California.

June 24, 1947.

1. Appeal and error ⇐786, 801(4)

Generally, if disposition of motion to dismiss appeal requires a consideration of the appeal on its merits, motion must be denied, but an appellate court has inherent power to dismiss an appeal where an examination of the judgment roll demonstrates that appeal is frivolous.

2. Wills ⇐371½

Where proponent's motion to dismiss contestant's appeal from order admitting former will to probate was based on same ground as was urged by proponent as justifying an affirmance of order admitting will to probate, in that contestant was not an aggrieved party, and an examination of the judgment roll did not establish that appeal was frivolous, motion to dismiss the appeal was not well taken.

3. Appeal and error ⇐329

Intervener's motion to intervene as an appellant came too late, where it was not made until after respondent's reply brief and notice of motion to dismiss appellant's appeal had been filed. Code Civ. Proc. § 387.

4. Wills ⇐359

An executor or executrix named in a will may properly prosecute an appeal from an order revoking the probate of the will.

5. Wills ⇐386

In a will contest, an appellate court is not bound by a construction of a document based solely on the terms of the written instrument without the aid of extrinsic evidence, where there is no conflict in the evidence, or a determination has been made on incompetent evidence.

6. Wills ⇐130

An holographic will must be dated by the testator. Probate Code, § 53.

7. Wills ⇐130

Recourse may not be had to a date appearing in body of an alleged holographic will in order to meet statutory requirement that an holographic will must be dated by the testator, if the date in body of instrument was not intended by testator to serve as date of instrument. Probate Code, § 53.

8. Wills ⇐72

No particular words are necessary to show a testamentary intent, but it must satisfactorily appear from the document offered as the last will that the decedent intended, by the paper itself, to make a disposition of his property after his death in favor of the party claiming thereunder.

9. Wills ⇐98

In the law of wills "integration", as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will.

See Words and Phrases, Permanent Edition, for all other definitions of "Integration".

10. Wills ⇐98

There is "incorporation by reference" when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designed to accomplish that purpose.

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporation by Reference".

11. Wills ⇐98

The requisites of a valid incorporation by reference in a will are that the incorporated document must be clearly identified and in existence at the time will makes reference to it.

12. Wills ⇐130

The omission of a testamentary intent or of a date from an otherwise valid holographic will is not supplied by a separate document or letter, when there is nothing to indicate that the second document is to be read or construed as part of the holographic will. Probate Code, § 53.

13. Wills ⇐130

An undated written memorandum in testator's handwriting stating that testator's will of December, 1939, was void, "as a new will was made on April 22, 1943" and that testator's sister was the sole heiress of all testator's possessions, was void for lack of a date, and the lack of a date was not supplied by the reference to the new will made on April 22, 1943, since the reference to that date was made merely to refer to and identify the formal will which testator had signed. Probate Code, § 53.

14. Wills ⇐130

Where there was nothing in language of testator's dated letter to his sister, or alleged holographic will stating that such sister was his sole heiress, to indicate that testator intended them, as read together, to be his will, or that it was his purpose to incorporate one of them into the other, the date on the letter could not be used to supply the statutory requirement that an holographic will bear a date. Probate Code, § 53.

15. Wills ⇐179

Where subsequent formal will and subsequent alleged holographic will were void because not executed with necessary statutory formalities, they did not void prior formal will which was executed with statutory formalities. Probate Code, §§ 53, 72–74.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding in the matter of the estate of Konstantin Wunderle, deceased, wherein Marion Di Paulo filed a petition for probate of a written memorandum as an holographic will or deceased, and wherein Fred R. Wittmer filed a petition for probate of a formal will. From an order admitting the formal will to probate, Marion Di Paulo, opposed by Fred R. Wittmer and Ben H. Brown, appeals, and Fred R. Wittmer moves to dismiss the appeal, and Ida Pieper moves to intervene as an appellant.

Motions to dismiss appeal and to intervene denied, and order admitting formal will to probate affirmed.

Myer B. Marion and Eugene L. Wolver, both of Los Angeles, for appellant.

Krag & Sweet and David T. Sweet, all of Alhambra, for respondents.

EDMONDS, Justice.

Three persons who were named in testamentary instruments made by Konstantin Wunderle are asserting rights to the property of his estate, and the appeal is from an order of the probate court admitting one of these documents to probate as his last will and testament. Certain procedural questions in connection with a motion to intervene and a motion to dismiss the appeal are also presented for decision.

In December, 1939, Wunderle made and duly executed a formal will, leaving 80% of his property in equal shares to his sister, Ida Pieper, and Bertha Rothlisberger. The remainder of his estate was left to Fred R. Wittmer. On April 22, 1943, the decedent signed what purports to be a formal will giving everything he owned to Ida Pieper and naming Marion Di Paulo as executrix. Concededly, however, this instrument was not executed and attested in accordance with the statutory requirements, and it has not been offered for probate.

A few days later Wunderle wrote the following letter to his sister:

"Los Angeles, Calif 3, May 1943
"My dear sister Ida!

"Yours and Marg. letters thankfully received. Enclosed, the copy of my Testament the way I promised and have held it. Everything else I have discussed with you of importance. My wish is, for your own good, to come to me when my health starts to fail. You can see by the copy, A Wittmer in the Testament is not mentioned. A letter is ready for Mr. Wittmer, which you shall hand to him when my eyes are closed forever. I am sorry that you are having trouble with your teeth, stay well so you can enjoy my possessions. I wouldn't like if Mr. Wittmer would find out about my testament. Hope and wish that it remains a secret as long as I live. It wasn't necessary that you caused yourself trouble to send the smoke meat, it shows your thoughtfulness. The next time I will send Marg. a letter. From Fritzi, in San Jose, I also received word. Sorry I have to stop writing as I am starting to get nervous. Next time more, regards as always as well as to the family.

"Your Konstantin."

With this letter Wunderle enclosed a copy of the testamentary document of April 22d.

Shortly after the death of Wunderle, Marion Di Paulo, named as executrix in the formal testamentary document of 1943, filed a petition for the probate, as an holographic will, of an undated written memorandum reading as follows: "The following lines declare that my will of December, 1939, is null and void, as a new will was made on April 22, 1943. Various reasons caused me to do that. Mrs. Ida Peiper is the sole heiress of all my possessions. Mrs. Ida Peiper will be in the house and live there after my death. 1200 No. Hazard Ave. For all favors rendered me by you, thanks. Konstantin Wunderle, Pasadena." The record discloses no evidence showing that this memorandum was either enclosed with, or attached to, the letter or the copy of the formal instrument which was sent to Ida Pieper, or that it is the letter referred to by Wunderle as "ready for Mr. Wittmer".

Three days after this petition was filed, Wittmer, who is named as executor in the instrument executed in 1939, petitioned for its admission to probate. The Public Administrator then requested letters of administration. Following a hearing, the 1939 document was admitted to probate as the last will of Wunderle and the petitions of Mrs. Di Paulo and the Public Adminis-

trator were denied. Her appeal is from that order.

No extrinsic evidence was introduced by either party in regard to Wunderle's testamentary intentions. The testimony relates entirely to the execution of the will which was admitted to probate and the genuineness of the memorandum offered by Mrs. Di Paulo.

The appellant takes the position that the date "April 22, 1943" mentioned in the memorandum written by Wunderle meets the statutory requirement that an holographic will must be "dated and signed by the hand of the testator himself." Prob. Code, sec. 53. But if that date was used for reference only, she asserts, either the date of the invalid formal will or the date of the letter to Ida Pieper supplies the necessary testamentary date. She also claims that the instruments disclose a testamentary intent. Another proposition advanced by her is that, by the letter, Wunderle republished and redated his holographic will. She also complains of the exclusion from evidence of certain documents.

In support of the order of the probate court, Wittmer insists that the memorandum written by Wunderle was not dated by him and, for that reason, is invalid. Moreover, it does not contain the requisite testamentary intent. He also maintains that Mrs. Di Paulo is not a party aggrieved by the order and, for that reason, she is not entitled to prosecute an appeal. A motion to dismiss the appeal upon the latter ground was thereafter made by him and is now pending. Ida Pieper, a beneficiary under the will admitted to probate and the testamentary instrument which is relied upon by the appellant, has moved for leave to intervene and become an appellant in this proceeding.

[1] Considering, first, the procedural questions, if the disposition of a motion to dismiss requires a consideration of the appeal upon its merits, the motion must be denied. Estate of Sayles, 212 Cal. 437, 438, 298 P. 971; Christin v. Story, 211 Cal. 381, 382, 295 P. 515; Pacific States Savings & Loan Co. v. Mortimer, 70 Cal.App.2d 811, 813, 161 P.2d 684. However, there is an exception to this general rule. An appellate court has inherent power to dismiss an appeal where an examination of the judgment roll demonstrates that the appeal is frivolous. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 457, 274 P. 748; Sonoma Magnesite Co. v. National Magnesite Products Corp., 189 Cal. 433, 434, 208 P. 962; Pacific States Savings & Loan Co. v. Mortimer, supra, 70 Cal.App. 2d p. 813, 161 P.2d 684.

[2] In the present case, the motion to dismiss is based upon the same ground as is urged by Wittmer as justifying an affirmance of the order of the probate court, namely, that Mrs. Di Paulo is not an aggrieved party. The appellant argues that she is entitled to prosecute the appeal because the holographic document incorporates, by reference, the testamentary document of 1943 and is therefore valid. This argument clearly involves a determination of the case upon its merits. Certainly, from an examination of the judgment roll it may not be said that the appeal is frivolous. A ruling upon the motion, therefore, requires an examination of the briefs and the reporter's transcript for the purpose of determining the validity of the documents offered for probate and consequently, Mrs. Di Paulo's right to appeal. In fact, the notice of motion declares that the motion "is based upon the file, Reporter's Transcript on Appeal, Appellant's Opening Brief, and papers filed herein." Under these circumstances, the motion to dismiss the appeal is not well taken.

[3] Turning to the second procedural question, section 387 of the Code of Civil Procedure, which authorizes the intervention of a third party in a pending action or proceeding, expressly provides that the motion shall be made "before trial". A motion to intervene after judgment has been entered will be denied. Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009; Kelly v. Smith, 204 Cal. 496, 501, 268 P. 1057. Ida Pieper did not move to intervene until after the respondent's reply brief and the notice of motion to dismiss the appeal had been filed. It was then too late for her to seek to become a party to the proceeding.

[4, 5] An executor or executrix named in a will may properly prosecute an appeal from an order revoking the probate of the will. Estate of Collins, 174 Cal. 663, 664, 164 P. 1110; Estate of Higgins, 158 Cal. 355, 358, 111 P. 8; Estate of Webster, 43 Cal.App.2d 6, 20, 110 P.2d 81, 111 P.2d 355. Upon the merits of the controversy, an appellate court is not bound by a construction of a document based solely upon the terms of the written instrument without the aid of extrinsic evidence, where there is no conflict in the evidence, or a determination has been made upon incompetent evidence. Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 827, 167 P.2d 719, 164 A.L.R. 685; Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. Therefore, the validity of the holographic instrument must be determined entirely by reference to the applicable statutes and principles of law.

[6, 7] "A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. * * *" Probate Code, sec. 53. Although the tendency of both the courts and the legislature has been toward greater liberality in accepting a writing as an holographic will (see Estate of Durlewanger, 41 Cal.App.2d 750, 752, 107 P.2d 477), this tendency "has never been stretched to excuse lack of substantial compliance with the statutory requirement that an holographic will must be dated by the testator." Estate of Carpenter, 172 Cal. 268, 269, 156 P. 464, 465, L.R.A.1916E, 498. And recourse may not be had to a date appearing in the body of an alleged holographic will if, obviously, the date was not intended by the testator to serve as the date of the instrument. Estate of Schiffman, 16 Cal.App.2d 650, 652, 61 P.2d 331.

[8] No particular words are necessary to show a testamentary intent but it must satisfactorily appear from the document offered as the last will and testament that the decedent intended, by the very paper itself, to make a disposition of his property after his death in favor of the party claiming thereunder. Estate of Button, 209 Cal. 325, 331, 287 P. 964; Estate of Kelleher, 202 Cal. 124, 129, 259 P. 437, 54 A.L.R. 913; Estate of Branick, 172 Cal. 482, 484, 157 P. 238; Estate of Pagel, 52 Cal.App.2d 38, 44, 125 P.2d 853, 856. A case in which the facts are similar to those shown by the present record is Estate of Pagel, supra, where it was held that a letter written by the deceased lacked the necessary testamentary intent. The court said: "* * * the decedent made it perfectly clear by the language used in his letter that he did not intend the letter to act as a posthumous declaration, but on the contrary stated he desired that his posthumous disposition narrated in his letter should be declared in a last will and testament."

[9] In considering whether the documents offered by Mrs. Di Paulo may be construed together to supply the omission of the date or testamentary intent, several rules must be taken into consideration. In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. Estate of Francis, 191 Cal. 600, 601, 217 P. 746; Estate of Clisby, 145 Cal. 407, 409, 78 P. 964, 104 Am.St.Rep. 58; Estate of Taylor, 126 Cal. 97, 100, 58 P. 454; Estate of Bauer, 51 Cal.App.2d 636, 638, 124 P.2d 630; Estate of Swendsen, 43 Cal.App.2d 551, 555, 111 P.2d 408; see Atkinson on Wills, secs. 139, 143; 16 Cal.L.Rev. 154, 155. Thus several writings, connected by sequence of thought (Estate of Swendsen, supra; Estate of Johnston, 64 Cal.App. 197, 221 P. 382), folded together (Estate of Merryfield, 167 Cal. 729, 141 P. 259) or physically forming one document (Estate of Clisby, supra; see, Estate of Skerrett, 67 Cal. 585, 8 P. 181), have been admitted to probate as constituting an holographic will.

[10, 11] On the other hand, there is incorporation by reference when one of the writings is a complete testamentary instrument, and refers to another document in a manner clearly designed to accomplish that purpose. Simon v. Grayson, 15 Cal.2d 531, 533, 102 P.2d 1081; Estate of Clumel, 151

Cal. 77, 79, 90 P. 192, 121 Am.St.Rep. 100; see Atkinson on Wills, secs. 142, 143; 16 Cal.L.Rev. 155. The requisites of a valid incorporation by reference are that the incorporated document must be clearly identified and in existence at the time the will makes reference to it. Simon v. Grayson, supra, 15 Cal.2d p. 533, 102 P.2d 1081; Estate of Bauer, supra, 51 Cal.App. 2d p. 638, 124 P.2d 630; Estate of Martin, 31 Cal.App.2d 501, 505, 88 P.2d 234.

[12] More directly applicable to the present case is the rule that the omission of a testamentary intent or of a date from an otherwise valid holographic will is not supplied by a separate document or letter, when there is nothing to indicate that the second document is to be read or construed as part of the holographic will. Estate of Keith, 173 Cal. 276, 278, 159 P. 705; Estate of Bauer, supra, 51 Cal.App. 2d p. 638, 124 P.2d 630; Estate of Goldsworthy, 54 Cal.App.2d 666, 672, 673, 129 P. 2d 949; Estate of Swendson, supra, 43 Cal. App.2d p. 555, 111 P.2d 408; Estate of Maguire, 14 Cal.App.2d 388, 390, 58 P.2d 209; Estate of Anthony, 21 Cal.App. 157, 162, 131 P. 96. And the date of an holographic will may not be supplied by one not in the handwriting of the testator. Prob.Code, sec. 53; Estate of Towle, 14 Cal.2d 261, 93 P.2d 555, 124 A.L.R. 624; Estate of Bower, 11 Cal.2d 180, 78 P.2d 112; Estate of De Caccia, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393; Estate of Clark, 55 Cal.App.2d 85, 129 P.2d 969.

By several decisions, it has been held that the date of an holographic will may be that which is stated in another portion of the same document. For example, in Estate of Skerrett, supra, a copy of a deed of gift and an undated letter, both in the handwriting of the testator, were attached and addressed to the testator's sister. The deed was invalid because it was not delivered. The court held that the letter and the copy of the deed together constituted a valid holographic will. In reaching this conclusion it was said: "The instrument * * * should have been admitted. It was written entirely by the hand of the deceased, it was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitutes a will; the one is not testamentary in its character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character." 67 Cal. 588, 8 P. 183; see, also, Estate of Hartley, 181 Cal. 469, 184 P. 950; Estate of Olssen, 42 Cal.App. 656, 184 P. 22.

In Estate of Swendsen, supra, an holographic will was written on two separate pieces of paper, but only one of them was dated. Although the papers were not attached, and it was not apparent from looking at them that they were connected in any way, both were admitted to probate upon the testimony of two witnesses quoting the testator as declaring that the two pieces of paper constituted his will.

However, when there is nothing to indicate an intention of the testator that the handwritten instruments be construed together, such as the papers being physically attached, or extrinsic evidence tending to prove such a purpose, the courts have refused to allow the lack of a date or testamentary intent in one document to be supplied by another totally disconnected instrument. Thus, in Estate of Anthony, supra, two letters addressed to different individuals were relied upon as constituting a valid holographic will. The court held that the omission of the month from the date of a letter, testamentary in character, was not supplied by the date in the other letter, apparently written upon the same day, which was not testamentary in character and did not refer to the first letter so as to incorporate it. And in Estate of Bauer, supra, it was valid that where only one of several letters written by the testator was dated, the undated ones were not admissible as an holographic will when there was nothing to indicate that they were to be read or construed as a part of the dated writing.

Upon the question of construing separate handwritten instruments together in order to supply testamentary intent, Estate of Keith, supra, is in point. The court there refused to admit a letter, unsigned and

addressed to the executor named in an admittedly valid holographic document, to probate; although it was found inclosed in the envelope containing the valid holographic will and to which it was attached by a clamp. This holding was based upon a consideration of the intention of the testator as shown by the language of the documents themselves and by extrinsic evidence.

[13] Applying these rules to the instruments in question, the handwritten instrument is void for lack of a date. In stating "that my will of December, 1939, is null and void, as a new will was made on April 22, 1943 * * *", the testator clearly did not intend "April 22, 1943" to be the date of his memorandum. That date was used only for the purpose of referring to and identifying the formal testamentary instrument which he had signed.

[14] Nor do the other documents supply the requirement of a date for the holographic memorandum. There is nothing in the language of the letter to Mrs. Pieper, or the memorandum, to indicate that Wunderle intended them, as read together, to be his will, or that it was his purpose to incorporate one of them into the other. The letter referred to one "ready for Mr. Wittmer", but does not identify the undated handwritten message as having been prepared for him. The memorandum includes no statement concerning the letter, and the record discloses no evidence to show that the undated message was either enclosed with, or attached to, the other documents sent to Mrs. Pieper by the testator. No evidence, other than the documents themselves, was introduced or received in evidence to show the intention of the testator in this regard. Furthermore, the lack of a date in the undated handwritten message may not be supplied by the integration or incorporation of the invalid formal will because the date in the instrument of April 22, 1943, is not in the handwriting of Wunderle.

Also, it does not appear from the letter that Wunderle, by that paper, intended to make a testamentary disposition of his property. Considering the manner in which the invalid document of April 22, 1943, was referred to, it is clear that the testator intended to dispose of his property by the invalid formal will rather than by the letter. Nor may the intent be supplied by the other documents. Assuming the undated memorandum discloses the necessary testamentary intent, there is nothing in the record to show that the testator intended that the letter and message be construed together as forming his will. The formal will may not be used to supply the letter with the requisite testamentary intent because the formal document is not in the testator's handwriting. And if the letter of May 3d was not a valid testamentary document, such as an holographic will or a codicil, it could not incorporate or have the effect of republishing or redating the other documents.

[15] For these reasons, it may not seriously be contended that the will admitted to probate was voided by the subsequent documents, because none of them was executed with the necessary statutory formalities. Probate Code, secs. 72, 73, 74. This conclusion makes it unnecessary to consider any other question presented by the parties.

The motions to dismiss the appeal and to intervene are denied, and the order admitting to probate the will dated December 5, 1939, is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

30 Cal.2d 356

PEOPLE v. CODINA.

Cr. 4778.

Supreme Court of California, in Bank.

June 24, 1947.

1. Infants ⇐20

Information charging commission of a lewd and lascivious act upon person of a minor, gave defendant sufficient notice that he was charged with contributing to delinquency of a minor, and failure to add in explicit language the obvious effect that the act tended to cause or encourage minor to become a lewd person, did not affect its sufficiency. Welfare and Institutions Code, §§ 700(k), 702; Pen.Code, §§ 952, 960.

2. Indictment and information ⇐47

An information is not insufficient by reason of any defect or imperfection in matter of form, so long as no substantial right of defendant is prejudiced upon the merits. Pen.Code, § 960.

3. Criminal law ⇐1186(4)

Where information attempted to charge contributing to delinquency of a minor and charged commission of a lewd and lascivious act upon person of minor, failure to add specifically that act tended to cause or encourage minor to become a lewd person, if error, was harmless where trial proceeded as though allegation were there and jury was properly instructed as to the elements necessary to be proven before a conviction could be had. Pen.Code, § 960; Const. art. 6, § 4½.

4. Criminal law ⇐878(3)
Indictment and Information ⇐128

Each count of an information must stand on its own merits and be weighed separately from the other counts in its disposition under statute permitting information to charge different statements of same offense under separate counts and providing that a verdict of acquittal of one or more counts is not an acquittal of any other count. Pen.Code, § 954.

5. Criminal law ⇐878(4)

Under statute, an acquittal of count charging lewd and lascivious conduct upon a minor in information framed on theory that the same lewd and lascivious conduct violated statute making such conduct a felony and also the statute prohibiting contributing to the delinquency of a minor, did not render a nullity a verdict of guilty on count charging contributing to delinquency of a minor. Welfare and Institutions Code, §§ 700, 702; Pen.Code, §§ 288, 952, 954, 960.

6. Infants ⇐20

Evidence sustained conviction for contributing to the delinquency of a minor by commission of a lewd and lascivious act upon the person of the minor. Welfare and Institutions Code, §§ 700, 702.

7. Witnesses ⇐316

In prosecution for contributing to the delinquency of a minor by commission of a lewd and lascivious act upon person of the minor, minor discrepancies and uncertainties in testimony of minor did not destroy minor's credibility as a witness nor render minor's recital unbelievable or untrustworthy. Welfare and Institutions Code, §§ 700, 702.

8. Criminal law ⇐1159(3)

Conviction for contributing to the delinquency of a minor by commission of a lewd and lascivious act upon the person of the minor could not be disturbed on appeal where the testimony was conflicting and minor's story was not inherently improbable. Welfare and Institutions Code, §§ 700, 702.

9. Criminal law ⇐720(6), 1171(3)

In prosecution for contributing to the delinquency of a minor by commission of lewd and lascivious acts reference in prosecuting attorney's closing argument to chief alibi witnesses of defense as "employees of defendant" wanting "to come to their employer's relief" and to the measure of the character testimony with regard to whether it pertained to the traits involved in the charge against defendant, were legitimate observations under the record and did not constitute reversible error. Welfare and Institutions Code, §§ 700, 702.

10. Criminal law ⇐1037(2)

Alleged objectionable remarks of prosecuting attorney in closing argument were not grounds for appeal where defendant

made no attempt to correct the alleged improprieties at the trial.

11. Criminal law ⇐1037(1, 2)

Generally any objectionable remarks or argument of the prosecuting attorney must be opposed at the time they are made and the court requested to admonish the jury concerning them before they can be made a ground for appeal.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Alfonso Codina, also known as James Tessaro, was convicted of contributing to the delinquency of a minor, and he appeals.

Judgment affirmed.

Prior opinion, 176 P.2d 397.

Richard C. Dinkelspiel, Alan A. Dougherty and Douglas M. Moore, all of San Francisco, for appellant.

Robert W. Kenny and Fred N. Howser, Attys. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was tried by a jury upon an information charging him in separate counts with (1) lewd and lascivious conduct in violation of section 288 of the Penal Code, a felony, and (2) contributing to the delinquency of a minor in violation of section 702 of the Welfare and Institutions Code, a misdemeanor. The alleged victim was a six-year-old girl. Defendant was acquitted on the first count and convicted on the second. He has appealed from the judgment and the order denying his motion for a new trial.

As grounds for reversal defendant argues the following points: (1) The deficiency in the pleading of count two to sustain a conviction; (2) the inconsistency of the verdict since both counts were based on the same act or occurrence, so that an acquittal on one would preclude a finding of guilt on the other; (3) the insufficiency of the evidence to support the verdict on count two; and (4) prejudicial remarks of the prosecuting attorney in his closing argument to the jury. An examination of the record in the light of applicable rules of law compels the conclusion that defendant's arguments are without merit, and that the judgment of conviction should be affirmed.

Taking up defendant's several points in their order of presentation, the first to be considered is his challenge of the sufficiency of the pleading of count two, on which he stands convicted. That count charges a violation of section 702 of the Welfare and Institutions Code, "Contributing to delinquency of minor." It alleges that defendant committed a lewd and lascivious act upon the person of the minor child involved but, as defendant notes, it does not allege that such act "caused or tended to cause or encourage" said minor child "to become a person of the character described in section 700 of [said] code." Defendant claims that such omission of recital as to "the tendency of" his alleged act renders count two fatally defective in the statement of "a public offense" under the "Juvenile Court Law." People v. Salisbury, 59 Cal.App. 299, 300, 210 P. 642; People v. Lamanuzzi, 77 Cal.App. 301, 303, 246 P. 557. But these cited cases were decided before the amendments of 1927 and 1929 liberalizing the rules of pleading in criminal prosecutions. As amended in 1929, and as it now reads, section 952 of the Penal Code expressly provides that "in charging an offense * * * it [the statement] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or *in any words sufficient to give the accused notice of the offense of which he is accused.*" (Emphasis added.)

[1, 2] According to section 702 of the Welfare and Institutions Code, a person who commits "any act * * * which * * * causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 [of said code] or which * * * contributes thereto * * * is guilty of a misdemeanor * * *." Within the purview of said section 700 would be a minor "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral

life." (Subd. (k), sec. 700, Welfare & Institutions Code.) It is obvious that the commission of "a lewd and lascivious act upon and with the body" of a minor person would tend to cause such minor to be a "lewd" person. Such conduct by its very nature would inevitably contribute to the delinquency of a minor and therefore would necessarily constitute a public offense under the provisions of said section 702. "The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial." People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506, 508; People v. Brac, 73 Cal.App.2d 629, 634, 635, 167 P.2d 535. "No * * * information * * * is insufficient * * * by reason of any defect or imperfection in matter of form" so long as no "substantial right of the defendant" is prejudiced "upon the merits" of the case. Pen.Code, sec. 960; People v. Gordon, 71 Cal.App.2d 606, 611, 163 P.2d 110. In line with these observations, the pleading of count two of the information here in question is not open to challenge. Its recital of defendant's commission of "a lewd and lascivious act" as the premise of the charge of his violation of said section 702 was "in * * * words sufficient to give" him "notice of the offense of which he [was] accused," contributing to the delinquency of a minor. Its failure to add in explicit language the "obvious" effect of the alleged conduct upon the minor person involved would not affect its sufficiency as determined by the prevailing rules of criminal pleading. People v. Pierce, 14 Cal.2d 639, 644-646, 96 P.2d 784, see, also, People v. Beesly, 119 Cal.App. 82, 84, 85, 6 P.2d 114, 970; People v. Gilbert, 26 Cal.App.2d 1, 7, 8, 78 P. 2d 770; People v. Curtis, 36 Cal.App.2d 306, 317, 98 P.2d 228; People v. Price, 46 Cal.App.2d 59, 60, 61, 115 P.2d 225.

[3] Moreover, even if count two of the information were regarded as deficient because of its failure to charge the "tendency" of defendant's commission of the lewd and lascivious act upon the minor child involved, an examination of the record discloses that such omission affected the trial not at all; in fact, the trial proceeded as if the allegation were there. Its absence was not noticed by defendant. He did not even demur to the information; if he had made such objection, his cause of complaint would have been at once removed, but without his thereby gaining any apparent advantage. At the conclusion of the trial, the judge properly instructed the jury as to all of the elements necessary to be proven before a conviction of the violation of section 702 of the Welfare and Institutions Code could be had. Thus, the jury was told that if they believed "from all the evidence, beyond a reasonable doubt," that defendant committed the alleged lewd and lascivious act upon the minor child, "thereby tending to cause and contribute to" said minor child "becoming and remaining such a person as described in Section 700 of the Welfare and Institutions Code, to wit, a person under the age of twenty-one years who is leading or from any cause is in danger of leading an idle, dissolute or immoral life, then [they] should find the defendant guilty of the second count in the information." The situation is comparable in its fundamental aspects to that prevailing in People v. Rankin, 10 Cal.2d 198, 74 P.2d 71, 73, where, in the light of "section 4½ of article 6 of the Constitution," it was said at page 202 of 10 Cal.2d, at page 73 of 74 P.2d that "the assumed defect is insufficient to warrant a reversal of the judgment."

[4, 5] Nor is defendant's second point sound in the claim that the verdict of guilty on count two is a nullity in view of his acquittal on count one. The information here is framed on the theory that the same "lewd and lascivious act" violates the provisions of two statutes. Pen.Code, sec. 288; Welfare & Institutions Code, sec. 702. As amended in 1927, and as it now reads, section 954 of the Penal Code provides: "An * * * information * * * may charge * * * different statements of the same offense * * * under separate counts. * * * *A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.*" (Emphasis added.) Thus, it plainly appears that each count must stand upon its own merit and be weighed separately in its disposition. Recent cases of this court so recognizing the clear intent and conclusive force of the italicized language of the

statute are People v. Stangler, 18 Cal.2d 688, 696, 117 P.2d 321; People v. Amick, 20 Cal.2d 247, 250-252, 125 P.2d 25; and Rodriguez v. Superior Court of City and County of San Francisco, 27 Cal.2d 500, 502, 165 P.2d 1; and further discussion of this matter is unnecessary here other than to note that defendant has had the advantage of the jury's leniency in the disposal of the two charges—one punishable as a felony, the other as a misdemeanor. See People v. Lopez, 46 Cal.App.2d 857, 858, 859, 117 P.2d 10.

[6-8] Likewise untenable is defendant's third point in challenge of the sufficiency of the evidence to sustain the verdict of guilt on count two. The record reveals this to be a case of conflicting testimony on the point of defendant's guilt in the light of his "alibi" defense, and it would serve no useful purpose to detail the evidence here. Suffice it to say that there is nothing "inherently improbable" in the child's story; that the mother's account is largely corrobrative thereof, particularly with respect to the time element; and that minor discrepancies and uncertainties in the testimony of the child do not serve to destroy her credibility as a witness nor render her recital unbelievable or untrustworthy. People v. Kearney, 20 Cal.2d 435, 436, 126 P. 2d 612. In such circumstances this court, under well-settled rules of law, will not disturb the jury's finding as a determination of fact upon its conviction of defendant on count two. People v. Murieta, 1 Cal.App.2d 727, 728, 37 P.2d 158; People v. Spillard, 15 Cal.App.2d 649, 652, 653, 59 P.2d 887.

[9-11] As his final point, defendant urges that the prosecuting attorney in his closing argument "misstated the evidence in several particulars" and made various "remarks" upon defendant's guilt, all of which constituted prejudicial error. The record refutes this contention. It is true that the prosecuting attorney, in summarizing the evidence and the factors for the jury's consideration, referred to (1) the chief alibi witnesses of the defense as "employees of the defendant" wanting "to come to their employer's relief" and (2) the measure of the character testimony with regard to whether or not it pertains to the "traits involved" in the charge against defendant. But such points of argument were legitimate observations in conformity with the scope of the record and the prosecution's position as to the efficacy of the defense. Certainly neither those references nor other comment of the prosecuting attorney, cited by defendant as "improper remarks" because they do not coincide with his view of the evidence, amounted to a "distortion of the testimony" to the confusion of the jury in determining the substantial rights of defendant. Moreover, defendant made no attempt to correct these alleged improprieties at the trial; and it is the general rule that any objectionable remarks or argument of the prosecuting attorney must be opposed at the time they are made, and the court requested to admonish the jury concerning them, before they can be made a ground for appeal. (24 Cal.Jur. 746, sec. 29.) The well-recognized exception to this rule as discussed in People v. Podwys, 6 Cal.App.2d 71, 75, 76, 44 P.2d 377, is of no avail to defendant in the light of the wholly distinguishable record.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

80 Cal.App.2d 295

Ex parte MEMMI.

Cr. 4147.

District Court of Appeal, Second District, Division 1, California.

June 12, 1947.

1. Divorce ⇐332
Habeas corpus ⇐117(1)

Where New York court awarded custody of child to father, both in divorce action and in habeas corpus proceeding New York decrees were conclusive as to matters which existed or occurred prior to and at time of their entry, and California courts, in father's subsequent habeas corpus proceeding, could not re-examine them for purpose of depriving father of custody awarded him by the New York decrees.

Divorce ⇐332
Habeas corpus ⇐117(1)

Where New York court of competent jurisdiction, in both divorce and habeas corpus proceedings, awarded custody of minor daughter of parties to father, and mother, in defiance thereof, took child to California, in habeas corpus proceeding in California, in absence of showing that since entry of New York decrees father had become unfit to have control of child or that change of circumstances affecting welfare of child had arisen, comity required recognition of father's right to custody.

3. Habeas corpus ⇐120

Where father of minor child was awarded custody of child by New York court of competent jurisdiction in both divorce and habeas corpus proceedings and there was no showing of change of circumstances, determination of superior court in intervening habeas corpus proceeding denying relief to father was not binding upon District Court of Appeal.

4. Judgment ⇐822(3)

Ordinarily, when a minor child is within jurisdiction of California courts, such courts notwithstanding a judgment, decree, or order of court of a sister state, are empowered to determine in their own behalf what things are for best interests and what will best promote welfare of child.

5. Divorce ⇐303(1), 332

An award of custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality and is later subject to change by court wherein award was made, whether order was made by a California court or by a court of a sister state.

6. Judgment ⇐822(3)

Petitioner for custody of a minor child to whom such custody was awarded by court of competent jurisdiction of a sister state is entitled to rely upon his decree for custody until respondent, who brought child into state in defiance of order of court of sister state, establishes that welfare and best interests of child will be jeopardized by continuing custody in petitioner.

7. Habeas corpus ⇐99(3)

Where mother of child had illegally brought child into California in defiance of an order of a New York court of competent jurisdiction, placing custody in father's hands, after first restoring custody of child to father, mother could assert in superior court any legal ground she might have for an order giving her custody or to otherwise modify decree of New York court, so as to conserve best interest and welfare of child.

Proceeding in the matter of the application of Joseph Memmi, for a writ of habeas corpus in relation to the custody of Gracie Ann Memmi, a minor, opposed by Marion B. Whittaker, which petition was filed in the District Court of Appeal; a former petition having been denied by the Superior Court of Los Angeles County.

Respondent ordered to deliver custody of child to petitioner.

Allan L. Leonard, of Los Angeles, for petitioner.

Thompson & Thompson, of Burbank, and Raymond G. Thompson, of Pasadena, for respondent.

WHITE, Justice.

This is a proceeding in habeas corpus brought to recover the custody of a minor child of petitioner and respondent allegedly

at present unlawfully detained by the latter. The writ having issued, a return was made thereto by respondent who has possession of the child and the matter is now before us to determine as between petitioner and respondent, the right to the custody of said minor, Gracie Ann Memmi.

The history of the case as disclosed by the record is that petitioner Joseph Memmi and respondent Marion B. Whittaker (formerly Marion B. Memmi) were married to each other February 22, 1941, and the above-named minor child, now five years of age, was born as the issue of said marriage.

It further appears that in a habeas corpus proceeding instituted by petitioner in the Supreme Court of the State of New York, county of Erie, directed to respondent herein, she made a return thereto, and the court having taken evidence made its order on December 23, 1943, sustaining said writ of habeas corpus. In said proceeding the court found "that the best interests and welfare of said infant (the minor child herein) require that the petitioner (petitioner herein) should have the care, custody and control of her, the said Gracie Ann Memmi, and that the said Joseph Memmi is entitled to the care, custody and control of the said Gracie Ann Memmi." Based upon these findings, the New York court made its order that respondent herein "forthwith surrender the custody" of said minor child to the petitioner, Joseph Memmi. On the following day, December 24, 1943, the order was served upon respondent's attorney. The sheriff of Erie County, New York, attempted to make personal service of said order on respondent herein, but without success. In January, 1944, respondent and the minor child removed to Pasadena, California, where the child has since been domiciled. In March, 1944, respondent returned to Buffalo, New York, to answer an indictment returned against her on an unrelated matter, and on March 22 was personally served at Buffalo, New York, with a copy of the aforesaid order of December 23, directing her to deliver said minor child to petitioner.

Because of respondent's failure to comply with such order the New York court on April 11, 1944, issued an order to show cause directed to respondent herein to show cause why she should not be adjudged in contempt of court and punished accordingly. Due service of such order to show cause was made personally upon respondent herein and after a hearing upon such order on May 22, the court adjudged her in contempt and imposed upon her a fine of $150, and ordered her committed to jail "until she surrender the custody of said Gracie Ann Memmi, infant, to Joseph Memmi, petitioner."

The record further reveals that respondent mother herein commenced an action in the courts of the state of New York against petitioner father herein for annulment, and that the latter commenced an action for divorce against respondent mother. On June 20, 1944, the New York court consolidated said actions for trial. On June 26 the court dismissed respondent's annulment proceeding "on the merits" and awarded petitioner herein a judgment of divorce from respondent, and awarded to petitioner herein the custody of the minor child Gracie Ann Memmi.

While respondent mother was not personally present at the aforesaid trial, she was represented thereat by counsel.

No further proceedings were had until petitioner herein filed a petition for a writ of habeas corpus in the Superior Court of Los Angeles County, seeking thereby to obtain the custody from respondent of said minor child. The writ issued and came on for hearing before the Superior Court of Los Angeles County on April 3, 1947, at which time petitioner, respondent, and the child were present in court, petitioner and respondent being represented by counsel. Following the taking of testimony which included documentary evidence of the aforesaid proceedings in the New York court the Superior Court of Los Angeles County made its order as follows:

"Petition is denied; joint custody of the child is awarded to the mother and the grandmother of the child. The child is not to be removed from her present locale without an Order of Court permitting it having been first obtained and notice having been given to the father; respondent is to cease calling the child Whittaker and the name on the school record is ordered changed to Memmi. Father is to be al-

lowed to see the child at all reasonable times. Neither party is to remove the child from the County of Los Angeles without an order of the Court first obtained.

"Execution of this order is stayed for fifteen days pending appeal. The child is to remain with the mother during this time."

In the proceeding now engaging our attention petitioner earnestly insists that due respect for the orderly administration of the law, and recognition of the doctrine of comity prevailing among sister states require this court to uphold the rights of petitioner under the two foregoing awards of custody made in the courts of the state of New York.

Respondent, on the contrary, asserts that both she and the minor child have been residents of the City of Pasadena, County of Los Angeles, California, since January, 1944, and that since said date the child has not been in the state of New York. That respondent was not present at the divorce proceedings in New York and that the court did not "hear evidence on her behalf concerning her fitness to have custody of said minor child nor petitioner Joseph Memmi's lack of fitness for such custody." But it should be remembered that while respondent was not personally present in the New York court she had submitted herself to the jurisdiction of that court and was represented by counsel, not only at the divorce and annulment proceedings but at the hearing on the habeas corpus proceedings on December 23, 1943, and that her attorney was served with a copy of the order made in the habeas corpus proceeding awarding custody to petitioner herein on December 24, 1943, at which time both respondent and the minor child were in the state of New York. Respondent was also personally served with a copy of the foregoing order when she returned to New York on March 22, 1944.

[1] Respondent further contends that since the judgment of June 26, 1944, awarding custody of the minor child to petitioner herein there have been changes in the circumstances and conditions affecting the welfare of the child, concerning which evidence was introduced in the hearing before the Superior Court of Los Angeles County. Except for the fact that petitioner herein has remarried and is now a resident of Washington, D. C., none of the claimed changed circumstances have occurred since the rendition of the decrees of the Supreme Court of New York. There is no mention in the aforesaid order of the Superior Court of Los Angeles County, nor is there anything in the record before us to show that the conduct of petitioner since the orders were entered by the New York court has been such as to render him unfit to have custody of the minor child, nor is there any showing of changed conditions affecting the welfare of the child. The most important and serious matters with which respondent charges petitioner in her return are alleged to have existed or occurred prior to and at the time of the entry of the decree of divorce in New York. Manifestly as to them the decrees of the New York court are conclusive, and we are not authorized to now reexamine them for the purpose of depriving petitioner of the custody awarded him by such decrees. Furthermore, the record before us shows that the child was brought to California by respondent in defiance of the decree of a sister state, awarding its custody to petitioner.

[2] In the absence of any showing that since the entry of the decree under which petitioner was granted custody of the child he has become an unfit or unsafe person to have the care and control of his minor child, or that changed circumstances affecting the welfare of the child have arisen, we are persuaded that due respect for the orderly administration of the law and recognition of the doctrine of comity among sister states require us to recognize the right of petitioner under the decree of the aforesaid court of the state of New York to the custody of said minor. In re Wenman, 33 Cal.App. 592, 593, 594, 595, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 286, 287, 279 P. 834; In re Kyle, 77 Cal. App.2d 634, 176 P.2d 96.

[3] Respondent's contention that the decision of the Superior Court of Los Angeles County upon petitioner's habeas corpus application therein, is, in the absence of any statement in the instant application,

showing change of fact or circumstances since that date, res adjudicata, binding upon this court, and a bar to this proceeding is determined adversely to respondent in the case of In re Marshall, supra, 100 Cal.App. at page 288, 279 P. 834. Here, as in the case just cited, no change is shown to have occurred relative to petitioner's condition or moral fitness since the date of the entry of the decree of the aforesaid New York court, nor does the order of the superior court show that any such change in petitioner's condition or moral fitness since such date was made to appear at the superior court hearing, or that any showing of changed conditions affecting the welfare of the child was made at such hearing or passed upon by the court. Therefore, the decision of the New York court must be held res adjudicata until such change in petitioner's condition, or in circumstances affecting the welfare of the child is shown.

[4, 5] We must not be understood as holding that on principles of comity the decree of the New York court was entitled under any and all conditions to full faith and credit in the courts of this state upon the ground that the New York decree was res adjudicata, and could not therefore be changed. Ordinarily, when a minor child is within this jurisdiction, the courts of this state are empowered, notwithstanding a judgment, decree or order of the courts of a sister state, to inquire into and determine in their own behalf what are for the best interests and what will best promote the welfare of a minor child. An award of custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality, and is later subject to change and modification by the court wherein it was made. This rule is applicable not only to orders made by California courts, but to such former orders of courts in other states. Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719.

[6] In the instant case we are not confronted with a case wherein respondent mother had legal custody of the child in California for the extended period from January, 1944, to date, but are faced with a situation wherein the minor child was brought into this state in defiance of a decree of a court of competent jurisdiction of a sister state, awarding its custody to petitioner herein. In such a situation we hold that petitioner herein is entitled to rely upon his decree for custody until respondent mother by allegations and proof establishes that the welfare and best interests of the minor child will be jeopardized by continuing such custody in the petitioner. There is no such showing contained in the record before us, and, as heretofore pointed out, the order made by the Superior Court of Los Angeles County contains no such finding.

[7] After first restoring custody of the child to the father, respondent mother is not precluded by this decision to assert in the Superior Court any legal ground she may have for an order giving to her the custody of the child or to otherwise modify the decree of the New York court so as to conserve the best interest and welfare of the child. But under the record before us, "a due respect for the orderly administration of the law and according to the doctrine of comity among sister states requires this court to recognize the right of the petitioner" (In re Wenman, supra, 33 Cal.App. at page 594, 165 P. at page 1026), under the decree of the court of the state of New York hereinbefore referred to.

Respondent is ordered to deliver the minor, Gracie Ann Memmi, to petitioner.

YORK, P. J., and DORAN, J., concur.

80 Cal.App.2d 386

PEOPLE v. JACKSON.

Cr. 4065.

District Court of Appeal, Second District, Division 3, California.

June 17, 1947.

Rehearing Denied July 1, 1947.

1. Prostitution ⇐4

Evidence sustained conviction of attempted pandering. Gen.Laws, Act 1906; Pen.Code, § 1159.

2. Statutes ⇐231

The section of Penal Code providing that when a defendant admits previous conviction charged in information, the charge of previous conviction must not be read to the jury nor alluded to on the trial, must be considered in connection with section of the Code of Civil Procedure which provides for the impeachment of a witness by showing prior conviction of a felony. Code Civ.Proc. § 2051; Pen.Code, § 1025.

3. Witnesses ⇐337(5)

Where defendant testified, prior convictions of felonies could be shown on cross-examination notwithstanding the defendant had admitted prior convictions charged in information. Code Civ.Proc. § 2051; Pen.Code, § 1025.

4. Criminal law ⇐37

Where the defendant first attempted to persuade a person to become an inmate of a house of prostitution, the fact that the police thereafter cooperated with such person to procure the defendant's arrest did not show that the defendant had been entrapped. Gen.Laws, Act 1906; Pen.Code, § 1159.

5. Arrest ⇐63(4)

Under the Penal Code, officers were entitled to arrest the defendant at night without a warrant where there was reasonable cause to believe that he had committed a felony. Pen.Code, § 836, subd. 5.

6. Criminal law ⇐394

Evidence is admissible even though obtained by unlawful search and seizure.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Malcolm Jackson was convicted of attempted pandering after prior convictions of felonies, and he appeals.

Affirmed.

Malcolm Jackson, in pro. per.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and W. E. Simpson, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputies Dist. Atty., all of Los Angeles, for respondent.

WOOD, Justice.

Defendant was charged with the crime of pandering. He admitted the allegations of the information that he had been convicted of felonies three times previously and had served terms in penitentiaries therefor. In a jury trial herein he was convicted of attempted pandering, "a lesser included offense as charged in the information." Defendant appears in propria persona on this appeal. His purported notice of appeal states in part that "I am making a motion for appeal," and that the "Motion is to appeal the verdict of guilty of Attemp—Pandering & was sentenced by you on June 21st 1946." It will be regarded as an appeal from the judgment.

Appellant's contention that the evidence was insufficient to support the judgment is not sustained. About April 1, 1946, appellant went to a photograph studio where the complaining witness, Miss Cooper, was employed, and gave her a telephone number and told her to call him. He returned that afternoon and told her he knew where she could get another job which would pay more money. When she asked him what work it was he said, "call house." Two days later appellant and a girl went to see her and he told her that she could get more money working in a house of prostitution; that he wanted her to go to his apartment to work for him; that she was to have sexual intercourse with men; that she could make $300 or $400 a week "turning tricks." About a week later he gave her a suit of clothes. Soon thereafter a note, which was in his handwriting, was delivered to her by a girl, and the note stated:

"This is the key and address. Its for the upper lock. You can just forget about these * * * jobs up here altogether, and I am expecting you tonite." With the note there was a key to which was attached a ticket, reading "510-½ East Fifth Street, Apartment 405." Another note in his handwriting, which was delivered to her at another time by a girl, stated: "The sooner you can get away the better. I've had a couple of pretty fair deals but couldn't hold them until 11:30. 'Phone me and I will tell you all about things. This kid works out of the place at times." She received four notes from him. On April 12, 1946, he returned in an automobile and gave her his telephone number. She telephoned to him about 4 p. m., and he said he wanted her to leave her work then and go to his apartment because he had a trick for her. She replied that she could not get away until 11:30 p. m.

After she received the first note above mentioned she reported the matter to the police. A police officer instructed a Miss Paige to go with Miss Cooper to appellant's apartment. It was arranged that a police officer would follow them there, and that other officers would go to the vicinity of the apartment and await developments. About 10:30 p. m. on April 12, 1946, Miss Cooper and Miss Paige met for the first time. They left the studio about midnight and were walking down Fifth Street when appellant came along in an automobile, stopped and asked them to get in, and they got in the back seat. He said they were going to a bar for a few minutes. Appellant said something about prostitution and "turning tricks," and Miss Paige, in compliance with instructions from the police, told him she wanted to make some money and asked if she could stay in his room and work for him. He said that they were to live in his apartment and to "take tricks" there. They were taken to a saloon four doors from his room where they stayed about twenty minutes. He introduced the girls to the bartender and told him they were going to work for appellant; that Paige would work in the bar as a front while actually "taking calls," and Cooper would stay in his apartment. He also introduced a colored man to Cooper and said he was the man who wanted to come up. Then appellant and the girls went to his room, number 405, at 510-½ East Fifth Street, and he unlocked the door. On the way there he paid the landlady $5.00 and the girls signed the register for two other rooms. When they were in his room he told them they were to "turn tricks" in his room every evening, and that the colored man in the saloon was a steady customer for sexual intercourse and was one who would give Cooper $10, and that appellant would take $5 of that amount. He then left the room, stating that he was going to the bar to get that man, and in a few minutes he returned with him. Appellant told Cooper, in the presence of the man, that she was to have sexual intercourse with that man for $10, and he told Paige that there was another man for her down the hall. At that time the police officers entered the room and arrested appellant.

A police officer testified that he saw appellant and the two girls enter said room 405; that about twenty minutes later he saw appellant leave the room; that about five minutes thereafter he saw appellant and another colored man enter the room; that he (the officer) knew the reputation of the place at 510-½ East Fifth Street, and that its reputation was that it was frequented quite often by prostitutes and was a place where prostitution was carried on.

Another police officer testified that the hotel at said address had a reputation of being a place where prostitution was carried on; that eighteen arrests for prostitution had been made upon those premises during the past two years. Appellant had been living in said room more than a year prior to the time he was arrested.

[1] The statute under which this prosecution was had (Stats.1911, p. 9, Deering's General Laws, Act 1906) provides: "Any person who shall procure a female inmate for a house of prostitution, or who, by promises * * * or by any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure for a female person a place * * *

as an inmate of any place in which prostitution is encouraged or allowed within this state * * * shall be guilty of a felony, to wit: pandering * * *." It is provided in section 1159 of the Penal Code that: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It is clear that the evidence was sufficient to justify findings that the place in question was a house of prostitution; that appellant knew it was such a place; and that he attempted to procure Miss Cooper to become an inmate thereof.

[2, 3] Appellant contends that since he had admitted the prior convictions the prosecution should not have alluded to them by asking him on cross-examination whether he had been convicted of a felony. His counsel called him as a witness and he testified. He denied that he said anything to Cooper about her working in a house of prostitution; denied that anything was said about either of the girls turning tricks; denied that he brought any man to either of the girls for the purpose of prostitution; and denied that he told Cooper the colored man was a steady customer. After he had so testified the deputy district attorney asked him, on cross-examination, if he had ever been convicted of a felony, and he replied that he had. Then he asked him how many times, and he replied three. Then he asked him what they were, and he said two burglaries and narcotics. Then he asked when, and he replied 1924, 1928, and 1939. When asked if all those were felonies, he said that was right. Appellant argues that those questions alluded to his prior convictions in violation of the provisions of Section 1025 of the Penal Code. That Section provides: "When a defendant who is charged in the * * * information with having suffered a previous conviction, pleads * * * not guilty of the offense for which he is * * * informed against, he must be asked whether he has suffered such previous conviction. * * * In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." That Section is to be considered in connection with the provisions of Section 2051 of the Code of Civil Procedure which provides that: "A witness may be impeached by the party against whom he was called * * * but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness * * * that he had been convicted of a felony." Section 1025 of the Penal Code was not designed to prevent the impeachment of a defendant on cross-examination by proof of conviction of a felony. (People v. Peete, 28 Cal.2d 306, 319, 320, 169 P.2d 924.) The questions on cross-examination herein concerning the prior convictions were proper. Furthermore, no objection to any of those questions was made at the trial.

[4] Appellant's contention that he was entrapped by the police is not sustained. Insofar as Miss Cooper was concerned the police did not in any manner instigate the crime or lure the defendant into its commission. The criminal intent and design originated in the mind of defendant. He went to see her in the first instance and several times thereafter, wrote her four notes, gave her a key, and represented that she could make big money, in an effort to persuade her to become an inmate of a house of prostitution.

[5, 6] He contends also that he was unlawfully convicted because his arrest was made without a warrant, and because evidence was obtained by unlawful search and seizure. This contention is not sustained. The officers were authorized to arrest the appellant at night without a warrant, there being reasonable cause to believe that he had committed a felony. (Penal Code, sec. 836, subdiv. 5.) It does not appear that evidence was obtained by unlawful search and seizure. Even if evidence had been so obtained it would have been admissible. (People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44.)

Appellant asserts in his brief that he has appealed also from the order denying his

motion for a new trial. It will be assumed that he has so appealed.

The judgment and the order denying his motion for a new trial are affirmed.

SHINN, Acting P. J. and KINCAID, J. pro tem., concur.



80 Cal.App.2d 709

LONG v. LONG (two cases).

Civ. 15666, 15650.

District Court of Appeal, Second District, Division 1, California.

July 2, 1947.

Hearing Denied Aug. 28, 1947.

Divorce ⇐286

Order directing reduction of alimony payments from $75 to $40 per month upon minor child of parties coming of age would not be set aside as abuse of discretion either upon husband's contention that alimony payments should have been terminated altogether or upon wife's contention that because of increased cost of living payment should have at least been permitted to remain the same if not increased.

Appeal from Superior Court, Los Angeles County; Kenneth N. Chantry, Judge.

Action by Pearl Marie Long against Paul Wilcox Long for divorce, wherein defendant filed a cross-complaint. A judgment was entered granting plaintiff a divorce. From an order relating to the payment of alimony, both parties appeal.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant, Pearl Marie Long.

Charles G. Young, of Los Angeles, for respondent, Paul Wilcox Long.

DORAN, Justice.

This is an appeal from an order in a divorce action relating to the payment of alimony.

The parties were married February 14, 1923. Defendant husband left plaintiff January 5, 1940. Plaintiff filed an action for separate maintenance April 3, 1940. By cross-complaint and amendments the action resulted in one for divorce as a result of which plaintiff obtained judgment November 28, 1940. The decree provided for the payment of $75 per month, "by way of support of plaintiff and the minor child of the parties hereto". Defendant husband paid said sum until February 27, 1946 when the minor child became 21 years of age.

In March, 1946, the husband sought to have the above-mentioned order for the payment of $75 per month terminated. Following a hearing on an order to show cause the order was modified and said payments reduced to $40 per month.

Both parties appeal from the order.

It is contended by each in substance that the court abused its discretion. Counsel on behalf of the wife argues, "we think the trial judge should have increased the allowance or at least permitted it to remain where it was since the cost of living had and has more than doubled and defendant's earnings had and have more than trebled. Accordingly, we ask that the order made about March 13, 1946, and entered about March 20, 1946, be reversed with directions to the trial court to fix the amount of money the defendant should pay to plaintiff for her support and maintenance and that it be fixed at a sum not less than $100.00 per month, or such other amount as the court may deem proper."

It is defendant husband's contention that no further payments should be required at all and in that connection counsel on behalf of the husband argues, in addition to the contention that the court abused its discretion, that the evidence was insufficient; that the court lacked jurisdiction and that the order was "not equitable".

A review of the record reveals that there can be no question as to the court's jurisdiction, nor can it be successfully contended that the evidence was insufficient. The sole issue here is whether the court abused its discretion. In that connection

the showing of both appellants is insufficient, in which circumstances the order cannot lawfully be disturbed on appeal.

The order therefore is affirmed.

YORK, P. J., and WHITE, J., concur.



80 Cal.App.2d 284

TICKNOR v. CITY OF SACRAMENTO et al.

Civ. 7350.

Sac. 5816.

District Court of Appeal, Third District, California.

June 11, 1947.

Rehearing Denied July 8, 1947.

Hearing Denied Aug. 7, 1947.

Municipal corporations ⇐217(3)

Under the city charter of Sacramento and rules of the civil service board, permanent civil service status can be acquired only by passing a competitive examination given by the board and being appointed to a position in the classified service from a list of eligibles furnished by the board.

2. Municipal corporations ⇐184(2)

One who accepted temporary war emergency appointment as police patrolman of Sacramento, knowing it to be only temporary, though he served as a patrolman for more than two years, could not acquire permanent civil service status without taking a competitive examination given by civil service board and being placed on list of eligibles.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by LeRoy F. Ticknor against the City of Sacramento and others for a declaratory judgment that plaintiff is a member of the classified service of the City of Sacramento and has the status of a civil service employee. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Ralph H. Lewis and Clifford R. Lewis, both of Sacramento, for appellant.

Richard J. Lawrence and Everett M. Glenn, both of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant commenced an action for declaratory relief in which he sought to have it decreed that he is a member of the classified service of the city of Sacramento and has the status of a civil service employee under the provisions of the charter of the city of Sacramento and the rules and regulations of the Civil Service Commission made pursuant to the charter provisions.

There is no dispute as to the facts which are substantially as follows: Appellant applied to the city of Sacramento for appointment as a police patrolman in July, 1943. At that time there was no civil service list for eligibles for the Police Department for the reason that, due to the war emergency, candidates had not appeared for examination in sufficient numbers to make an adequate eligible list, and the previous list had been abolished by the Civil Service Board, which board ordered that during the war emergency appointments would be made on a temporary basis. Appellant was interviewed by an employee of the city and also by the Chief of Police and was given a physical examination by the city physician who found him to be physically qualified for the position. Subsequent to these interviews and physical examination, appellant was on November 16, 1943, appointed as a patrolman in the Sacramento Police Department. On December 28, 1943, appellant was notified by letter from the Civil Service Board that his appointment was of a temporary nature, that he had no civil service status under the Charter, and that persons holding such temporary appointments could not remain in the city service after eligible lists had been prepared unless they qualified after competitive tests.

It is conceded that appellant did not take a written examination for the position of Police Patrolman given pursuant to the rules and regulations of the Civil Service Board and that he was not appointed from an eligible list. It is conceded also that appellant has served in excess of two years as a patrolman, and has received salary increases and vacation with pay.

The trial court found that appellant was the holder of a temporary position, which he held at the pleasure of the City Manager, subject to immediate removal therefrom by him without cause; and that within ten days from the posting of an eligible list for the position of patrolman the City Manager must terminate the temporary employment of appellant. This appeal is from the judgment entered in accordance with said findings.

The question presented upon this appeal is whether appellant by reason of his appointment, as aforesaid, became a member of the classified service of the city of Sacramento, and entitled to the benefits of a permanent civil service status. In order to properly interpret the questions of law herein involved we must consider the facts in the light of the charter provisions and the rules and regulations of the Civil Service Board applicable to the instant case. Their substance may be summarized as follows:

Charter section 43 provides that all employees shall be appointed on the grounds of fitness and that "All officers or employees shall be chosen or promoted, whenever a list of eligibles is furnished by the Civil Service Board, from the three candidates standing highest on the list."

Charter section 49 provides that an appointment shall be complete only after a six month probationary period.

Charter section 150 provides that police department employees must have certain qualifications and pass a Civil Service Board examination before appointment.

The following rules and regulations of the Civil Service Board are pertinent:

Section 7 provides for temporary appointments in an emergency for periods not to exceed 60 days or until appointments can be made from an eligible list.

Section 6 provides that the appointing power must terminate a temporary appointment within 10 days after posting of an eligible list.

Section 12 provides that appointments shall not be complete until after a six month probationary period.

Section 13 reads in part as follows: "All requisitions for appointments in all branches of the classified service, whether temporary or permanent, where no eligible list is had, must be approved by the Chairman of the Board before person is appointed or consent to appointment given. * * *"

On October 20, 1942, the Civil Service Board passed the war emergency resolution in question reading in part as follows:

"Now, therefore, be it resolved that upon appointment by a department head and the City Manager, the Civil Service Board may consider approval of temporary appointments to positions for which eligible lists are inadequate, and

"Be it further resolved that no Civil Service status is to accrue to the benefit of temporary appointees made under such conditions, and

"Be it further resolved that at such time as City employees receive such temporary appointments, such employee shall be so notified and/or sign the temporary appointment."

Appellant contends that his appointment, being regularly made pursuant to the Charter and the Civil Service Board rules, entitles him to a civil service status and upon serving for the probationary period he acquired a permanent civil service status. In support of this contention appellant relies upon Rule V, section 13, above quoted, which he argues provides for temporary or permanent appointments where there is no eligible list, and he argues further that an appointment thereunder is temporary in its inception but becomes permanent if extended beyond the 60 day period with the consent of the board. Respondents in reply contend that the appointment of appellant falls under Rule V, section 7, providing for temporary emergency appointments for "periods not to exceed 60 days or until appointments can

be made from an eligible list." Respondents contend further that in any event the appointment was temporary originally, and cannot ripen into a permanent status by mere lapse of time or length of service.

[1] In determining the question involved upon this appeal all of the provisions of the charter and all of the rules and regulations of the Civil Service Board bearing upon the questions of how employees become members of the civil service must be considered. Section 43 of the charter provides that all employees shall be appointed on grounds of fitness and shall be chosen from an eligible list furnished by the Civil Service Board. Section 49 of the charter provides that such an appointment shall be complete or permanent only after a six month probationary period. Section 150 of the charter provides that police department employees shall pass a Civil Service Board examination before appointment. It is clear to us from these provisions that the intent is that any appointment that may ripen into a permanent civil service rating must be one that is made from a list of eligibles furnished by the Civil Service Board and of a person who has passed the examination given by such board. Otherwise the whole structure of the civil service law would be broken down and its effectiveness destroyed.

None of the cases cited by appellant supports his position. In the case of Nilsson v. State Personnel Board, 25 Cal.App. 2d 699, 78 P.2d 467, the chief question before the court was whether or not the petitioner had completed his probationary period. Nilsson had been appointed originally when there was no eligible list, but afterwards took the examination given by the board and was placed on the eligible list. There was some confusion in the records of the board as to what his status was, but the trial court found that he had been the lawful holder of his position for more than six months and had obtained civil service status. There is nothing in the Nilsson case to even remotely suggest that Nilsson could have acquired civil service status without having passed the examination and been placed on the eligible list.

The case of McGillicuddy v. Civil Service Commission, 133 Cal.App. 782, 24 P.2d 942, also relied upon by appellant, merely holds that McGillicuddy and others who were regularly appointed by the Civil Service Commission of the City of San Francisco from a civil service eligible list could not be prevented by the commission from acquiring permanent civil service status by erroneously designating their appointments as temporary.

The recent case of Campbell v. Board of Civil Service Commissioners of the City of Los Angeles, 76 Cal.App.2d 399, 173 P. 2d 58, in which a hearing was denied by the Supreme Court, is very similar in point of fact to the instant case. Due to the manpower shortage caused by the war emergency, an ordinance was adopted providing for temporary appointments where there was no appropriate civil service list. The petitioner received such a temporary appointment under circumstances quite similar to those under which appellant received his appointment. The appointment was understood by the petitioner, the police department and the commission as a temporary one, just as was the appointment of appellant in the instant case. In affirming the judgment of the trial court that the petitioner had not acquired civil service status, the court said, 76 Cal.App. 2d at pages 404, 405, 173 P.2d at page 61:

"It appeared from the evidence that plaintiff took no examination in which he competed against other applicants, was given no ranking in accordance with his determined excellence, and was not placed upon an eligible list or certified for appointment in accordance with the procedure outlined in section 100 of the Charter. The tests and the instruction which he took were not intended to be a substitute for those which pertained to the regular civil service procedure. His examination was not competitive except in the sense that he was endeavoring to and did receive a passing I. Q. rating of 90 out of a possible 138. His appointment depended only upon his passing the medical examination and receiving a passing grade in the mental ability test.

"The methods prescribed by charter for the making of appointments in the civil service are mandatory and controlling. Campbell v. City of Los Angeles, 47 Cal. App.2d 310, 313, 117 P.2d 901; Heard v. Board of Administration, etc., of the City of Los Angeles, 39 Cal.App.2d 685, 695, 698, 104 P.2d 47; Pinion v. State Personnel Board, 29 Cal.App.2d 314, 317, 319, 84 P.2d 185; Nash v. City of Los Angeles, 78 Cal.App. 516, 519, 520, 248 P. 689. No power reposed in the City Council, the board of Civil Service Commissioners or the Police Department to adopt methods of appointment different from those prescribed by the Charter, nor could the essentials of the Charter requirements have been dispensed with by ordinance. But there was no attempt to dispense with them. It was the inability to fill positions through the regular civil service channels which brought about the scheme of war emergency appointments. Plaintiff accepted such an appointment well understanding that it was temporary, only, and that his continued service would not result in his appointment becoming permanent. But he contends that it was not within the power of the City Council to thus continue his temporary employment, for the reason that it was limited by the charter to 60 days. We understand his argument to be that the ordinance, in so far as it gave a fixed and continuing temporary status to his employment, was in conflict with the charter and void, and that when the period of 60 days, as limited by the charter, had expired he became a probationary employee and, at the expiration of six months of service, a permanent employee, subject to discharge only for cause. We are unable to agree with this contention. In the first place, while the charter provides for the making of temporary appointments to positions within the classified civil service, such appointments are in reality only temporary expedients preliminary to the positions being filled through the established procedure. The appointments do not make the appointees qualified civil service employees or members of the civil service system, which can be entered only through successful competitive examination, certification and appointment. The ordinances only relieved the board and the head of the Police Department from making successive appointments of 60 days each until examinations could be held and eligible lists created in accordance with the civil service provisions of the charter. We find no conflict between the ordinances and those provisions, but as we consider plaintiff's argument we cannot see how it leads to the conclusion that invalidity of the ordinance would bring about a change in the temporary character of his employment. Had it not been for the continuation, under the ordinance, of his employment beyond the original 60-day period, his status as an employee, instead of being a permanent one, would have been without a legal basis and would have terminated 60 days after it was made.

"We find no support for the claim that plaintiff has been appointed or has acquired a status in the classified civil service other than as a temporary employee whose appointment may be terminated at any time."

[2] In view of the foregoing we are convinced that appellant could not, under the provisions of the City Charter of the City of Sacramento and the rules of the Civil Service Commission, acquire permanent civil service status without taking and passing an examination, and being appointed from a civil service eligible list. The trial court correctly determined that appellant did not become a permanent civil service employee of the city of Sacramento.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

ROSENBERG et al. v. RASKIN.
Civ. 15754.

District Court of Appeal, Second District, Division 2, California.
June 13, 1947.

Rehearing Denied June 27, 1947.
Hearing Denied Aug. 7, 1947.

1. Appeal and error ⇐1071(3)
Where finding, which defendant conceded was supported by substantial evidence, sustained trial judge's conclusion that plaintiffs and defendant had entered into a contract which defendant breached to damage of plaintiff in sum of $1,700, question whether evidence sustained other findings in favor of plaintiff was immaterial.

2. Contracts ⇐108(1)
A contract is not void against public policy unless it is injurious to public as a whole or contravenes some established interest of society.

3. Contracts ⇐108(2)
Contract between members of master bakers association and a fellow member whereby he agreed to keep his bakery closed until members of association had entered into a new contract with bakers' union was not void as against public policy.

4. Contracts ⇐108(2)
Evidence ⇐20(1)
It is a matter of common knowledge that businessmen throughout the United States have since the beginning of the Republic at various times entered into agreements in local communities to close down their stores on the Sabbath Day, on holidays, on Saturday afternoons and other appropriate occasions, and such agreements are legal and do not contravene public policy.

5. Contracts ⇐113(4)
Where contract which members of master bakers association had with bakers' union was terminated by notice in accordance with the contract, agreement between members of association and fellow member to keep his bakery closed until members of association had entered into new contract with bakers' union was not invalid as having for its purpose the breaching of contract with union.

6. Appeal and error ⇐209(1)
Contention that there was no substantial evidence of damage could not be sustained where defendant did not question trial court's finding that plaintiff had suffered loss in specified sum.

7. Appeal and error ⇐931(1)
Where defendant did not question trial court's finding, presumption existed that there was substantial evidence to support finding.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Carl Rosenberg and another doing business as Chicago Bakery & Creamery against Ben Raskin, doing business as Raskin's New York Rye Bakery to recover damages for breach of contract. Judgment for plaintiff and defendant appeals.

Affirmed.

David Sokol, of Los Angeles (John W. Rice, of Los Angeles, of counsel), for appellant.

Paul Gordon and Max Esterman, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for breach of a contract which defendant had entered into with his fellow members of the Hebrew Master Bakers Association to keep his bakery closed until the members had entered into a new contract with the bakers' union, defendant appeals.

Defendant does not question the sufficiency of the evidence to sustain the following findings of the trial court:

1. That plaintiffs and defendants are members of the Hebrew Master Bakers Association, a voluntary association for the protection of various bakeries in the city of Los Angeles.

2. That at a meeting of such association held on the 30th day of April, 1945, defendant falsely and fraudulently and with

intent to deceive and defraud plaintiffs, among others, and with intent to gain possession of plaintiffs' customers, represented to plaintiffs that he would, in conjunction with all of the members of the aforementioned association, keep his place of business closed until a new contract was made with the bakers' union.

3. That plaintiffs believed and relied upon the representations made by defendant, and in consideration of the promise of defendant not to keep his bakery open were induced thereby not to open their place of business on the following day, and that they adhered strictly to the agreement entered into between defendant and plaintiffs with other members of the association and kept their place of business closed until a new contract was entered into with the bakers' union some weeks later.

4. That defendant immediately after inducing plaintiffs and others to agree to the terms above mentioned did open his place of business and caused such place of business to remain open during all the time that plaintiffs kept their bakery closed.

5. That among plaintiffs' customers were the Home for the Aged, Canter's Delicatessen and Bernie's Delicatessen, all of Los Angeles, and that as a result of defendant's operating his bakery between May 1st and May 12th, 1945, with the intent to deprive plaintiffs of the regular trade of such customers, plaintiffs suffered a loss in the sum of $1,700.

Defendant's Contentions

First: That findings numbers VI and IX are not sustained by the evidence.

This proposition is immaterial. The trial court made among others the following findings:

"VI. That the representations as to closing defendants' bakery were false, and were then and there known by the defendants to be false; that in truth and in fact the defendants had no intention of keeping their bakery closed until a new contract was signed by plaintiffs and defendants, with other bakeries of the association, but merely made such representations for the purpose of inducing the plaintiffs, among others, not to open their places of business, so that defendants, with intent to defraud plaintiffs, could and did gain possession of various customers of plaintiffs, defendants fully knowing and taking advantage of the fact that by reason of plaintiffs' keeping their bakery closed, in reliance upon the representations of the defendants, which defendants then and there knew to be false, plaintiffs could not serve their trade."

"IX. That defendants, immediately after falsely and fraudulently inducing plaintiffs, with others, to agree to the terms mentioned hereinbefore, and with the knowledge on the part of the defendants that plaintiffs would not open their bakery business, and that plaintiffs would not be in a position to serve their customers, contacted various customers of the plaintiffs with the intent to take away from plaintiffs, and deprive them of, their regular trade."

[1] It is immaterial whether there was evidence to sustain the foregoing findings since by failing to question the sufficiency of the evidence to sustain the five findings of the trial court hereinbefore stated defendant conceded that there was substantial evidence in support of them; and such findings unquestionably sustain the trial judge's conclusion that plaintiffs and defendant entered into a contract which defendant breached to the damage of plaintiff in the sum of $1,700.

Second: The contract was against public policy and therefore void.

[2, 3] This contention is devoid of merit. The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public as a whole or contravenes some established interest of society. (Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 44, 200 P. 934; Flinn & Treacy v. Mowry, 131 Cal. 481, 488, 63 P. 724, 1006.) In Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., supra, 187 Cal. at page 44, 200 P. at page 937, appears this very apt and pertinent statement: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have

the utmost liberty of contract, and that every contract, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts of justice. *Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.*" (Italics added.)

[4] In the present case there was nothing in the contract that was injurious to the interests of the public as a whole or that contravened any established interest of society. It is a matter of common knowledge that business men throughout the United States have since the beginning of our Republic at various times entered into agreements in local communities to close their stores on the Sabbath day, on holidays, on Saturday afternoons and on other appropriate occasions. Such agreements are perfectly legal and do not in any respect contravene public policy.

[5] Neither is there any merit in defendant's contention that the purpose of this agreement was to breach contracts which the various members of the association had with the bakers' union. Plaintiffs and defendant and other members of the association each had a contract with the bakers' union commencing on the first day of May, 1943, and continuing until the 30th day of April, 1945, and thereafter until a new agreement had been consummated or the agreement canceled by the employer or the union. The trial court found, supported by substantial evidence, that in the afternoon of April 30, 1945, the members of the association had notified the union of the termination of their contracts with it as of that day. Therefore it is obvious that the agreement which defendant entered into with plaintiffs on the evening of April 30, 1945, was not for the purpose of breaching contracts which had previously been terminated.

The cases of National Labor Relations Board v. Crown Can Co., 8 Cir., 138 F.2d 263, and National Labor Relations Board v. Franks Bros. Co., 1 Cir., 137 F.2d 989, are clearly not in point on the present appeal for the reason that such cases, arising under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., dealt with threats and intimidations by employers against their employees to keep them from unionizing. No such situation obtains in the present case.

[6, 7] Third: There is no substantial evidence of damage.

This proposition is untenable in view of the fact that defendant does not question the trial court's finding that plaintiffs had suffered a loss in the sum of $1,700. Hence it must be presumed that there was substantial evidence to support such finding.

Fourth: The complaint does not state a cause of action.

This contention is predicated upon defendant's claim that the contract is void because against public policy. We have fully discussed this proposition under defendant's second contention and as above indicated find that such claim is without merit.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 301

McKINLEY et al. v. SOUTHERN PAC. CO. et al.

Civ. 7299.

District Court of Appeal, Third District, California.

June 12, 1947.

Hearing Denied Aug. 7, 1947.

1. Appeal and error ⇨931(1), 989

To justify reversal of judgment for insufficiency of evidence to support it, record must show that, accepting full force of evidence adduced, with every reasonable inference therefrom favorable to prevailing party, and excluding all conflicting evidence, law precludes such party from recovering judgment.

2. Appeal and error ⇨994(3)

Determination of weight of witnesses' testimony is not appellate tribunal's function, but trial court's duty.

3. Railroads ⇐348(5)

Evidence supported finding that locomotive was traveling at excessive speed of 50 to 55 miles per hour over heavily traveled city street crossing at time of collision with truck resulting in death of passenger therein.

4. Evidence ⇐586(3)

In action for death of passenger in truck struck by defendant railway company's locomotive at street crossing, testimony of codefendant truck driver, called as witness by plaintiffs, that he heard no locomotive whistle or bell, supported finding that whistle was not blown or bell rung, though all other witnesses testified to contrary. Code Civ.Proc. § 2055; Civ.Code § 486.

5. Appeal and error ⇐1010(1)

The trial court's finding, supported by evidence, that defendants were negligent, cannot be disturbed on appeal.

6. Constitutional law ⇐70(1)

Any modification of rules, fixed by many Supreme Court decisions, that testimony of party, called as witness by adverse party under statute, cannot be considered evidence of such adverse party in weighing it against a presumption, and does not dispel contrary presumption in favor of party calling witness should be effected by legislature, not by overruling of cases establishing such rules by District Court of Appeal. Code Civ.Proc. § 2055.

7. Death ⇐58(1)

In death action, plaintiffs were entitled to presumption that decedent exercised ordinary care, and such presumption, though rebuttable, was evidence. Code Civ.Proc. § 1963, subd. 4.

8. Evidence ⇐591
Railroads ⇐346(5)

In action for death of passenger in truck struck by locomotive at street crossing, testimony of codefendant truck driver, called as witness by plaintiffs, that decedent asked witness to drive truck notwithstanding instructions of decedent's employer not to permit witness to drive, could not be regarded as plaintiff's evidence, and hence did not overcome statutory presumption of decedent's due care, but merely created conflict therewith, so that trial court's finding that decedent was not contributorily negligent was supported by evidence. Code Civ.Proc. § 1963, subd. 4; § 2055.

9. Witnesses ⇐298

A person's right to his private books and papers cannot be violated, unless power to do so clearly appears.

10. Evidence ⇐368(2)
Witnesses ⇐271(2)

In action for death of passenger in truck struck by locomotive at street crossing, where codefendants locomotive engineer and fireman on cross-examination by plaintiffs, testified as to details of accident and stated that they made written reports thereof to their superior, trial court properly granted plaintiff's motion to order defendants to produce reports for plaintiff's use on further cross-examination of such witnesses.

11. Evidence ⇐368(6)

The trial court must be depended on to exercise wise discretion in matter of requiring party to produce written reports or documents as to which such party's witnesses testify in order to protect party from unnecessary disclosure of contents of his private books, papers and records to others, but no party has right to refuse to produce any report or document which may have bearing on facts of pending litigation.

12. Evidence ⇐539½(3), 555

One who had been a locomotive engineer and fireman for many years was qualified to testify as to speed of locomotive at time of collision after stating facts considered by him in giving his opinion as to such speed.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Lucille McKinley, individually and is guardian ad litem for J. L. McKinley and others, minors, against the Southern Pacific Company and others for the death of John McKinley as the result of a truck, in which he was riding, being struck by

named defendant's locomotive at a street crossing. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Jones and Quinn, of Stockton, T. B. Scott and Nathan B. McVay, both of Modesto, for appellants.

Cleary and Zeff and Francis W. Halley, all of Modesto, for respondents.

SCHOTTKY, Justice pro tem.

On February 21, 1944, at about 11:00 a. m. one John McKinley was injured fatally when a truck, in the cab of which he was riding, was struck by a locomotive of the Southern Pacific Company without any cars attached to it, at the B Street crossing in the city of Modesto. McKinley's widow, individually and as guardian ad litem for three minor children, brought an action to recover damages for his death, and the trial court, sitting without a jury, awarded plaintiffs and respondents a judgment for $25,000 against defendants Southern Pacific Company, Elmer F. Ahlborn, the locomotive engineer, Howard H. Shafer, the locomotive fireman, and Frank Leo, Jr., who was driving the truck at the time of the accident. Following the denial of motions for a new trial, said defendants appealed from the judgment, the appeal of defendant Frank Leo, Jr., being separate from the appeal of the Southern Pacific Company and its employees.

As grounds for a reversal of the judgments against them, appellant Southern Pacific Company and its employees made the following contentions: (1) That there was no evidence of any negligence on the part of the Southern Pacific Company or its employees; (2) that John McKinley, the decedent, was as a matter of law guilty of contributory negligence which proximately contributed to his death; (3) that the court erred in rulings during the trial to the material prejudice of these appellants.

Appellant Frank Leo, Jr., contends that the judgment against him should be reversed because the decedent "was guilty of contributory negligence as a matter of law."

Before discussing these contentions of appellants we shall give a brief summary of the evidence.

Appellants Shafer, Ahlborn and Frank Leo, Jr., were called as witnesses by respondents under section 2055 of the Code of Civil Procedure. Shafer testified that he was fireman on engine 3102 which was being returned from Merced to Tracy without cars attached; that he was on the left side of the cab watching ahead; that he saw the truck approach the track and called to the engineer to stop when a collision seemed imminent, the engine then being 120 to 130 feet back of the B Street crossing; that the bell had been ringing for some 1,320 feet back of the crossing and that the engine was traveling about 20 miles per hour as they came up to the crossing; that the whistle was first blown about 170 feet back of the crossing and the last blast was still sounding when he called to the engineer and the engineer applied the brakes in emergency; that the engine hit the truck just back of the door of the cab and traveled about 600 feet after the accident; that he saw the truck as it turned to the right and approached the track at an angle, appearing to slow down; that at the time he called to the engineer to stop, the front of the truck was 20 to 25 feet from the track and was traveling at a speed of 6 to 8 miles per hour; that the bell was still ringing after the collision.

Ahlborn, the engineer, testified that he was on the right side of the cab and that as they approached the B Street crossing the fireman (Shafer) called to him but he could not hear what the fireman said; that he did not apply his brakes at that instant but did apply them in an emergency position when the fireman pulled his head into the cab; that when the fireman called to him they were 120 to 130 feet from B Street crossing and that the engine ran 500 to 600 feet past the crossing; that it stopped about 200 feet beyond the truck; that he had been in the employ of the Southern Pacific Company for 24½ years, all in engine service, and that there was no defect in the engine or any condition to affect its stopping; that he had made an inspection of the brakes before he left Merced and they were in good

condition and were operated by compressed air; that the bell was ringing approaching B Street crossing and that he heard it; that he began to blow the whistle at the east end of the railroad bridge (about 1,700 feet from the crossing); that there was a lapse of between 5 and 6 seconds between the first and second series of blasts and that he started the second series about 300 feet east of the crossing and had not completed it when the fireman called to him.

Appellant Frank Leo, Jr., testified that he was 16 years old; that his father's name was Frank Leo; that he was driving the truck when the collision occurred; that decedent John McKinley was riding with him; that the truck was being used to haul milk picked up from farms and taken to the Nestle Plant at Ripon; that they had completed picking up the milk and were on the way to Ripon; that as he came up to the B Street crossing they were going about 10 miles per hour; that he slowed down and was traveling about six when he got up to the tracks; that he heard no bells ringing or any whistle blowing; that he looked at the wigwag and did not see it moving; that his eyesight and hearing were normal; that it was raining and that there was only one windshield wiper on the truck which was on the driver's side; that the right half of the windshield was somewhat blurry and the side of the cab had windows; that the B Street crossing goes on an angle to the left, and from the time he started to turn he could not see more than 50 feet south of the edge of the crossing; that when he came up to the crossing he looked to the left and asked McKinley if there were any trains coming; that McKinley looked and said "O.K." and the witness then started to cross the crossing but never got across; that he was supposed to help McKinley to pick up the milk and show him where to go, and that McKinley was supposed to drive; that he was present the night before when his father told McKinley not to let the boy drive as he did not have a driver's license; that McKinley asked him to drive, and he at first refused but near the end of the route he did take the wheel and was driving at the time the accident occurred.

Roy Livingston, a police officer, testified that he had occasion to go to the scene of the accident while the train was still there, and that the distance from the crossing to the truck was about 600 feet, the engine being some distance west of the truck.

Marion L. Stanchfield, a witness called by respondents, testified that he had been an engineer and fireman for 28 years. He had examined the crossing at B Street and had in mind that there was no grade there. He stated that a Mikado type engine such as the one involved here, with brakes in good condition after full application of brakes, was traveling at a speed of between 50 and 55 miles per hour if 925 feet were required to stop the engine, and that if 725 feet were required to stop it, the engine would be traveling between 45 and 50 miles per hour. He stated further that an engine such as the one here involved, if traveling 20 miles per hour, should stop within 130 and 135 feet after full application of brakes.

Mrs. Madeline Amorante was called by appellants and testified in substance that she and her husband, Ernest Amorante, were traveling in an automobile behind the truck; that they first saw it when it was ahead of them on the old 99 highway bridge across the Tuolumne River (which paralleled the railroad bridge); that she heard the whistle blow while she was on the bridge and looked back and saw the train; that she saw the truck until it was hit and saw it turn off of 7th Street into B Street.

Ernest Amorante, also called by appellants, testified that he saw the truck about 150 feet ahead of him while he was on the bridge; that the truck was creeping along slowly as it made the turn down B Street and that he thought it was going to stop; that he heard the first whistle from the engine when he was on the bridge, and there were intervals between the toots of the whistle which continued right up to the time of the collision; that the engine was traveling 20 to 25 miles per hour; that the truck did not stop before it was hit but slowed up, appearing is if it were going to stop; that he did not hear the bell ringing on the engine.

Henry M. Noels, a signal maintainer, employed by appellant Southern Pacific Company, testified that he had inspected the wigwag signal at the B Street crossing at

4:00 p.m. on February 19th, two days prior to the accident, and also at 11:50 a.m. on February 21st, the day of the accident, and that the equipment was in good working order. He testified further that rainy weather would not stop the signals from working.

Francis W. Halley testified that the distance from the center of the B Street crossing to the east end of the railroad bridge is 1,707 feet, and that the distance from the center of the B Street crossing to the east end of the old highway 99 bridge is 1,698 feet.

The first contention of appellants Southern Pacific Company and its employees is that there was no evidence of any negligence on their part. Said appellants assert that the evidence is not fairly susceptible of any other conclusion than that the engine was approaching the crossing at a speed of 20 to 25 miles per hour, that the whistle on the engine had been blown at intervals from the easterly end of the highway bridge up to the crossing, and that the truck approached at a speed and in a manner which gave the appearance that it was going to stop. Said appellants state further that the conflicting evidence upon which respondents rely is "so uncertain, so inherently lacking in probative value that it is not worthy of consideration." Respondents in reply contend that the court's finding of negligence on the part of said appellants is properly based on four points: (a) Extreme speed; (b) failure to sound the whistle or ring the bell; (c) failure of the fireman to give the proper signal to warn the engineer; (d) failure of warning device.

[1] It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment.

[2, 3] It appears from the evidence, hereinbefore summarized, that there is support in the record for a finding that the engine traveled 925 feet after the time the fireman called to the engineer. The witness Stanchfield testified that with an engine of the type involved here, if the brakes were in good condition, it could be stopped within 130 to 135 feet if the brakes were fully applied and the engine were traveling 20 miles per hour; that if 925 feet were required to stop it, it would be traveling at a speed between 50 and 55 miles per hour; and that if 725 feet were required to stop, it would be traveling at a speed of between 45 and 50 miles per hour. Appellants make no contention that it would not be negligence on the part of the appellant railroad company and its employees to operate the engine at a speed of 45 to 55 miles over a crossing in the city of Modesto, but said appellants vigorously attack the testimony of the witness Stanchfield, even though they produced no witness to contradict the opinion evidence of that witness. It may well be that the criticism of Stanchfield's testimony is justified, but the witness was before the trial court and was thoroughly cross-examined by counsel for appellants. It is not the function of an appellate tribunal to pass upon the weight of the testimony of the various witnesses because that is the duty of the trial court. We cannot say upon the record here that the trial court could not properly find that the engine was traveling at a speed of from 50 to 55 miles per hour over a heavily traveled crossing in the city of Modesto and that such a rate of speed was excessive. While it is true that the engineer and the fireman and several other witnesses testified that the engine was not traveling more than 20 miles per hour, such testimony merely created a conflict in the evidence.

[4] Appellants Southern Pacific Company and its employees contend also that the evidence is susceptible of no other conclusion than that the whistle was blown at intervals from the easterly end of the highway bridge up to the crossing. All of the witnesses except appellant Frank Leo, Jr., who was called by respondents under section 2055 of the Code of Civil Procedure,

testified as to the blowing of the whistle or the ringing of the bell. Appellant Frank Leo, Jr., testified that he heard no whistle or bell and that his hearing was normal. While it must be conceded that it would seem that the evidence clearly preponderates in favor of a conclusion that the whistle was blown and the bell rung, yet we cannot say, as a matter of law, that the testimony of Frank Leo, Jr., does not support the opposite conclusion.

In Eastman v. Atchison T. & S. F. Railway Co., 51 Cal.App.2d 653, 660, 125 P.2d 564, 568, five witnesses testified that the bell was ringing and the whistle had been blown, two of these witnesses being the engineer and the fireman. As against this testimony the plaintiffs produced one witness who testified that just as the train came to the crossing the wigwag signal started and he heard a very slight bell; that up to that time he heard no bell at all and at no time did he hear any whistle. The court said: "It is doubtless the law that failure to comply with the regulations prescribed by section 486 of the Civil Code as to ringing the bell and blowing the whistle of a railroad train upon approaching a street crossing is prima facie evidence of negligence on the part of the railroad company [citing cases]; *and that where the evidence is conflicting as to whether the train crew complied with such statutory requirement, the implied finding of the jury adverse to the railroad company is binding on appeal.* [Citing cases.] Furthermore, the courts have held that if a witness is in a position to hear the bell or the whistle of the locomotive and he testifies he heard neither, such testimony is sufficient to raise a conflict with positive testimony to the contrary that such warnings were given. [Citing cases.]" (Italics added.)

Also see Downing v. Southern Pacific Co., 15 Cal.App.2d 246, 59 P.2d 578; Thompson v. Los Angeles & S. D. B. R. Co., 165 Cal. 748, 134 P. 709; Lahey v. Southern Pacific Co., 16 Cal.App.2d 652, 61 P.2d 461.

[5] We are, therefore, unable to agree with the contention of said appellants that there was no evidence of any negligence on their part. As we have pointed out, there was evidence upon which such a finding could be based, and the trial court having so found, we cannot disturb such finding.

The second contention of appellants Southern Pacific Company and its employees is that John McKinley, the decedent, was, as a matter of law, guilty of contributory negligence that proximately contributed to his death. Said appellants point out that the trial court found that appellant Frank Leo, Jr., was guilty of negligence which was a proximate cause of the accident and contend that the negligence of Frank Leo, Jr., was the negligence of John McKinley. Said appellants argue that it was the duty of McKinley under the instructions of his employer to control the operation of the truck and that he was responsible for the negligence of the driver because, as said appellants contend, the boy was McKinley's agent. Said appellants set forth the testimony of appellant Frank Leo, Jr., that he was supposed to help McKinley pick up the milk and show him where to go, and that McKinley was supposed to drive; that he was present the night before when his father told McKinley not to let the boy drive; that McKinley asked him to drive, and he at first refused, but near the end of the route did take the wheel. Appellants argue that this evidence is uncontradicted and without conflict.

Respondents in reply urge that the trial court was not bound to believe the testimony of appellant Frank Leo, Jr., and that respondents were not bound by his testimony as he was called by them under section 2055 of the Code of Civil Procedure. They point out that Frank Leo, Sr., was not called as a witness to corroborate his son; that Leo, Sr., sent his son with McKinley on three different occasions; and that it was clear that Leo, Jr., was an agent and servant of Leo, Sr.

Respondents cite the case of Cioli v. Kenourgios, 59 Cal.App. 690, at page 697, 211 P. 838, at page 841, where this court said: "The fact that plaintiff called the alleged conspirators to the witness stand did not compel approval by him of their testimony. He could use their appearance on the stand, their words, their acts—in fact anything they could furnish in his favor, and reject

the rest. The salutary provision of section 2055 of the Code of Civil Procedure, * * was designed to prevent as far as possible parties to an action from perpetrating fraud and dishonesty. It strips them of former barriers used for shielding falsehood." They also cite the case of Blanc v. Connor, 167 Cal. 719, at page 722, 141 P. 217, at page 218 in which the court said: "The rule was thus stated in Davis v. Judson, 159 Cal. 128, 113 P. 150, in which Mr. Justice Lorigan, delivering the opinion of this department, said: 'While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.'"

In the case of Blank v. Coffin, 20 Cal.2d 457, at page 461, 126 P.2d 868, at page 871 our Supreme Court said: "There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: 'A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061 subd. 3 of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180 § 154."

Respondents argue further that the evidence set forth by appellants is not uncontradicted. They point out that respondents are entitled to rely upon the presumption that a person takes ordinary care of his own concerns (Code of Civ.Proc., sec. 1963, subd. 4), and that the presumption that decedent exercised due care at the time of the accident is evidence in the case and is sufficient to support the finding of the court that decedent was not negligent.

[6] The case of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 532, bears a striking similarity to the instant case, so far as the question of contributory negligence is concerned. It was a case arising out of the death of one Smellie when the truck in which he was riding, which was being driven by one Ireland, was struck at a railroad crossing in the city of Madera by one of defendant's trains. One defense was contributory negligence of the deceased. Plaintiff put Ireland, also a defendant, upon the witness stand under section 2055, and upon cross-examination by counsel for his codefendant, Southern Pacific Company, Ireland testified that the deceased said, just before going onto the track, "It's all clear, let's go." This evidence was not contradicted by any witness. The trial judge directed a verdict in favor of defendants. In reversing the judgment our Supreme Court said, 212 Cal. pages 555–561, 299 P. 535:

"This brings us to the point of considering the effect of the testimony of the defendant Ireland. Conceding it to be contradictory to, and inconsistent with, the presumption, did it merely produce a conflict in the evidence, or did it overcome and dispel it?

"In the present action, as already stated, Ireland, although examined by the plaintiff, was called under section 2055 of the Code of Civil Procedure. This section reads as follows: 'A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the

record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness when so called, may be examined by his own counsel, but only as to the matters testified to on such examination.'

* * * * * *

"The effect of evidence given by an adverse party under section 2055 was commented on by this court in the recent case of Marchetti v. Southern Pac. Co., 204 Cal. 679 [686] 269 P. 529, 532. In that case we said: 'While the two trainmen, who were called for cross-examination under section 2055 of the Code of Civil Procedure, testified that they gave the required signals, both by ringing the bell and sounding the whistle the plaintiffs, especially upon a motion for a nonsuit, would not be concluded by their evidence; it being the duty of the court upon a motion for a nonsuit to accept the evidence most favorable to the plaintiffs.'

"As opposed to the foregoing rule and the authorities cited in support thereof, the respondents rely principally upon the case of Figari v. Olcese, 184 Cal. 775, 195 P. 425, 428, 15 A.L.R. 192, but we find nothing in that case contrary to the views hereinbefore expressed, or to the authorities last cited. In that case the court held, upon the trial of an action in which the evidence had been produced by the calling of an adverse witness under section 2055 of the Code of Civil Procedure, that the evidence of such witness might be given its proper weight in the final determination of the issues of the case. As bearing out our construction of said section, this court in that case held: 'In other words, such testimony is to be treated as though given on cross-examination.'

"Neither do we think that in any of the following cases, cited by respondent, is there anything to be found which is contrary to the construction we have placed upon section 2055 of the Code of Civil Procedure: Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Preo v. Roed, 99 Cal. App. 372, 278 P. 928; Andrews v. Waldo, 205 Cal. 764, 272 P. 1052; Heiter v. Hirschfeld, 205 Cal. 625, 271 P. 1051; Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788. In Brown v. Chevrolet Motor Co., supra, and in Koster v. Southern Pac. Ry. Co., supra, no reference is made to section 2055. While in the other cases witnesses were called under said section, no question was presented nor discussed in the opinion of any of these cases as to the force and effect of such evidence against a disputable presumption.

"Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict.

"Besides, the testimony of Ireland has certain elements of weakness which render it of doubtful probative value, and which, we think, presents additional reasons why it should not, as a matter of law, be held to be conclusive of the fact to which it relates. In the first place it is the testimony of an adverse party, and a jury may disregard the testimony of such a witness as against a presumption if the latter satisfies them. Adams v. Hopkins, 144 Cal. 19, 77 P. 712; Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332, 187 P. 996; Keating v. Morrissey, 6 Cal.App. 163, 91 P. 677.

"Then again the testimony of Ireland related to a declaration of another person. Evidence of the declarations or oral admissions of a party are always received with caution. Code Civ.Proc., § 2061, subd. 4. The reason for this rule is that: 'In most cases it is impossible, however honest the

witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission.' 10 Cal.Jur., p. 1081; Davis v. Davis, 26 Cal. 23, 41, 85 Am.Dec. 157.

"A third inherent weakness to be found in the testimony of Ireland is that it purports to give the statements or declarations of a deceased person. Regarding testimony of this character, this court said: 'The evidence is of oral admissions against interest by a man whose lips are sealed in death. What then does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (section 2061, subd. 4) that the evidence of oral admissions of a party ought to be received with caution by a jury. In Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St. Rep. 87, this court in bank said, "No weaker kind of testimony could be produced." Again in bank (Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417) this court has said: "It is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory."' Estate of Emerson, 175 Cal. 724, 727, 167 P. 149, 151. We might go on and cite many other authorities, but the above are sufficient for our present purpose. To invoke a rule which would deprive a party of the right to have a jury pass upon the weight of evidence of this character would be contrary to an unbroken line of decisions of this court, and its effect would be in many instances to deprive a party to an action of the right, guaranteed to him by the law of this state, to a trial by jury.

"We are, therefore, of the opinion that the testimony of Ireland, as against the presumption that the deceased took ordinary care of his own concerns, was not sufficient as a matter of law to dispel said presumption, but, on the other hand, merely tended to create a conflict with said presumption, which it was the right of the appellants to have passed upon by the jury in its final deliberations, and not by the court on a motion for a directed verdict.

"The respondent, the Southern Pacific Company, contends that, as between it and the appellants, the testimony of Ireland must be regarded as evidence of the appellants, and, therefore, under the rule enunciated in Mar Shee v. Maryland Assur. Corp., supra [190 Cal. 1, 210 P. 269] it entirely overcame and dispelled the presumption of due care on the part of the deceased. Said respondent cites no authority to support this contention, and we think to assent to it would be to place an unauthorized limitation upon the remedial provisions of section 2055 of the Code of Civil Procedure."

Counsel for appellants Southern Pacific Company and its employees in their brief make a vigorous attack upon the decision in the Smellie case. They characterize the rule enunciated in that case as "erroneous, unsound and contrary to the great weight of authority," and, in effect, ask this court to overrule it. This court, as an intermediate appellate tribunal, is bound by the decisions of the Supreme Court, and the rule enunciated in the Smellie case has been approved by the Supreme Court many times, and, as said by Chief Justice Gibson in Speck v. Sarver, 20 Cal.2d 585, at page 590, 128 P.2d 16, at page 19: "The rules as to the nature of rebuttable presumptions upon which the foregoing opinion is based have been fixed by many decisions of this court, and any modification of such rules should be effected by the Legislature, and not by overruling at this time the cases establishing them."

[7, 8] We, therefore, conclude that respondents were entitled to the presumption that decedent McKinley took ordinary care of his own concerns; that such presumption, though a rebuttable one, was evidence in the case; that the testimony of appellant Frank Leo, Jr., who was called by respondents under section 2055 of the Code of Civil Procedure, is not to be regarded as evidence of respondents and hence does not dispel or overcome the presumption of due care on the part of the deceased, but merely creates a conflict with the presumption; and that the finding of the trial court that the deceased was not guilty of contributory negligence is supported by the record.

What we have said relative to the second contention of appellants Southern Pacific Company and its employees applies also to the contention of appellant Frank Leo, Jr., that decedent was guilty of contributory negligence.

The next contention of appellants Southern Pacific Company and its employees is that the trial court erred in granting respondents' motion to compel said appellants to produce written reports of the accident made by appellants Ahlborn and Shafer (the engineer and fireman) to their superior. Upon cross-examination of said appellants respondents brought out the fact that they had made written reports to B. E. Stone, their superior, and counsel for respondents thereupon demanded said statements and moved the court for an order requiring appellants to produce them, which motion was granted by the court over the objection of said appellants. Appellants concede that no prejudice resulted to them from said ruling but urge that it is a question of some importance and should be determined by this court.

[9] It is, of course, elementary that the right of a person to his private books and papers is not to be violated except where the power to do so clearly appears. In Kullman, Salz & Co. v. Superior Court of Solano County, 15 Cal. App. 276, at page 286, 114 P. 589 at page 593, this court said: "We do not, of course, intend to be understood as saying that there is no power in the court to compel the production of private books and papers, or that such power is inconsistent with the constitutional provision, for 'when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it.' Ex parte Clarke, [126 Cal. 238, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176.] But what we do intend to say is that such power can be exercised by the court only where the facts clearly and without question warrant it * * *."

In Morehouse v. Morehouse, 136 Cal. 332, 337, 68 P. 976, 978, the court, quoting from Ex parte Clarke, 126 Cal. 235, 239, 58 P. 546, 547, 46 L.R.A. 835, 77 Am.St.Rep. 176, said: "When a witness is in court * * * and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it." See, also, Freel v. Market St. Cable Ry. Co., 97 Cal. 40, 44, 31 P. 730; Hirshfeld v. Dana, 193 Cal. 142, 153, 223 P. 451; Cordi v. Garcia, 39 Cal.App.2d 189, 196, 102 P.2d 820. And in the latter case the court, after citing Morehouse v. Morehouse, supra, said that the right of defendants' attorney to inspect and use letters in question for impeachment purposes might have been properly granted.

[10, 11] Appellants assert that no showing was made in this case that anything in the requested statements was material to the issues in the instant case, but it is difficult to understand how written reports by the engineer and the fireman to their superior as to the details of the accident could fail to be material. Where the engineer and fireman were witnesses and testified as to such details, and in the course of such testimony stated that they had made such written reports, it was, in our opinion, clearly proper for the trial court to grant respondents' motion to order appellants to produce said statements for respondents' use in further cross-examination. If there were statements in said reports inconsistent with the testimony of the witnesses, respondents were entitled to use them for impeachment purposes, and if there were no inconsistent statements in said reports, no possible injury could result to appellants. A trial court must be depended upon to exercise a wise discretion in such matters to protect a party from any unnecessary disclosure to others of the contents of his private books, papers and records, but no party has a right to refuse to produce any report or document which may have a bearing upon the facts of the pending litigation.

[12] The final contention of appellants Southern Pacific Company and its employees is that the trial court erred in permitting the witness Stanchfield to testify as to the speed of the engine. There is no merit in this contention and said appellants devote only a few lines of their brief to it.

The witness Stanchfield stated the facts that he took into consideration in giving his opinion as to the speed, and these factors were taken from the evidence. The weight of the testimony was a matter for the trial court but we cannot hold that it was erroneously admitted.

The instant case is one in which it must be stated that, so far as the record is concerned, the evidence clearly preponderates in favor of appellants. However, the trial court, after hearing the evidence, observing the witnesses, and reading the briefs of respective counsel, found in favor of respondents, and thereafter denied appellants' motions for a new trial. As we have hereinbefore pointed out, the evidence is sufficient to support the judgment, and no prejudicial errors have been committed.

In view of the foregoing, the judgment is affirmed.

THOMPSON, Acting P. J., and PEEK, J., concur.



80 Cal.App.2d 367

McDONALD et al. v. RANDOLPH.

Civ. 3657.

District Court of Appeal, Fourth District, California.

June 13, 1947.

1. New trial ⇐161(1)

The trial court has power to grant a new trial on condition.

2. New trial ⇐162(1)

An order granting defendant a new trial was not void as a whole because it contained conditions permitting plaintiffs to consent to reduction of jury's verdict in plaintiffs' favor on a day subsequent to 60-day period allowed by statute for filing motion for new trial. Code Civ. Proc. § 660.

3. Appeal and error ⇐1072

Plaintiffs making no election at any time to remit portion of jury's verdict in their favor were not prejudiced by invalid condition of order granting defendant new trial unless plaintiffs consented to reduction of verdict within time extending beyond statutory 60-day period for filing motions for new trials. Code Civ.Proc. § 660.

4. New trial ⇐162(5)

Where plaintiffs made no election to remit portion of jury's verdict in their favor at any time, portion of order granting defendant new trial unless plaintiffs consented to reduction of verdict within time extending beyond 60 days allowed by statute for filing motion for new trial was void. Code Civ.Proc. § 660.

5. Appeal and error ⇐9

Where defendant's motion for new trial was granted on ground that evidence was insufficient to sustain verdict in amount allowed as general or special damages, an appeal from judgment entered on the verdict was ineffectual and was dismissed.

Appeal from Superior Court, Imperial County; Charles C. Haines, Judge.

Action by Margaret McDonald and her husband, Marvin McDonald, against C. E. Randolph for damages allegedly sustained from the unskillful and negligent treatment by defendant of first-named plaintiff while a patient in a hospital. A judgment was entered on verdict for plaintiffs for $7,500 general damages and $1,166 special damages after denial of defendant's motion for judgment notwithstanding verdict. From an order granting defendant's motion for a new trial on the ground of insufficiency of evidence and excessiveness of the verdict unless plaintiffs within 30 days should stipulate to reduce amount of judgment as to general and special damages, defendant appeals.

Appeal dismissed.

Horton and Knox, of El Centro, and Monroe & McInnis, of San Diego, for appellant.

Edward B. Patterson, of El Centro, for respondents.

GRIFFIN, Justice.

This action is for damages for injuries alleged to have been suffered by plaintiff Margaret McDonald while she was a patient in a hospital. Defendant and appellant is a physician and surgeon. It was alleged that on April 24, 1944, plaintiffs, husband and wife, employed defendant to perform an operation for an appendectomy upon Mrs. McDonald; that the operation was unskillfully and negligently performed, and that as a result thereof Mrs. McDonald suffered certain serious burns and that the cure therefor was prolonged by reason of unskillfulness on the part of defendant in treating them. General and special damages were sought.

Defendant admitted that he performed the operation, and while the patient was in the hospital she did receive burns. It was then claimed that on May 24, 1944, plaintiffs, for a valuable consideration, released the proprietor of the hospital from any claim for said damages. The remaining allegations of the complaint were denied.

The evidence shows that the operation itself was not unskillfully performed; that Mrs. McDonald remained in the hospital about one week after she received third degree burns on the calves of her legs by a hot water bottle placed there by the nurse immediately after the operation. After plaintiff returned home she was under the care of defendant for two weeks. He dismissed her as improved. Thereafter, she obtained another doctor and was treated by him for 16 months. That doctor testified for plaintiff and gave as an opinion that in the treatment of third-degree burns the most satisfactory results come from having a moist surface during the time of treatment rather than the dry treatment used by defendant, and that the method of treatment used by him was not a reasonable treatment, i. e. that it was not the medical treatment the ordinary doctor would give a patient under the circumstances.

Another doctor, testifying for defendant, gave as his opinion that according to his experience, the treatment accorded Mrs. McDonald by defendant after she was burned was in accordance with the general practice in the community. On cross-examination, he testified, however, as follows:

"Q. (By Mr. Patterson): * * * if you have a third-degree burn that would cover two-thirds of the leg in two or three weeks after you had seen it, do you think you would be justified in telling the patient it was getting along all right and didn't need further attention from you? A. Not unless it had healed over.

"Q. I mean still running. A. No."

There was a sharp conflict in the evidence as to whether defendant's treatment of plaintiff in respect to the burns was proper. The evidence shows that at the time of trial plaintiff's legs were in such condition she would "always have scars" and "her legs would be smaller."

Motions for nonsuit and directed verdict were denied. The trial court instructed the jury, however, that there was insufficient evidence to sustain any finding that defendant assumed or had any responsibility or control over the hospital and that the evidence established that the plaintiff received the burns while under the care of the employees in the hospital and during the absence of Dr. Randolph, and that therefore no verdict could be returned against him for damages for the burning of plaintiff's legs in the first instance. However, the court did submit to the jury the question whether or not the care given to plaintiff after she left the hospital and before she placed herself in the care of another doctor was or was not negligent, and whether, in short, plaintiffs were entitled to damages because of a delay in recovery as a result of negligent treatment. The jury returned a verdict in favor of plaintiff for the sum of $7500 general damages, and $1166 special damages. A motion for judgment notwithstanding the verdict was made and denied. Judgment was entered upon the verdict on June 7, 1946. Defendant filed his no-

tice of intention to move for a new trial based upon the ground of the insufficiency of the evidence and that the damages were excessive. This notice was served and filed on June 12, 1946. On August 7, 1946, the motion having theretofore been submitted on written briefs to the judge who tried the case, there was entered the formal order of the court entitled: "Order Disposing of Motion for New Trial." It provided that:

"* * * said motion for new trial be and the same is hereby granted upon the ground that the evidence is insufficient to justify the verdict of the jury in the amount allowed either by way of general or special damages, unless within thirty (30) days from and after the filing of this order the plaintiffs shall have stipulated to reduce the amount of the judgment insofar as the same is for general damages, to the sum of $1,500.00, and insofar as the same is for special damages, to the sum of $250.00, the plaintiffs, however, to be allowed their costs.

"But it is hereby further ordered that should said stipulation, within the time above limited, be filed, then for said reduced amounts and taxable costs, but for no further or greater sums, said judgment shall stand in full force and effect without any further order of the court."

No stipulation reducing the judgment was filed on behalf of the plaintiffs, and on August 30, 1946, the defendant Randolph filed his notice of appeal.

Before considering the propriety of the court's rulings on the motions, we will consider the validity and effect of the order of the court with reference to the motion for new trial. By the provisions of section 660 of the Code of Civil Procedure, the power of the court to pass upon a motion for new trial expires 60 days from and after service on the moving party of written notice of entry of judgment, or if no such notice is served, then 60 days after the filing of the notice of intention to move for a new trial. It is to be noted that the verdict was rendered June 6, 1946, and judgment was entered June 7, 1946. No notice of entry of judgment was served, but a notice of intention to move for a new trial was served and filed on June 12, 1946. The 60 days, therefore, would expire on August 11, 1946. The order of the trial court granting a new trial upon condition was dated August 7, 1946, and endorsed filed August 8, 1946. Had the trial court made an order conditional in form but providing that the condition which determined whether the motion for new trial should be granted or denied must take place within the 60 day period, no possible question could have arisen. Here, however, the trial court, with only 4 days to go in which it had any power to act upon the motion for new trial, entered its order purporting to grant to plaintiffs 30 days within which they could determine whether they would accept a new trial or would file their stipulation or consent to a reduction of the judgment. The defendant was immediately confronted by the serious procedural question of the effect of this conditional order, and the appeal from the judgment was taken out of an abundance of caution.

[1] There can be no question of the power of the court to grant a new trial on condition. In Hyams v. Simoncelli, 41 Cal.App.2d 126, 106 P.2d 68, a somewhat similar conditional order was made upon a motion for new trial. However, the party was allowed 24 hours within which to agree to a reduction of the judgment, and before the expiration of this time additional time was granted for such reduction. The reduction agreement was filed within the period thus extended. It was held that such extension of time was within the power of the court, it being specifically noted that all of the events took place within the time allowed by the code for acting upon a motion for new trial. Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 18 P.2d 87, is then cited.

[2, 3] In Ertman v. Municipal Court, 68 Cal.App.2d 143, 155 P.2d 908, 156 P.2d 940, an order was made granting a new trial unless the plaintiff, within ten days thereafter consented to a reduction of the verdict. The 60 days, or the last day on which the motion for new trial could have been granted under section 660 of the Code of Civil Procedure, expired before

the end of that time. The court said, 68 Cal.App.2d at page 146, 155 P.2d at page 910:

"* * * appellant contends that the order granting a new trial must be held void because it contained a condition permitting him to consent to a reduction of the verdict on a day subsequent to the sixty day period. It would seem more logical that if the court attempted to impose a condition upon the order which it had no power to impose the condition alone should fall rather than the order as a whole. It is manifest from the language of the order that the court intended to grant a new trial unless a portion of the verdict was remitted. It had the power to grant the plaintiff five days to make an election, but could not continue that time over the sixty day period. But the plaintiff did not make an election to remit at any time and was therefore not prejudiced by the invalid part of the order."

The appeal in that case was affirmed for other reasons and the point was not squarely decided. It is indicated by dictum that the trial court had no power to extend the period of time beyond the sixty day period and that the net effect of such ruling would constitute the granting of a new trial and that the condition attached to said order became inoperative.

It should be here noted that the plaintiffs in this case, as in the Ertman case, never did file the stipulation consenting to a reduction in the judgment. It should be held here, as it was held there, that plaintiffs cannot now claim they were prejudiced by the invalid part of the order.

[4] Defendant argues that since the trial court sought to grant a new trial but failed to make an effective order within the time allowed by statute, the net effect was to deny a new trial by operation of law, citing Dolan v. Superior Court, 47 Cal.App. 235, 190 P. 469; Payne v. Santa Barbara Cottage Hospital, 2 Cal.App.2d 270, 37 P.2d 1061; Supera v. Moreland Sales Corp., 13 Cal.App.2d 186, 56 P.2d 595; and Kraft v. Briggs, 15 Cal.App.2d 667, 59 P.2d 1044. The cases cited reiterate the general statutory rule that if the trial court does not grant a new trial within the sixty days the motion is automatically denied, but those cases are factually different from the instant case. Here, at the instance and request of defendant, based on the ground of insufficiency of the evidence to support the judgment, the motion for new trial was granted within the sixty days. The only condition that would change the effect of the order was the filing of a stipulation of the parties accepting a reduction in the verdict and judgment entered thereon to the sum of $1,750. No such stipulation was filed within the sixty days during which the trial court had jurisdiction and power to deny or grant a new trial. Therefore, the portion of the order permitting an extension of time beyond the sixty days was void. The authorities cited by respondents fully support this conclusion. If the court had power to extend the time thirty days beyond that period, it would have the same power to extend it one year or more. We do not believe this to be a proper construction of the statute.

[5] Since the motion for new trial was granted on the ground stated, an appeal from the judgment entered on the verdict is ineffectual and must be dismissed.

In view of this conclusion, we particularly refrain from passing upon the sufficiency of the evidence to support the judgment, and the merits of the rulings made on the orders questioned.

Appeal from judgment dismissed.

BARNARD, P. J., and MARKS, J., concur.

PATTON v. PATTON.*

Civ. 13361.

District Court of Appeal, First District, Division 1, California.

June 18, 1947.

Rehearing Denied July 18, 1947.

Hearing Granted Aug. 14, 1947.

1. Divorce ⇐211, 223

In the absence of a property settlement agreement, the court has the power in his discretion to grant alimony pendente lite and suit money, which power is to be exercised in the light of the reasonable needs of the wife and the available means of the husband. Civ.Code, §§ 137, 158, 159.

2. Divorce ⇐213, 225

Property settlement agreements entered into prior to divorce must be entered into subject to the discretion vested in the trial courts by statute to grant alimony pendente lite, and suit money. Civ.Code, §§ 137, 158, 159.

3. Divorce ⇐213, 225

A property settlement agreement entered into prior to commencement of divorce action did not deprive the court of its statutory power to grant the wife alimony pendente lite and suit money where she was in need of financial assistance and husband was able to make the payments ordered. Civ.Code, §§ 137, 158, 159.

4. Divorce ⇐213, 225

Property settlement contracts are not binding on the divorce court until they are submitted to and approved by the court in the divorce action, and such contracts, even though valid, are not binding on the court as respects its power to make award of alimony pendente lite and suit money. Civ. Code, §§ 137, 158, 159.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by John Patton against Willie Patton for divorce, wherein defendant filed a cross-complaint. From orders directing plaintiff to pay defendant $100 per month alimony pendente lite and $100 attorney's fees and costs, plaintiff appeals.

Orders affirmed.

Edmund J. Hall and Alan J. Critcher, both of San Francisco, for appellant.

FitzGerald Ames Sr., Hugh B. Miller and John H. Lenz, all of San Francisco, for respondent.

PETERS, Presiding Justice.

The trial court, on the application of Mrs. Patton, defendant and cross-complaint in a pending divorce action, ordered Mr. Patton to pay his wife $100 per month alimony pendente lite, and $100 attorneys' fees, and $10 costs. From these orders the husband appeals. The sole question presented is whether, as a matter of law, the trial court was precluded from making such awards because of the existence of a property settlement agreement between the parties in which it was provided that the husband should not be liable for the support of his wife or for attorneys' fees.

These parties were married in September, 1943. They first separated in March, 1945. On March 14, 1945, they entered into a property settlement agreement. Under the terms of that agreement the husband agreed to and did pay to his wife $500, and the husband received all of the other property of the parties. The agreement contained this provision: "Husband shall not be liable for support, maintenance, costs or attorneys' fees of Wife and in this respect, wife releases Husband for all claims whatsoever from the beginning of the world to this date and for all time to come." Thereafter, the parties resumed marital relationships, but again separated in June, 1945. On July 2, 1945, the parties entered into a supplementary agreement in which they "ratified and confirmed" the prior agreement, and by which the husband agreed to and did pay to his wife $250 more "in full settlement of all claims and demands, and of all property rights of the parties."

In January, 1946, the wife commenced an action to cancel the two agreements on the ground of the alleged fraud of the husband. Prior to that time, in July, 1945, the husband had brought an action for divorce

* Subsequent opinion 196 P.2d 909.

against his wife and she had cross-complained on the grounds of cruelty. The two actions were consolidated, and, after a trial on the merits, the court, on August 13, 1946, found that the two agreements were based on a valid consideration and that no fraud was perpetrated by the husband. Judgment was entered in the fraud action in favor of the husband. The wife has appealed from that judgment and that appeal is now pending. At the same time that the court decided the fraud case it decided the divorce actions then pending by a judgment to the effect that neither party was entitled to a divorce.

In the meantime, in May, 1946, the husband commenced a second action for divorce, charging desertion. In September, 1946, the wife filed an answer and cross-complaint. In these pleadings she charged her husband with cruelty all during their married life, and also with adultery, the act being alleged to have been committed on August 29, 1946, subsequent to the entry of the judgments in the fraud and first divorce case. The cross-complaint included a prayer for alimony and suit money. The cross-actions for divorce in the second divorce case were pending when the orders here appealed from were made.

From the affidavits of the parties, and from the evidence produced at the hearing, it is apparent that the wife is in need of financial assistance and cannot maintain her defense or offense in the pending divorce actions unless she has temporary alimony and suit money. The evidence also shows that the husband is financially able to make the payments ordered without undue hardship. The husband makes no contention to the contrary, but places his sole reliance on the contention that the property settlement agreements deprived the trial court of its otherwise discretionary power to grant temporary alimony and suit money. The contention lacks merit.

[1-3] In the ordinary case, in the absence of a property settlement agreement, there can be no doubt that the trial court has the statutory power, in its discretion, to grant alimony pendente lite, and suit money, which power is to be exercised in the light of all of the factors in the case pointing to the reasonable needs of the wife and the available means of the husband. § 137, Civ.Code; see cases collected 1 Cal.Jur. p. 964, § 19; 1 Cal.Jur. p. 992, § 46. The husband urges, however, that the wife has contracted away this right. He points out, correctly, that under § 158 of the Civil Code a husband and wife are free to enter into any contract with each other respecting property as they would be if unmarried, except that under § 159 of that code they cannot agree to alter their legal relations as husband and wife. While it must be conceded that the contracts here involved do not fall within the prohibitions of § 159, it does not necessarily follow that a husband and wife may contract away the discretionary powers conferred upon divorce courts by statute. Section 137 of the Civil Code states, in no uncertain language, and without limitation, the power that may be exercised by the divorce court in such cases, and embodies a most important statement of the public policy of this state. So far as pertinent here, that section reads: "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action." It has consistently been held in this state that all property settlement agreements entered into prior to divorce must be entered into subject to the discretion vested in the trial courts by § 137, supra. The leading case is Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713 (hearing denied by the Supreme Court). In that case, as in the instant case, the husband appealed from an order granting temporary alimony and suit money. In that case, as in the instant case, the parties had entered into a separation agreement by which the wife waived all claims to support. In that case, as in the instant case, the husband contended that his wife had contracted away whatever rights she otherwise might have under § 137 of the Civil Code. The court stated the question involved in the following language (67 Cal.App. at page 196, 227 P. at page 713): "Does a contract between husband and

wife settling out of court their property rights, in accordance with the provisions of section 159 of the Civil Code, which contract does not show upon its face that it is contra bonos mores, and which contract has not been adjudicated null and void because obtained by fraud, undue influence, or for any other reason, deprive the trial court of its power to grant alimony pendente lite under the provisions of section 137, Civil Code?"

After a most interesting review of the pertinent authorities the court answered the question presented as follows (67 Cal. App. at page 198, 227 P. at page 714): "The answer to appellant's position that he has a right to stand upon his contract with the respondent until the same is set aside in a proper proceeding is that under the decisions hereinbefore cited all such contracts must be made subject to the discretion of the trial court vested in it by section 137 of the Civil Code."

The Steinmetz case stands unequivocally for the position that, even if the property settlement agreement be valid in a legal sense, the trial court, prior to the approval of such contract in the divorce action, cannot be divested by such agreement of its statutory power to grant alimony pendente lite, and suit money, in its discretion, if it feels such to be necessary.

The rule of the Steinmetz case was approved by the Supreme Court in Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715, which was also an appeal from an order granting the wife temporary alimony and suit money. The court, 194 Cal. at page 81, 227 P. at page 718, citing § 137 of the Civil Code and the Steinmetz case, stated: "Even if the agreement be not void, it is subject to the sanction of the court, and does not deprive the court of its power to grant temporary alimony under the statutory authority therefor." See, also, Ott v. Ott, 127 Cal.App. 325, 326, 15 P.2d 897.

In an extended article on "Property Settlement Agreements" in 14 So.Cal.L. Rev. 373, the author, Hon. Emmet H. Wilson, citing the Locke Paddon and Steinmetz cases, states, at p. 377: "Even if the agreement be not void, it does not deprive the court of its power to grant temporary alimony and costs under its statutory authority."

The same thought is expressed by 1 Nelson on "Divorce and Annulment" (2d Ed.) p. 440, § 12.40, where the author states: "Ordinarily, however, it is held that such an agreement [separation agreement] does not preclude an allowance for temporary alimony or suit money, where the necessity therefor is shown." The author cites, in support of the text, the Steinmetz case, and cases from Ohio and Washington, with a New York Supplement case being indicated as contra.

[4] The reason for the rule is obvious. While the validity of a separation agreement does not depend upon the approval of the divorce court (Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826) that court has certain statutory powers in relation to support. Such contracts are not binding on the divorce court until they are submitted to and approved by that court in the divorce action. Moog v. Moog, 203 Cal. 406, 264 P. 490; Sanborn v. Sanborn, 3 Cal.App.2d 437, 39 P.2d 830. The divorce court is not bound by a contract between the parties as to the amount of support money payable as such, the power to make the award as to support money being derived from the statute and not from the contract. Soule v. Soule, 4 Cal.App. 97, 87 P. 205; Mathews v. Mathews, 55 Cal.App. 661, 204 P. 27; Hughes v. Hughes, 68 Cal.App. 195, 228 P. 675; Smith v. Superior Court, 89 Cal. App. 177, 264 P. 573; Chadwick v. Chadwick, 95 Cal.App. 690, 273 P. 86; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50. This being so, although the contract may be a valid contract, the court is not necessarily bound by it.

It is quite clear that nothing is contributed to the husband's position on the present appeals by the fact that the instant property settlement agreements have been upheld by another department of the Superior Court against the claim that they had been secured by fraud, even if the prior judgment were final, which it is not. The power of the divorce court conferred by § 137 of the Civil Code to grant alimony pendente lite, and suit money, exists irrespective of the validity or invalidity of the property

settlement agreement. It is, therefore, of no significance that such contracts have been held to be supported by consideration and that no fraud was exercised by the husband.

In his briefs the husband places his main reliance on three cases, but none is in point. The case of Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755, involved a suit on a separation agreement and had nothing to do with the power of the court to grant alimony pendente lite or suit money. In re Davis' Estate, 106 Cal. 453, 39 P. 756, and Estate of Walker, 169 Cal. 400, 146 P. 868, simply involved the right of the wife (Walker case) or the right of the nominee of the wife (Davis case) to be appointed administratrix of the deceased husband's estate after having waived, by separation agreement, all rights in the husband's property. In both cases the Supreme Court upheld the trial court's determination that by the contract the wives involved had waived their rights under § 1365 of the Code of Civil Procedure, now § 422 of the Probate Code.

At the oral argument counsel for the husband placed considerable reliance for a reversal on the recent decision of the Supreme Court in Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265. He contended that in that case the Supreme Court conclusively determined that the orders here made by the divorce court were beyond that court's power. That case is now one of the leading cases on many of the legal consequences that follow the execution of a valid property settlement agreement, but it did not at all discuss, because it did not involve, the power of the divorce court to order payment of alimony pendente lite, or suit money. That case involved an appeal from an interlocutory decree of divorce which provided for the support and maintenance of the wife until further order of the court. In other words, it involved permanent alimony, and not temporary alimony. The facts of that case demonstrate the inapplicability of the rules there announced to the problem here involved. The parties separated and executed a property settlement agreement, which provided for a division of property and for support of the wife for 18 months. The wife waived any other support money, in consideration of the assignment to her of the major portion of the community property. Several months after the execution of the agreement the wife sued the husband for a divorce, and, among other things, prayed for support as set out in the agreement, and for approval of that agreement. At the trial she testified that the husband had complied with all of his obligations under the agreement, and that the agreement was acceptable to her. The trial court, however, refused to approve the agreement limiting the support to 18 months, approved an amendment to the complaint, and then approved the property settlement agreement except as to the 18 months' limitation as to support, and as to that, granted permanent support. This was held to be beyond the power of the divorce court. In so holding, Mr. Justice Traynor, speaking for a unanimous court, made a most interesting and informative review of the law on this subject. He pointed out that in making separation agreements the parties may provide for support in any one of three ways: (1) By a contract in which the support provisions are in the nature of alimony, and are separable from the division of property provisions. As to this type of contract the divorce court "has the power to modify the provisions for alimony before or, if the provisions are incorporated in the decree, after judgment in accord with its power over alimony generally." 29 Cal.2d at page 624, 177 P.2d at page 267. (2) By a contract in which the support provisions are not in the nature of alimony but are part of the division of the property. As to this type "there can be no modification of the payments after the decree without the consent of the parties * * * [but] the court in the divorce action may grant [permanent] alimony to the wife and approve the agreement as well, since these agreements purport to deal only with the division of the property of the parties." 29 Cal.2d at page 625, 177 P.2d at page 267. The determination of whether the particular contract is one for the division of property or whether the payments are alimony is for the divorce court. (3) The third type of contract is where the wife waives support in

consideration of receiving a more favorable division of the property. As to these contracts the divorce court cannot add a provision for permanant alimony, because so to do would basically change the agreement of the parties. It was held that the Adams case fell in the third category, and that the court could not award additional alimony and approve the property settlement.

The case does not determine that, by a valid agreement waiving support, the wife has waived support pendente lite, or suit money. The Supreme Court was careful to point out that in the divorce action that court should carefully scrutinize the agreement, the circumstances under which it was made and the nature and value of the property in order to determine the real nature of the agreement. That cannot be done until the divorce case is tried on its merits. The fact that the property settlement agreement is valid does not determine into what category it may fall. Until the divorce case is tried on its merits that fact cannot be ascertained. Until that time the discretionary power conferred on the divorce court by § 137 stands unimpaired.

The orders appealed from are affirmed.

WARD, and BRAY, JJ., concur.



GLATTS et al. v. HENSON et al.

Civ. 15652.

District Court of Appeal, Second District, Division 2, California.

June 6, 1947.

Hearing Granted July 31, 1947.

1. Easements ⇐52

Intention to convey exclusive interest in strip of land over which easement is granted cannot be imputed to owner of servient tenement, in absence of clear indication thereof. Civ.Code, § 806.

2. Easements ⇐42

Extent of servitude is determined by terms of the grant. Civ.Code, § 806.

3. Easements ⇐38

Grantor of easement may use what he does not expressly convey, so long as he does not unreasonably interfere with grantee's use. Civ.Code, § 806.

4. Dedication ⇐57
Easements ⇐52

Real estate developers' grant of easement for road and pipe line purposes to city, and subsequent grant of similar easement of private party, did not grant exclusive easement to either where developers owned other land adjacent to or served by the easement road, and other circumstances negatived such intent. Civ.Code, § 806.

5. Easements ⇐42

Grant of easement passes nothing but what is reasonably necessary to its proper enjoyment.

6. Easements ⇐2

Where easement granted to city for road and pipe line purposes was not exclusive, identical easement could be granted concurrently to others over the same area.

7. Easements ⇐21, 38

Even though owner grants easement over land adjacent to that conveyed to his grantee, he retains dominion over his own land and subsequent grantee thereof acquires all rights reserved by the deed which first conveyed the easement.

8. Easements ⇐25

Where easements for road purposes were granted to several grantees concurrently by real estate developers, each was a continuing easement.

9. Easements ⇐22, 24

Persons purchasing land from real estate developers who had granted concurrent easements over such land to city and others could not, with knowledge of such easements, acquire title to the road strip by occupying it and obtaining quitclaim deed from city.

10. Easements ⇐27

Where real estate developers granted city an easement over 12.5 feet along line of parcel, and reserved and granted to third person an easement over 30 foot strip, so that interest in westerly 17½ feet of the 30

foot strip was retained, city's quitclaim of the entire 30-foot strip to purchasers of the fee did not result in merger of the easement and fee.

11. Easements ⇐24, 26(1)

City as owner of easement for road purposes could not by quitclaim deed terminate such easement which had been specifically granted also to owner of an adjoining parcel to which it became appurtenant, and city's quitclaim deed to owner of another parcel could not affect easements of any of adjoining parcels or their grantors who had reserved rights for benefit of public.

12. Easements ⇐3(1)

An intended easement is never construed as personal if it can fairly be construed as appurtenant to the dominant estate. Civ.Code, § 662.

13. Easements ⇐3(2)

Where easement for road purposes was concurrently granted to purchasers of lots, it became an appurtenance of all lots, despite absence of express declaration in conveyances of other parcels. Civ.Code, § 662.

14. Easements ⇐24

Where easement for road purposes had become an appurtenance of several adjoining lots served thereby, deeds transferring such lots conveyed the easements which had become attached to each parcel as an appurtenance. Civ.Code, §§ 1084, 1085, 1104.

15. Easements ⇐3(2), 24

An appurtenant easement as a right of way cannot be converted by owner of dominant estate into an easement in gross, nor separated from dominant estate, nor transferred by deed as a separate entity apart from land to which it is attached, but may be transferred only by conveyance of the servient estate unless grant of its creation has expressly excepted it from terms of the deed.

16. Easements ⇐32

Landowners who knew that others had in good faith acquired easements over 30-foot strip on their land six years before they purchased their parcel, could not equitably assert title to such strip by adverse possession.

17. Vendor and purchaser ⇐239(1)

In equity no claim to property may be asserted which has as its foundation a scheme or plan whereby an innocent possessor who has purchased the property and given notice of his ownership may be deprived of his rights.

18. Adverse possession ⇐71(1)

An adverse claim cannot be successfully asserted as to land reserved to grantor in the very instrument which is basis of adverse claimant's alleged right.

19. Estoppel ⇐29(1)

Where deed reserved to grantor the right to dedicate a portion of the area conveyed to the public, grantee accepting deed acknowledged grantor's superior claim to such portion.

20. Adverse possession ⇐34

Occupancy of alleged adverse possessor must be exclusive.

21. Adverse possession ⇐58

Hostile character of adverse possession is the essence of prescriptive title.

22. Adverse possession ⇐31, 58

Adverse occupant must hold hostile intent against the world and owner must have knowledge of such hostility.

23. Easements ⇐36(1)

Owners of lot claiming adverse possession of strip over which easements for road purposes had existed, were required to prove payment of taxes on that strip or that no taxes were assessed. Code Civ.Proc. § 325.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Bernard N. Glatts and another against Fred C. Henson and others to quiet title. From an adverse judgment, plaintiffs appeal.

Affirmed.

Roland Maxwell and Paul H. Marston, both of Pasadena, for appellants.

Vernon M. Brydolf, of Pasadena, for respondents Hal T. and Helen G. Simpson.

Alfred S. Chapman, of Los Angeles, for A. B. Chapman Estate and Alfred S. Chapman, trustee.

Bissell & Atwill and John R. Atwill, Jr., all of Pasadena, for respondents Fred C. and Alice Henson.

MOORE, Presiding Justice.

Prior to November, 1926, the A. B. Chapman Estate, a corporation, was owner of lot 14 of tract 901, Los Angeles county, as shown by a recorded "Licensed Surveyor Map." There were 26 numbered lots in the subdivision which lies north of and adjacent to Colorado street and near its intersection with Madre street in Pasadena. None of the 26 lots was ever sold by number but the tract was subsequently sold in parcels described by metes and bounds by the Chapman estate and William Chapman, a testamentary trustee. The estate and the trustee are hereinafter referred to jointly as the Chapmans. The area involved herein consists of five of such parcels in the southeast corner of lot 14, as indicated by the map below. This action



was brought to quiet plaintiff's title to the easterly 30 feet of parcel 4.

By deed of the Chapmans to Glatts of February 18, 1938, conveying parcel 4 it was provided as follows: "Reserving unto the grantor, its successors or assigns, as easement for road purposes, together with the right to dedicate the same to the public use over the easterly 30 feet of the herein described parcel of land." Evidently resolved to gain and hold the strip which their grantors had reserved, plaintiffs entered upon and occupied it, and in 1938 constructed an office, a warehouse and a garage on the westerly 17½ feet thereof. Further to fortify their claim of title, on September 25, 1945, they caused the city of Pasadena to quitclaim its interest in and title to the easement over the 30-foot strip to plaintiffs. By virtue of such quitclaim deed and of their alleged adverse possession for a period of more than five years prior to the commencement of this action plaintiffs maintain that they now hold a permanent fee-simple title to the 30-foot strip against the world.

The court below rejected plaintiffs' demand but quieted their title to parcel 4 subject to easements for road purposes in favor of defendants as follows:

(a) An easement in favor of the Chapmans over the entire 30 feet for road purposes, together with the right to dedicate the same to the public use, which right was reserved by the Chapman deed of June, 1932, to Braley and February 18, 1938, to Glatts;

(b) an easement for free and unhindered road purposes over the easterly 12.50 feet as granted by Chapman to defendants Henson July 20, 1937;

(c) an easement for road purposes over the entire 30 feet as granted to defendant Braley by deed June 3, 1932, which same easement was thereafter conveyed along with parcel 5 to the Simpsons.

The court found (1) that the easement granted to Pasadena by the Chapman deed of June 30, 1931, was not exclusive either by the express terms of the grant, by the nature of the easement or by virtue of the purpose for which it was granted; (2) that only the naked legal title to the 30-foot strip passed to plaintiffs by the city's deed of September 25, 1945; (3) that plaintiffs have interfered with the free use by defendants Henson of the easterly 12.50 feet of parcel 4 and have denied them the free use thereof for ingress and egress to and from parcels 1 and 3.

Pursuant to such findings the court adjudged that the Hensons own an easement for road purposes over the easterly 12.50 feet of parcel 4; that Simpsons own an easement for road purposes over the entire 30-foot strip; that the Chapmans are the owners of an easement for road purposes and of the right to dedicate such easement to the public use over the entire 30-foot strip. The title of each of the defendants was quieted as to his easement and plaintiffs were enjoined from interfering with their rights of ingress to or egress from their respective parcels and were ordered to remove all obstructions on the 30-foot strip.

The findings are supported by the Chapman deed of June 30, 1931, whereby Pasadena was vested with title to parcel 1 and "an easement for road and pipe line purposes over a strip of land 25 feet wide" along the easterly side of parcel 4, 12.5 feet of which lies along the westerly side of parcel 5. Such easement was not exclusive to the city. No conveyance of the 30-foot strip was ever executed to the city. Consequently all that was ever conveyed by Pasadena to plaintiffs was such interest as it had acquired, which was a nonexclusive right to make a road upon and to lay pipes under the easterly 12½ feet of parcel 4, unless it had acquired an easement by user over the entire 30 feet.

[1–3] An intention to convey an exclusive interest in a strip of land over which an easement is granted cannot be imputed to the owner of the servient tenement in the absence of a clear indication of such intention. The extent of a servitude is determined by the terms of the grant. Civil Code, sec. 806. What the grantor of the servient tenement does not expressly convey in granting an easement he may use so long as he does not unreasonably interfere with the grantee's use of the easement. City of Pasedena v. California-Michigan Land and Water Company, 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186. The identical deed involved herein (Chapman to Pasadena) was under consideration in the cited case, wherein it was also held that since the grantor retained the right to use the land reasonably he reserved also the power to transfer such privilege to third persons.

[4, 5] That Chapman had no intention of granting an exclusive easement either to the city or to Braley is reasonably inferred from the circumstances. They owned other land adjacent to or served by the easement road. Also, at the time of their conveyance of parcel 5 to Braley on June 3, 1932, they declared in the deed their ownership of "a strip of land 60 feet wide," agreed to dedicate without expense to Braley the strip to the public for street purposes, and granted an easement to him over the strip until such time as it should be dedicated. By the Chapman deed of June 30, 1931, the city agreed to release the easement along the east line of parcel 4 whenever the extension of Madre street 267 feet north of Colorado street should be completed. From the language of the deed, the situation of the parties, and the nature of the easement, affecting three separate parcels, it is evident that no exclusive easement to Pasadena was intended. Civil Code, sec. 806. Ballard v. Titus, 157 Cal. 673, 110 P. 118, cited by appellant is not applicable to the issue of the exclusiveness of the easement. The question there involved was whether the dominant owner had the right to use the entire width of his easement. The court did not even consider whether the servient owner or his grantee might concurrently use the easement. Nothing passes by grant of an easement but what is reasonably necessary to its proper enjoyment. Parks v. Gates, 186 Cal. 151, 154, 199 P. 40.

[6, 7] It follows that since the easement of the city was not exclusive, the identical easement could be granted concurrently to others over the same area. Even though an owner grant an easement over land which is adjacent to that conveyed to his grantee, he retains dominion over his own land and a subsequent grantee thereof becomes possessed of all the rights that were reserved by the deed which first conveyed the easement. Brookshire Oil Company v. Casmalia Ranch Oil & Development Company, 156 Cal. 211, 217, 103 P. 927; City of Pasadena v. California-Michigan Land and Water Company, su-

pra, 17 Cal.2d at page 579, 110 P.2d 983, 133 A.L.R. 1186.

[8, 9] It is not clear that at the time of its quitclaim to plaintiffs in 1945 Pasadena had any moral right to convey the 30-foot strip. It owned no lands to be served by the easement, and never used it after the sale of parcels 1 and 2 to Henson, July 27, 1937. Since it had no need for the easement and did not use it for over eight years prior to its quitclaim to plaintiffs, the concurrent easements theretofore conveyed by Chapman to the Hensons, grantees of parcel 2, to Riek and Knapp, grantees of parcel 3, and to Braley, grantee of parcel 5, could not have interfered with the city's enjoyment of its easement conveyed to it by Chapman as an appurtenance to parcel 1. Inasmuch as the several grantees of Chapman could concurrently enjoy the easement over parcel 4, it cannot in reason be said that the easement granted to any of them excluded the others from a full enjoyment thereof, and each was a continuing easement. Moreover, the Chapman deed to the city by unmistakable language reserved not only the 12.5-foot easement over parcel 4 but also "the right to dedicate the same to the public use." Such language in a conveyance in the public records was itself a notice to plaintiffs not only that the Chapmans had specifically reserved such interest in the land but also that they intended to dedicate the strip to public uses. Having knowledge of such reservation and intention and of the easements granted by the deeds of the other parcels, plaintiffs cannot be convicted of good faith in their attempt to acquire title to the strip by occupying it and by obtaining the quitclaim of Pasadena on the theory that the 30-foot easement had been granted to the city contemporaneously with the grant of parcel 5.

[10-14] Plaintiffs contend that the city's quitclaim of the 30-foot strip to them resulted in a merger. This cannot be so for three reasons: (1) Pasadena was at no time grantee of a 30-foot easement. It was granted an easement over 12.5 feet along the east line of parcel 4. The only easement conveyed by Chapman over the 30-foot strip was granted to Braley June 3, 1932, in the deed of parcel 5 which Braley subsequently conveyed with the 30-foot easement to Simpson. Whatever interest the city had in the westerly 17½ feet of the 30-foot strip was contained in the reservation by Chapman in the deed to Braley which was for the immediate use of the several owners of the five parcels and for the perpetual use of the public, to be dedicated at a future time. (2) But even though Pasadena had been the grantee of the entire 30-foot easement, it could not by quitclaim deed terminate the easement which had been specifically granted to the owner of parcel 5 to which it became appurtenant. Elliott v. McCombs, 17 Cal. 2d 23, 31, 109 P.2d 329. By its quitclaim deed to plaintiffs the city merely conveyed its legal interest in the strip. Such a conveyance could not affect the easements of any of the defendants or the rights of the Chapmans which they had reserved for the benefit of the public. Smith v. Smith, 21 Cal.App. 378, 380, 131 P. 890, 891. In the Smith case the subdivider had exhibited to his purchasers a map showing an alley to be used by his purchasers for ingress to and egress from the properties acquired from him. His representations and their reliance upon them "were sufficient as to such parties to establish said strip as an alleyway." His subsequent attempt to convey the fee title of the alley to a stranger was abortive. All that he conveyed "was the naked legal title, subject to the easement." (3) Moreover, not only from the deed records did plaintiffs have notice that Pasadena had never been granted an easement over the 30-foot strip but also that it had been specifically transferred by mesne conveyance to Simpson and had been reserved for the public use in the very deed to plaintiffs. In other words, the easement over the entire 30 feet became an appurtenance of parcels 1, 2, 3 and 5 and not a personal right of the owner of any of them. An intended easement is never construed as personal if it may fairly be construed as appurtenant to the dominant estate. Civil Code, Sec. 662; Wright v. Best, 19 Cal.2d 368, 383, 121 P. 2d 702. It is appurtenant despite the absence of an express declaration in the conveyances of the other parcels. Elliot v.

McCombs, supra. The original deed to the city suggests no inference other than that the easement over the 25 feet thereby conveyed was intended to be an appurtenance of parcel 1, as does likewise the deed to Braley imply that an easement over the 30-foot strip became appurtenant to parcel 5 by virtue of the Braley deed as well as by deed to plaintiffs "reserving unto the grantor, its successors or assigns" an easement over the 30-foot strip for road purposes. Inasmuch as the easement over the 30-foot strip of parcel 4 is an appurtenance of each of the properties served by the easement the deeds transferring them conveyed the easements which had become attached to each parcel as an appurtenance. Civil Code, secs. 1084, 1085, 1104.

[15] An appurtenant easement as a right of way cannot by the owner of the dominant estate be converted into an easement in gross, nor be separated from the dominant estate, nor be transferred by deed as a separate entity apart from the land to which it is attached, but may be transferred only by a conveyance of the servient estate unless the grant of its creation has expressly excepted it from the terms of the deed. Shonafelt v. Busath, 66 Cal.App.2d 5, 14, 151 P.2d 873; Conaway v. Toogood, 172 Cal. 706, 712, 158 P. 200; 17 Am.Jur. p. 1013, sec. 125, p. 1015, sec. 127. To honor the quitclaim deed of the 30-foot strip by the city herein would be tantamount to a declaration that the owner of a dominant estate may create an easement in gross out of an appurtenant right, in violation of a cardinal principle of the law of real property. Since the city owned nothing when it executed the quitclaim deed of the 30-foot strip, that instrument transferred exactly nothing.

[16, 17] Plaintiffs assert title to the 30-foot strip by adverse possession. Such a claim has no equitable basis. The deed of June 3, 1932, to Braley having explicitly reserved an easement over the 30-foot strip "for road purposes" plaintiffs thereby knew that they could not have acquired a greater interest in that strip than Braley had obtained. Also, they knew that the deed from Braley to Simpson had been delivered one year, seven months and 21 days before the quitclaim to them by the city. With the knowledge that others had in good faith acquired easements over the 30-foot strip six years before they had purchased parcel 4, more than six years prior to their erecting the structure on the westerly 17½-foot portion of the 30-foot strip and over 13 years prior to the city's quitclaim, how could they in good conscience have occupied it and have asserted ownership of it in a court of equity? Their rights perished at the moment of conception. In equity no claim to property may be successfully asserted which has as its foundation a scheme or plan whereby an innocent possessor who has purchased it and given notice of his ownership may be deprived of his rights.

[18, 19] City and County of San Francisco v. Main, 23 Cal.App. 86, 137 P. 281, does not support plaintiffs' contention. There the property occupied adversely was effectively closed for a period of ten years against all uses by every person who had any titular interest in an easement over the land. In the instant action neither the Chapmans nor any of their grantees were denied use of the strip for road purposes by the structure of plaintiffs. Until such denial the statutory period could not begin to run. Title to the land having been reserved by the Chapmans for the purpose of dedicating it to the public use, such right could not have been violated by the structure until after an actual dedication. Nor were the rights of the Braleys or of the Simpsons to use the strip for road purposes ever denied them by the presence of the structure. Therefore their future rights thereto cannot be thwarted until after an actual dedication. It is a rule widely recognized that an adverse claim cannot be successfully asserted as to land reserved to the grantor in the very instrument which is the basis of an adverse claimant's alleged right. 1 Cal.Jur., p. 495, sec. 5. Having gained title to his land by the deed which reserved to the grantor the right to dedicate a portion of the area conveyed to the public, the grantee thereby acknowledges the superior claim of the grantor to such portion.

[20-22] To gain title by adverse possession the occupancy of the possessor must be exclusive. The hostile character of such possession is the very essence of a prescriptive title. Not only must the occupant hold a hostile intent against the world but the owner must have knowledge of such hostility. Pacific Gas & Electric Company v. Crockett Land & Cattle Company, 70 Cal. App. 283, 289, 233 P. 370; 1 Cal.Jur., p. 535. As to plaintiffs' claim of title by adverse possession the evidence is substantially recited above. While Mr. Glatts gave testimony to the effect that he had effectively closed the roadway over the easement at all times subsequent to his acquisition of parcel 4, Mr. Henson's testimony which was adopted by the court was that at the time of his purchase of parcels 1 and 2 in 1937 he found access thereto from Colorado street over a dirt road which passed over the easement on the east side of parcel 4; that he constructed a building on his property in 1937 which he used for storage and a carpenter shop; that he and his employees rode in and out over the easement; that in 1939 he built a factory on parcel 2 for the manufacture of scientific instruments and hired 28 employees who traveled "in and out over this roadway"; that the materials used in his factory were brought in only over the same roadway, and that he has continuously used the easement to the time of trial. He never found it closed except on three or four occasions "when Mr. Glatts parked his truck crosswise," and on New Year's day when he had a grandstand and the policeman "would not let us go through." At one time on request he consented that Mr. Glatts might stack lumber on the easterly 12.5 feet of parcel 4. There is no evidence that during the seven years of their possession of the 17½ feet prior to filing this action the Chapmans had knowledge of plaintiffs' intention to deny to any one the right to use the roadway or that they intended to resist use of the entire 30 feet after its dedication by the Chapmans. The presence of the structure upon the strip might reasonably have been compatible with plaintiffs' recognition of Chapmans' reservations in their deeds to plaintiffs and to the Braleys.

[23] Plaintiffs contend that it was not necessary for them to prove payment of taxes on the 30-foot strip or that no taxes were assessed. Such contention is contrary to the statute defining the mode of gaining title by adverse possession. Code Civil Proc. § 325. It was indispensable to the proof of their case that such evidence be adduced. The decisions cited by plaintiffs (Biggs Ditch Company v. Jongste, 24 Cal.2d 298, 303, 149 P.2d 1; McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944) involve attempts to establish easements by user over the lands of others. Of course the plaintiff in such an action is not required to prove that he has paid taxes on an easement which is nonassessable, as held by both of the cited decisions. But plaintiffs' failure herein to prove their payment of taxes on the 30-foot strip leaves their proof incomplete for the establishment of a prescriptive title.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



80 Cal.App.2d 316

Ex parte RUGLAND.

Cr. 2017.

District Court of Appeal, Third District, California.

June 12, 1947.

Infants ⇐69

Provision of the Welfare and Institutions Code, which was in effect at time of conviction of nineteen year old youth in 1944 for two violations of the Vehicle Code, that a court shall commit to the Youth Authority any person convicted of a public offense, who is found to be less than twenty-one years of age at time of apprehension, was mandatory on the trial court, which should have committed the youth to the Youth Authority rather than to the

Folsom State Prison. Welfare and Institutions Code, §§ 1731, 1731.5; Vehicle Code, § 503.

Proceeding in the matter of the application of Warren Elmer Rugland for a writ of habeas corpus, to secure the petitioner's release from Folsom State Prison.

Causes remanded to the Superior Court with directions to commit petitioner to the Youth Authority.

Warren Elmer Rugland, in pro per.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Dep. Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner has petitioned this court for a writ of habeas corpus. The facts are not disputed. The petition alleges that petitioner is now illegally deprived of his liberty by the Warden of the Folsom State Prison. His claim is that he should have been committed to the Youth Authority instead of being sentenced to a state prison. The facts are that on December 11, 1944, petitioner was arraigned for judgment and sentence in the superior court of Tulare County, on his pleas of guilty to two separate charges of violation of section 503 of the Vehicle Code. At the time of such arraignment petitioner was 19 years of age and his counsel, appointed by the court to represent him, urged the trial court to withhold sentencing petitioner to a state prison because of his youth and the probable effects of incarcerating him in such an institution. Despite such urge by counsel, the trial court did not commit petitioner to the Youth Authority but instead sentenced him to the state prision at San Quentin.

The Attorney General concedes that upon such facts, under section 1731.5 of the Welfare and Institutions Code as that section read at the time the sentence was imposed, it was mandatory upon the trial court to commit petitioner to the Youth Authority. People v. Ralph, 24 Cal.2d 575, 150 P.2d 401. Section 1731 of the Welfare and Institutions Code then provided, and still provides, that a court shall determine whether a person convicted of a public offense was less than 21 years of age at the time of his apprehension. Section 1731.5 of the same code, at the time of the imposition of the sentence upon petitioner, and so far as material here, provided: "A court shall commit to the Authority any person convicted of a public offense" etc., "who is found to be less than 21 years of age at the time of apprehension." Stats. 1944, 3rd Ex. Session, ch. 2, sec. 5.

By virtue of the aforesaid provisions and the decision in People v. Ralph, supra, we are forced to hold that it was mandatory upon the trial court to commit this petitioner to the Youth Authority.

The causes are therefore remanded to the superior court of Tulare County with directions to commit petitioner to the Youth Authority.

PEEK and THOMPSON, JJ., concur.



80 Cal.App.2d 277

SINAI v. MULL.

Civ. 7319.

Sac. 5796.

District Court of Appeal, Third District, California.

June 11, 1947.

Rehearing Denied July 8, 1947.

Hearing Denied Aug. 7, 1947.

1. Taxation ⇐421(1)

A levy of assessment on realty must describe the realty with sufficient particularity to identify the portion sought to be assessed with certainty, or the levy is wholly void. Revenue and Taxation Code, § 602.

2. Taxation ⇐421(3)

If realty intended to be assessed is but a part of a larger tract, such fact must be made to appear on the assessment roll, since a description of the larger tract alone is not a sufficient description of its parts, and the particular part intended must be so identified that it can be located and separated from the whole.

3. Taxation ⇐421(3), 658(4), 764(2)

Where only a fraction of lot was assessed or sold for delinquent taxes, but it was impossible to determine from notice of sale or from deed to purchaser what portion of the lot was sought to be assessed or conveyed, both the levy and the deed were void for uncertainty. Revenue and Taxation Code, § 602.

4. Taxation ⇐421(3), 439, 658(4), 688, 764 (2), 770

The description of a fraction of a lot or parcel of land, in a levy of assessment, notice of sale for delinquent taxes, or deed of conveyance which is so uncertain that it is impossible to determine what portion of the land is assessed or sold, constitutes error, jurisdictional in its nature, which cannot be cured by a validating statute. St. 1943, p. 1993; St. 1945, p. 2176; Pol. Code, § 3629; Revenue and Taxation Code, § 602.

5. Taxation ⇐439, 688, 770

Mere errors in the proceedings of a tax levy, in the sale for delinquent taxes, and in the deed of conveyance of realty therefor, which are not jurisdictional in their nature, will be cured by validating acts, but the legislature may not validate proceedings for sale of realty which are void from the inception for lack of jurisdiction. St. 1943, p. 1993; St. 1945, p. 2176; Pol. Code, § 3629.

6. Taxation ⇐796(2)

Statutes requiring the owner of realty to supply tax assessor with a written statement of his taxable property did not give rise to presumption that owner of realty furnished inadequate description which led to errors in tax deed, so as to estop landowner from asserting the invalidity of the assessment proceedings and tax deed. Pol. Code, § 3629.

7. Taxation ⇐810(1)

In suit to quiet title to fraction of lot against defendant claiming under tax deed, which failed to designate what portion of the lot was sought to be assessed or conveyed, burden was on defendant to show that the tax deed was valid and that his title to the fraction of the lot was good.

8. Estoppel ⇐61

Defendant waived his asserted defense of estoppel by failure to plead or prove it.

9. Appeal and error ⇐173(9)

Defendant could not invoke an estoppel as a defense to an action for the first time on appeal.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Suit to quiet title by John S. Sinai against A. M. Mull, Jr. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Mull & Pierce, of Sacramento, for appellant.

T. L. Chamberlain, of Auburn, for respondent.

THOMPSON, Justice.

This is a suit to quiet title to a fraction of Lot 60, Block I, of Tahoe Vista Subdivision, in Placer County, California. It is described in the complaint by metes and bounds. Plaintiff's title was acquired in 1933 by deed which was recorded in volume 270 of deeds, page 173, Placer County Records. The defendant purchased at tax sale from the State of California, May 17, 1944, for $110 the "Fraction of lot in Tahoe Vista Sub'd. fr. 60, Block I (Eye) and improvements, described in Book 270, page 170, Placer County Records." The last-mentioned deed, referred to for a particular description, designated 29 separate lots in the tract, including lot 60, belonging to The Sherman Company, but utterly failed to segregate or describe any fraction of any such lots. The deed to which reference was made did not purport to describe plaintiff's fraction of said lot 60, or any other fractions of lots. It was impossible to determine from that description what portion of said lot the plaintiff subsequently acquired. The levy of taxes, notice of delinquency and sale, and deed to the defendant each failed to describe the fraction of lot 60 which the plaintiff owned. The court adopted findings favorable to plaintiff and quieted title in him to his fraction of that lot, subject to payment to the de-

fendant of taxes, penalties and costs incurred, in the sum of $136.68. Judgment was rendered accordingly. From that judgment this appeal was perfected.

The evidence shows that The Sherman Company owned said 29 lots, including lot 60, in 1931. Without specifying any particular portion of said lot 60, an uncertain and indefinite fraction thereof was assessed and sold to the State of California for delinquent taxes which accrued in 1931. It was sold to the state in 1932, but the deed of conveyance was not executed until July 1, 1938. The plaintiff purchased his portion of lot 60, in 1933, by deed which was recorded in Book 270 at page 173, Placer County Records. After notice to plaintiff of sale for delinquent taxes, served April 25, 1944, which notice contained the erroneous description and reference to Book 270, page 170, Placer County Records, and without any designation of plaintiff's fraction of the lot, it was sold and conveyed to the defendant May 17, 1944, for the sum of $110. That deed to the defendant also failed to designate the fraction of said lot which was thereby conveyed. It failed to refer to the book and page of the Placer County Records where plaintiff's land was described.

In the notice of assessment, notice of sale, and all proceedings, including the deed to the defendant, the description of the portion of the lot sold was so insufficient and inaccurate that it was impossible to determine what fraction of the lot was assessed or sold. The notice of sale stated that lot 60 was assessed to The Sherman Company in 1931 and 1932, to Beulah Morgan in 1935 and 1936, and to John *A.* Sinai in 1937 to 1943, inclusive. It is true that, subsequent to the sale, the plaintiff was issued two Certificates of Redemption on the Installment Plan, for payment of delinquent taxes on his fraction of Lot 60, Block I, with proper reference to his deed in Book 270, page 173, Placer County Records. But those certificates are immaterial since they did not affect the sale of the property.

The defendant contends that the errors in the descriptions of the property which occurred in the levy, in the notice of sale and in the deed are not jurisdictional in their nature, and that the failure to designate the fraction of said lot is cured by the validation acts of 1943 and 1945. Stats. 1943, p. 1993, Chap. 458, and Stats. 1945, p. 2176, Chap. 1134. It is also claimed for the first time on this appeal that the plaintiff is estopped from denying the validity of the proceedings of assessment and the deed of conveyance to the defendant, because he must be presumed to have supplied the assessor with a statement of taxable property as required by Section 3629 of the Political Code, containing the deficient description of his fraction of said Lot 60, and that the plaintiff subsequently had knowledge of delinquent taxes on his property.

We are of the opinion the findings and judgment are adequately supported by the evidence. The description of the property appearing in the tax proceedings and deed to the defendant is fatally defective. It is indefinite and uncertain. It is impossible to determine what portion or "fraction" of Lot 60, Block I of Tahoe Vista Subdivision was vested with a tax lien. The reference in the tax levy, the notice and the deed to a *fraction* of Lot 60, Block I of Tahoe Vista Subdivision, as "described in Book 270, page 170, Placer County Records," throw no light on the subject. That description covers twenty-nine designated lots in Block I, belonging to The Sherman Company, including Lot 60. No fractions of lots are mentioned in that description.

[1, 2] It is the invariable rule that a levy of assessment on real property must describe the land with sufficient particularity to identify the portion sought to be assessed with certainty, or it is wholly void. Revenue and Taxation Code, sec. 602; Stewart v. Atkinson, 96 Cal.App. 50, 55, 273 P. 606; Harvey v. Meyer, 117 Cal. 60, 63, 48 P. 1014; Smith v. City of Los Angeles, 158 Cal. 702, 707, 112 P. 307; Palomares Land Co. v. County of Los Angeles, 146 Cal. 530, 536, 80 P. 931; 24 Cal.Jur. 190, secs. 176, 177; 61 C.J. 721, sec. 889g; Black on Tax Titles, 2d Ed., p. 146, sec. 115. With relation to the necessity of designating the particular part or fraction of lots or land sought to be assessed, it is said in 61 Corpus Juris at page 721, that: "If the property intended to be assessed is but a part of a larger tract this fact must be made

to appear on the assessment roll for a description of the larger tract alone is not a sufficient description of its parts. Also the particular part intended must be so described and identified that it can be located and separated from the whole, and, except where a more definite description is impossible, a description of land simply as part of, a certain number of acres in, or a certain number of feet of, a specifically designated larger tract is an insufficient description and renders the assessment void."

The foregoing text is supported by numerous California authorities.

In the Stewart case, supra [96 Cal.App. 50, 273 P. 607] which was a suit to quiet title to real property, where a levy of taxes was made, and the land was sold for delinquent taxes to the state by deed describing it merely as "one-half of lot 12, block 132" of Carmel-by-the-Sea, in Monterey County, it was said: "As to the description contained in the assessment and tax deed with respect to the one-half of lot 12, block 132, assessed to defendant Nettie E. Wagner, who it is conceded was the owner of the south one-half of such lot, and which was assessed and deeded as 'one-half of lot 12, block 132,' we think the description is void for uncertainty in that it cannot be ascertained from the description what half of the lot is attempted to be described. In Harvey v. Meyer, 117 Cal. 60, 48 P. 1014, the court lays down the rule in tax proceedings that no presumption of fact may be indulged in as to the size, location or extent of a lot, nor is parol evidence admissible to ascertain what particular tract or lot the assessor had in mind when making the assessment. An assessment so indefinite and uncertain as to render it impossible to determine what part of the land was intended to be assessed—what particular half of a lot—is invalid."

[3] In the present case only a "fraction" of the lot in question was assessed or sold for delinquent taxes. It is utterly impossible to determine what portion was sought to be assessed or conveyed. Both the levy and the deed are therefore void for uncertainty.

[4, 5] The description of a fraction of a lot or parcel of land, in a levy of assessment, notice of sale for delinquent taxes, or deed of conveyance, which is so uncertain and indefinite that it is impossible to determine what portion of the land is assessed or sold, constitutes error, jurisdictional in its nature, which cannot be cured by a validating statute. The legislature has no power to validate the taking of property without due process or notice to the owner. That would amount to the taking of property without due process, which is prohibited by the constitution. The legislature may not validate proceedings for the sale of real property which are void from the inception for lack of jurisdiction. Miller v. McKenna, 23 Cal.2d 774, 782, 147 P.2d 531; People v. Holladay, 25 Cal. 300, 310; People v. Van Nuys Lighting Dist., 173 Cal. 792, 797, 162 P. 97, Ann.Cas. 1918 D, 255; 51 Am.Jur. 678, sec. 737; 140 A. L.R. 980, note. It is true that mere errors in the proceedings of a tax levy, in the sale for delinquent taxes and in the deed of conveyance of real property therefor, which are not jurisdictional in their nature, will be cured by the validating acts. Stats. 1943, p. 1993; Stats. 1945, p. 2176; Miller v. McKenna, supra; Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567. In the Miller case, supra [23 Cal.2d 774, 147 P.2d 537], in which a judgment for the defendant was reversed on appeal, the Supreme Court held that the validating act of the legislature could not have the effect of depriving plaintiff of his property "without due process of law and thus by a mere legislative rescript pronounce as valid a deed which was void when it was made * * * and thereby transfer the title of the plaintiff to the defendants." It is evident that a deed, based upon a tax levy and sale for delinquent taxes, in none of which proceedings or instruments the real property is designated or described, is void for lack of jurisdiction. Such an omission goes to the very foundation of the jurisdiction. If the omission to designate the only fraction of a lot which is sought to be subjected to tax levy in the present case may be cured by the validating act, the owner might be deprived of his property by a mere notice that any property or interest

therein which he owned in Tahoe Vista Subdivision was subject to delinquent taxes. That would be contrary to the requirement of Section 602 of the Revenue and Taxation Code. That construction would abrogate all statutory protection against depriving an owner of property without due process. The validating act is specifically limited "to the correction of defects, irregularities and ministerial errors". When the assessment is levied upon an entire tract owned by the taxpayer, or mere errors occur in designating certain metes and bounds, it has been held that the validating act will cure the defects. But we have found no case which holds that a total failure to describe the only fraction of a lot which is owned by the taxpayer may be thus cured.

In the cases of People v. Cone, 48 Cal. 427, and People v. Hyde, 48 Cal. 431, it was held that the failure to designate the portions of larger tracts described, which were sought to be subjected to taxes, made it impossible to ascertain what particular lands were intended to be assessed and therefore rendered the entire levy void.

In Black on Tax Titles, page 146, section 115, it is said that: "* * * A description which states that the property is part of a larger tract, but does not clearly identify the specific and determinate part intended, is so inadequate as to render the assessment a nullity. For not only would such a description be inadequate to inform the owner of the taxing of his land, but a deed conveying a 'part' of a lot or tract would convey no legal title to any portion thereof."

And in section 484, at page 619, of the same volume, it is declared that: "* * * If the defect is jurisdictional—that is to say, if it goes to the root of the authority to act, if it involves the omission of a step which the legislature could not have dispensed with, or if it consists in an irregularity which the legislature had no power to declare immaterial—then it is beyond the reach of a curative statute."

The foregoing text is supported by Forster v. Forster, 129 Mass. 559, 566, and authorities from various jurisdictions.

We conclude that the failure to designate plaintiff's fraction of lot 60 in any of the proceedings or the deed renders them invalid for lack of jurisdiction to levy the assessment or convey the property by deed for delinquent taxes.

[6-8] Finally, the appellant contends that since Section 3629 of the Political Code, now sections 441 to 445, inclusive, of the Revenue and Taxation Code, required the owner of land to supply the assessor with a written statement of his taxable property, it must be presumed plaintiff furnished the inadequate description which led to the errors complained of, and that he is therefore estopped from asserting the invalidity of the proceedings or deed to the defendant. We think not. The land was sold for delinquent taxes which accrued in 1931, before plaintiff owned the land. There is no evidence that plaintiff or his predecessor in title furnished the assessor with an inaccurate or inadequate description of the fraction of lot in question. The burden was on the defendant to show that his own deed was valid and that his title to the fraction of the lot was good. He failed to do so. The court adopted findings adverse to him on that issue. Moreover, the defendant waived his asserted defense of estoppel by failure to either plead or prove it. Burk v. City of Santa Cruz, 163 Cal. 807, 810, 127 P. 154, 156; Hunt v. Alamitos Land Co., 66 Cal.App. 438, 226 P. 415; 1 Bancroft's Code Pleading, pp. 459-463, secs. 298-300; 51 C.J. 248, sec. 227; 120 A.L.R. p. 9, note. In the Burk case, supra, it is said, in a suit to quiet title to real property, regarding an asserted estoppel arising from acts of dedication: "But it is said by respondent that the acts of the plaintiff estop her from denying that it was her intent to dedicate the streets. It would be a complete answer to this to say that if estoppel in pais was relied upon it was the duty of the defendant to have pleaded this estoppel, and, not having pleaded it, it cannot be considered. Such is the uniform rule of decisions laid down by this court from the case of Clarke v. Huber, 25 Cal. 593, to Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 674, 66 P. 982."

In the Hunt case, supra, which was a suit to quiet title to real property, a similar contention was made on appeal, that the respondent waived its right to challenge an

inadequate description of the land by furnishing the assessor, pursuant to the provisions of the Political Code, a statement containing the same erroneous description. The Appellate Court disposed of that contention by declaring, in effect, that the asserted estoppel was waived by failure to introduce evidence to that effect, or, at least, by failing to call the attention of the reviewing court to such evidence. It does not definitely appear whether an estoppel was pleaded in that case. At least, the Appellate Court held that necessary elements of an estoppel were lacking, and that proof of that estoppel was not called to the court's attention.

[9] In the present case the asserted estoppel was neither pleaded nor proved at the trial. It is too late to attempt to invoke an estoppel as a defense to an action, for the first time, on appeal.

The judgment is affirmed.

SCHOTTKY, Justice pro tem., and ADAMS, P.J., concur.



80 Cal.App.2d 513

DE LESHE v. DE LESHE.

Civ. 3636.

District Court of Appeal, Fourth District, California.

June 21, 1947.

Rehearing Denied July 15, 1947.

1. Divorce ⇐245(1)

Where contract between husband and wife dividing property between them and providing for payment of $250 a month support to wife by husband until he was retired from active duty with the Navy, and providing for the fixing of monthly support by court after his retirement from active duty, was made part of interlocutory decree of divorce that expressly retained jurisdiction in court to change or modify allowance to wife, court had jurisdiction, after husband's retirement from active duty, to do so. Civ. Code, § 139.

2. Divorce ⇐245(2)

Modification of an interlocutory divorce decree which had awarded wife property worth nearly $20,000 out of community estate, in order to require husband to pay $125 a month for wife's support, did not violate statute providing that when wife has a separate estate, court, in its discretion, may withhold any allowance to her out of husband's separate property, where property awarded wife did not produce much income. Civ. Code, § 142.

3. Divorce ⇐245(2)

Where divorced wife was in poor health, unable to work, and untrained in any employment, and her income was only $57 a month, court did not abuse its discretion in requiring divorced husband, on his retirement from active duty in the Navy, to pay wife $125 a month out of his monthly retirement pay of $375.

4. Divorce ⇐286

On appeal by divorced husband from order modifying interlocutory decree of divorce by requiring the husband to pay certain monthly amount to wife for her support, burden was on husband to show a breach of discretion by trial court in the order.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Suit for divorce by Mae P. DeLeshe against Maxemillian B. DeLeshe, wherein an interlocutory decree of divorce in favor of the plaintiff was entered. From an order modifying the decree by requiring the defendant to pay plaintiff $125 a month for her support and maintenance, the defendant appeals.

Order affirmed.

See also 181 P.2d 931.

William H. Wylie, of San Diego, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order modifying an interlocutory decree of divorce by requiring defendant to pay plaintiff $125 per month for her support and maintenance.

Plaintiff and defendant were married on October 7, 1913, and separated on May 1, 1944. There were two daughters born to them, both of whom were adults and married when the interlocutory decree of divorce was rendered. On June 27, 1944, plaintiff brought her action for separate maintenance which was thereafter changed by amendment into an action for divorce.

Under date of May 25, 1945, the parties entered into a property settlement which divided their community property between them and awarded plaintiff property of the value of about $20,000. Among other things the contract contained the following:

"That Second Party (defendant) agrees to pay to First Party (plaintiff) for her support and maintenance the sum of Two Hundred Fifty Dollars ($250) per month from date hereof until Second Party is retired from active duty with the United States Navy and upon retirement of Second Party from such active duty, Second Party shall thereafter pay to First Party for her support and maintenance, such sums per month as may be fixed by the Court in the proceedings hereinbefore mentioned; * * *.

"It is understood and agreed that the payments hereinbefore provided for either specifically or those later to be fixed by the Court, are to be made by Second Party to First Party during the life time of First Party or until she remarries."

The interlocutory decree of divorce, dated May 22, 1945, approved the property settlement, made it a part of the decree, and specifically set forth the provisions of the property settlement just quoted as to the payments to be made to plaintiff.

Defendant was an officer in the Navy of the United States. He was retired for disability under date of February 1, 1946, with the rank of Commander.

On April 12, 1946, plaintiff filed her notice of motion for an order fixing a reasonable sum to be paid her monthly for her support and maintenance "in accordance with the interlocutory decree of divorce heretofore entered".

The motion was heard on affidavits and counter affidavits. The facts averred are conflicting. On May 24, 1946, the trial court filed its order modifying the interlocutory decree of divorce by requiring that "defendant pay to plaintiff the sum of One Hundred Twenty-five Dollars ($125.00) per month for plaintiff's support and maintenance, and it is therefore accordingly ordered that defendant pay to plaintiff the sum of One Hundred Twenty-five Dollars ($125.00) per month for her support and maintenance, said payments to commence as of the 16th day of May and to be payable on the 16th of each succeeding month thereafter until further order of this Court."

This appeal is from that order.

Defendant argues three grounds for reversal of the order which are: (1) The trial court was without jurisdiction to modify or amend the property settlement agreement made part of the interlocutory decree after the decree had become final; (2) that the order violated the provisions of section 142 of the Civil Code; (3) that the trial court abused its discretion in fixing the amount to be paid plaintiff. None of these arguments are convincing.

[1] The trial court did not modify nor amend the agreement but carried out its express provisions in fixing the amount to be paid after defendant had been retired. Further, in the interlocutory decree the trial court expressly retained jurisdiction to change or modify the allowance, so it had jurisdiction to do so. Sec. 139, Civil Code; Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15; Deyoe v. Deyoe, 126 Cal.App. 558, 14 P.2d 780.

[2] The order did not violate the terms of section 142 of the Civil Code even though plaintiff did receive property of the value of nearly $20,000 out of the community estate at the time of the settlement. The property did not produce any considerable income and from the evidence the trial judge could have concluded that such income was not sufficient for her support.

Under such circumstances a wife is not required to exhaust her separate estate before a court can require the former spouse to contribute to her support. Farrar v. Farrar, 45 Cal.App. 584, 188 P. 289; Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92; Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119. A convincing reply to the argument is found in the provisions of the property settlement agreement. Under it the plaintiff was given certain real and personal property, together with the promise of defendant to pay her $250 per month until his retirement and thereafter such sum as the court might fix. The promise to pay is just as much a part of defendant's obligations under the contract and a part of its consideration as is the promise to convey to plaintiff the property described. Deyoe v. Deyoe, supra. The trial court did not necessarily proceed under any section of the code, but merely fixed the amount defendant should pay under the clear and express terms of his agreement.

[3] We can find no breach of discretion in the amount ordered paid to plaintiff. Her affidavit states that she is in poor health and unable to work as well as being untrained in any employment; that the small income of $57 per month which she receives on a note and deed of trust on the real property received by her under the terms of the settlement, and sold by her, is used to pay installments on a home purchased by her after the sale of the former home of the parties. There is no sufficient showing that she has sufficient income to support herself.

[4] Defendant receives $375 per month retirement pay. He lists payments and living expenses exceeding the $250, which would be left after paying plaintiff $125 per month, and argues that allowing plaintiff that amount was a breach of discretion. We see no merit in the argument especially as his obligation to pay is founded on contract. Defendant finds himself in no different financial condition than some other divorced husbands. The burden was on him to show a breach of discretion in the order. Whitehead v. Whitehead, 45 Cal. App.2d 447, 114 P.2d 403. There is nothing in the record indicating that he could not reduce his standard of living on the one hand or increase his income on the other.

The order is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.



80 Cal.App.2d 517

DE LESHE v. DE LESHE.

Civ. 3650.

District Court of Appeal, Fourth District, California.

June 21, 1947.

Rehearing Denied July 15, 1947.

Divorce ⇐287, 288

Where trial court in divorce suit reserved jurisdiction over an allowance to the divorced wife for her support, the court could, on husband's appeal from order modifying amount of support money, award the wife an allowance for her support and for her costs and attorney's fees on the appeal. Civ.Code, § 139.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Suit for divorce by Mae P. DeLeshe against Maxemillian B. DeLeshe, wherein the plaintiff was granted an interlocutory decree of divorce. From an order requiring the defendant to pay plaintiff $100 a month for support during the pendency or his appeal from an order modifying the divorce decree, to pay $50 for plaintiff's costs and to pay $125 attorney's fees on the appeal, the defendant appeals.

Order affirmed.

William H. Wylie, of San Diego, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order requiring defendant to pay plaintiff $100 per month during the pending of his appeal from an order modifying the interlocutory decree of divorce, $50 to pay her costs and $125 attorney's fees on that appeal.

There was an appeal taken by defendant from an order amending the interlocutory decree of divorce and requiring him to pay $125 per month for her support and maintenance which was affirmed in an opinion in the case entitled DeLeshe v. DeLeshe, Cal.App., 181 P.2d 929. Facts are set forth in that opinion which do not need to be repeated here.

After defendant had appealed from the order amending the interlocutory decree of divorce by requiring him to pay plaintiff $125 per month for her support and maintenance, plaintiff filed her notice of motion to require defendant to pay her a reasonable sum for her support and maintenance pending that appeal, and to pay her costs and attorney's fees on the appeal. The motion was granted and defendant was ordered to pay plaintiff the amounts already mentioned. This appeal is from that order.

Defendant argues that the appeal taken from the order amending the interlocutory decree removed jurisdiction from the Superior Court so that it had no jurisdiction to make the order under attack here. He also makes some of the same contentions made on the appeal from the earlier order. As they have been disposed of in our other decision we need give them no further notice here.

It is well settled in this State that where the trial court has reserved jurisdiction over an allowance to a wife for her support, as was done here, it may award the wife, or former wife, an allowance for her support and for her costs and attorney's fees on an appeal from an order modifying the amount of the support money. In Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, an argument was made identical with that made by defendant here. It was disposed of as follows: "It matters not whether we consider the allowance of costs and attorney's fees to the wife to enable her to appeal from the order modifying the decree as an additional allowance to her for her support as authorized by section 139, Civil Code, made after the final decree of divorce, or whether we consider that the divorce action is pending within the meaning of section 137, Civil Code, so long as the court retains power to modify the terms of the decree, or whether we regard it as an order deemed necessary for the enforcement of the final decree within the meaning of the provisions for such enforcement contained in section 137, Civil Code, above quoted. It is clear that the court has jurisdiction to award the former wife whatever costs and expenses are necessary for the prosecution of an appeal rendered necessary by the application of the husband for the modification of the decree."

There are many cases in California to the same effect, among which it should be sufficient to cite the following: Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251; Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Smith v. Smith, 94 Cal.App. 172, 270 P. 995; Treece v. Superior Court, 113 Cal.App. 728, 298 P. 1040; Moore v. Gosbey, 130 Cal.App. 70, 19 P.2d 995, and Parker v. Parker, 22 Cal.App.2d 139, 70 P.2d 1003.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

GOOD et al. v. LINDSTROM et al.

Civ. 3630.

District Court of Appeal, Fourth District, California.

June 19, 1947.

Rehearing Denied July 16, 1947.

Hearing Denied Aug. 14, 1947.

1. Reformation of Instruments ⇐45(5)

Evidence authorized judgment reforming deed because of mutual mistake of the parties to convey 1.57 acres instead of 6.56 acres actually described.

2. Trial ⇐404(1)

Trial court's findings of fact should be construed, where possible, to support rather than to defeat a judgment.

3. Reformation of Instruments ⇐46

A finding that parties mutually intended that 1.57 acres was to be conveyed by deed and that, by mutual mistake of parties, the land described in the deed contained 6.56 acres, was not in direct conflict with the finding under allegations of cross-complaint for damages that plaintiffs, in tracing out and pointing out on the ground the boundaries of land intended to be conveyed, pointed out certain lands not included in the deed, and not then owned by plaintiffs, so as to preclude entry of judgment on the first finding reforming the deed.

4. Reformation of Instruments ⇐46

Evidence failed to establish such negligence or undue delay in seeking reformation of deed as would, as a matter of law, bar plaintiffs' action, where verbal agreement to sell and written offer to purchase were made in May, 1944, the survey which finally disclosed mutual mistake of the parties was made early in 1945, and the action to reform the deed was filed on April 10, 1945.

5. Appeal and error ⇐1009(4)

What is or is not clear and convincing proof authorizing reformation of written instrument is generally and primarily a question for trial court.

6. Appeal and error ⇐1009(4)

Where evidence supporting trial court's decision to reform deed on ground of mutual mistake of parties appeared to be convincing, District Court of Appeal would not disturb the judgment.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by George Frantz Good and another against Siegfried F. Lindstrom and another for reformation of a deed because of mutual mistake of the parties, wherein the defendants filed a cross-complaint seeking damages. From a judgment in favor of plaintiffs reforming the deed, but awarding defendants $500 damages on their cross-complaint, the defendants appeal.

Affirmed.

Warren E. Libby, of Los Angeles, for appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiffs, reforming a deed because of mutual mistake of the parties, and in favor of defendants awarding them $500 because of a mistake of plaintiffs.

The property involved is in the Rancho Sante Fe in San Diego County. It was sold by plaintiffs to defendants in 1944. The amended complaint alleged that by mutual mistake of the parties, the deed from plaintiffs to defendants described 6.56 acres of land, while the plaintiffs actually intended to describe and convey, and defendants intended to have described and to purchase 1.57 acres of land.

[1] The trial court found these allegations to be true and there is much substantial evidence supporting these findings. The evidence supporting them, while contradicted by defendants, shows that the parties, excepting Gertrude Good Martin, went on the ground with Mrs. Good and a Mr. Martin, a real estate broker; that the property was broken by canyons separating the high ground; that the parties agreed to start the description of the land to be sold at a little distance from a water meter near a road on which it fronted, with a

frontage of about 150 feet on this road, thence from near the meter to a fir tree growing on the down slope from a promontory, thence to an unnamed road (we will refer to this as the base line); that plaintiffs would sell and defendants would buy the land, triangular in shape, owned by plaintiffs north of the base line. Plaintiffs particularly specified that no part of the promontory was to be sold as Mr. Good and Mrs. Martin intended to build homes on it because of its unusually fine view.

No survey of the land was made until early in 1945 because of the difficulty in obtaining the services of an engineer. Plaintiffs testified that due to the housing shortage defendants wanted to move into the house on the premises as soon as possible, to which they consented; that it was agreed that a description be worked out for use in the deed and if the survey showed that description to be incorrect the parties would correct it.

Defendants contradicted much of this evidence, but the trial court found it to be true. In passing it should be noted that defendants signed the following document supporting these findings:

"Offer to Purchase Real Estate. Date, May 17, 1944. The undersigned hereby offers to purchase from the owner thereof the following described real property: The portion of Lot 3, Block 48, Rancho Sante Fe, approximately one and one-half acres —three-bedroom furnished house, County of San Diego, California, for the entire purchase price of seventy-five hundred ($7500.00) to be paid as follows: * * *"

The survey showed that one of the lines of the property described in the deed bisected the promontory which plaintiffs did not intend to sell; that the land described in the deed contained 6.56 acres; that the land viewed by the parties which plaintiffs intended to sell and defendants intended to buy contained 1.57 acres. The deed was reformed so that defendants became owners of the smaller tract.

Defendants filed a cross-complaint seeking damages because a small tract of land lying north of the base line, near the unnamed road, was not owned by plaintiffs and was not included in the deed to defendants. The trial court found this to be true and awarded defendants damages in the sum of $500.

[2, 3] As their principal ground for reversal, defendants urge that the finding "that said parties mutually intended and understood that the property described in above finding Number I (the 1.57 acres) was conveyed by the deed described in above finding Number II (the 6.56 acres) and that it was the actual agreement and intention of the parties that the land described in finding I and no more should be conveyed by the plaintiffs to the defendants and that the plaintiffs, by the mutual mistake of the plaintiffs and defendants, conveyed the land described in above finding Number II by the said deed by the plaintiffs to the defendants; and that the said deed describes lands in addition to those described in finding Number I, and that it was not the intention of the plaintiffs to sell, and it was not the intention of the defendants to purchase said additional lands" is in direct conflict with the finding under the allegations of the cross-complaint for damages, alleging that plaintiffs represented that they were selling the land north of the base line to the unnamed road, which finding is as follows:

"That said plaintiffs, in tracing out and pointing out on the ground the boundaries of the said land intended by the parties to be conveyed, pointed out and referred to certain lands not included in the said deed, and that said lands so pointed out are not and were not then owned by the said plaintiffs and that the pointing out of said land was through the mistake of the said plaintiffs and that the said defendants have been damaged by the said mistake in the inability of the said plaintiffs to convey said land so mistakenly and erroneously pointed out in the sum of $500.00."

From this finding the conclusion of law was drawn:

"That in order to do equity as between the said parties, the said plaintiffs should pay to said defendants, the sum of $500.00 as damages for erroneously pointing out certain land as being a part of the intended

conveyance from the said plaintiffs to the said defendants."

When carefully construed these findings do not actually conflict. The first quoted finding concerns the agreement actually made by the parties, while the second quoted finding relates to the conduct of Mr. Good on the ground. When the findings are read with the testimony of Mr. Good in mind, to the effect that by the agreement of the parties only the land north of the base line *owned by plaintiffs* was to be conveyed, any apparent conflict disappears. Perhaps it may be that the award of damages to defendants was a generous act on the part of the trial court of which defendants cannot complain because it was in their favor. It seems to have been prompted by the desire to do absolute justice between the parties in an action in equity. In any event findings should be construed, where possible, to support rather than to defeat a judgment. Haight v. Haight, 151 Cal. 90, 90 P. 197; Haller v. Yolo Water & Power Co., 34 Cal.App. 317, 167 P. 197. The findings here can and should be so construed.

[4] Defendants also urge that there has been such negligence on the part of plaintiffs in seeking reformation of the deed that their action must fail. In support of this argument they cite Burt v. Los Angeles Olive Growers Ass'n, 175 Cal. 668, 166 P. 993; Moore v. Vandermast, Inc., 19 Cal.2d 94, 119 P.2d 129, and Welk v. Conner, 102 Cal.App. 286, 282 P. 963.

We find nothing in the evidence supporting the argument of such negligence or undue delay. The verbal agreement to sell and the written offer to purchase were made in May, 1944. The survey which finally disclosed the mistake was made early in 1945. The action to reform the deed was filed on April 10, 1945. Under the facts before us there was no such negligence or undue delay in seeking the reformation as would, as a matter of law, bar plaintiffs' action.

[5, 6] The authorities cited by defendants do not bear upon or support their argument. The effect of the holdings in the three cases is thus stated in Moore v. Vandermast, Inc., supra [19 Cal.2d 94, 119 P.2d 130]:

"Although plaintiff's contentions upon this appeal are stated in various ways, the basic point upon which he relies is that the evidence is insufficient to support the findings of the trial court. In this connection it should be noted that where one seeks to reform a written instrument by the introduction of extrinsic evidence, the courts have generally required clear and convincing proof, or something more than a preponderance of the evidence, as the basis for such an invasion of the parol evidence rule."

What is or is not clear and convincing proof is generally and primarily a question for the trial court. Where, as here, the evidence supporting its decision to reform appears to be convincing, we should not disturb the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



80 Cal.App.2d 182

WECK et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST. et al., and eight other cases.

Civ. 15252–15260.

District Court of Appeal, Second District, Division 2, California.

June 5, 1947.

Rehearing Denied June 24, 1947.

As Corrected July 14, 1947.

Hearing Denied July 31, 1947.

1. Appeal and error ⇐1078(1)

Where orders were not discussed in appellants' briefs, the appeal therefrom was presumed to have been abandoned and orders would be affirmed.

2. Appeal and error ⇐110

Order denying a new trial is not appealable.

3. Negligence ⇐56(1)

The "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient inter-

vening cause, produces the injury and without which result would not have occurred.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Negligence ⇐119(1)

To maintain action for damages for wrongful act or neglect of another, it must be alleged and proved that such act was direct and proximate cause of injury.

5. Negligence ⇐59

To render defendant liable, it must appear not only that injury complained of was natural and probable consequence of neglect or wrongful act of defendant, but that such consequence ought reasonably to have been anticipated by person of ordinary intelligence in light of attending circumstances, unless act is one of wanton wrong.

6. Negligence ⇐134(11)

Proximate cause need not be proved to point of demonstration, but may rest on reasonable inferences that may be drawn from evidence, provided there is proof of negligence.

7. Levees and flood control ⇐36
Waters and water courses ⇐176

Proximate cause of flood damage to plaintiffs' lands would not be inferred against flood control district in absence of allegation and proof of careless or defective construction or maintenance of flood protection work installed by district, nor against others, unless it was shown that they committed negligent or wrongful act or that there was dereliction of duty on their part that tended to cause overflow of water.

8. Trial ⇐178

A directed verdict may be ordered when, disregarding conflicting evidence and giving to plaintiffs' evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff.

9. Trial ⇐142

Unless, as a matter of law, no other reasonable conclusion is reasonably deducible from evidence and any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it on appeal or trial court to set it aside, court may not take case from jury.

10. Trial ⇐178

A motion for directed verdict for defendant concedes as true evidence on behalf of plaintiff, with all fair and reasonable inferences to be deduced therefrom.

11. Trial ⇐139(1)

The fact that court might be justified in granting a new trial if verdict should be rendered for plaintiff does not necessarily warrant directing a verdict for defendant on the same evidence.

12. Trial ⇐17b

Court has no power to weigh evidence, on motion for directed verdict for defendant, but is bound to view it in light most favorable in support of plaintiff's cause.

13. Evidence ⇐591
Trial ⇐178

Evidence produced by plaintiff under statute permitting litigant to call adversary is not binding on plaintiff, but on a motion for directed verdict weighs for him as far as it is favorable and must be disregarded as far as it is unfavorable. Code Civ.Proc. § 2055.

14. Waters and water courses ⇐51, 54, 78, 162

A person may lawfully use such means as are necessary to confine water in its channel in order to protect his own property, but no one has right to obstruct or divert flow of water from its natural channel or water course in such manner as to damage property of another.

15. Waters and water courses ⇐115

"Floodwaters" are those that were once a part of a stream or natural water course and that have escaped from it, overflowing land not usually thus covered.

See Words and Phrases, Permanent Edition, for all other definitions of "Floodwaters".

16. Waters and water courses ⇐116

Floodwaters are a common enemy against which every man has a right to defend himself.

17. Waters and water courses ⇐115

"Surface waters" are those arising from rains, springs, or swamps, and not collected in a channel.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Water".

18. Waters and water courses ⇐54

Owners of property adjacent to natural water course were entitled to build dikes, bulkheads, and other constructions in order to confine water in its channel as a protection of their cultivated land from damage by spreading waters.

19. Waters and water courses ⇐38

Where water course has existed for long period of time as channel for natural drainage of water shed tributary to it, manner of its creation is not material and it has all attributes of a natural channel and it is a water course in a legal sense although dry except in time of rain.

20. Waters and water courses ⇐38, 51

In action for damage caused by diversion of storm waters from natural water course, evidence established that channel involved was a natural water course which could not be obstructed with impunity.

21. Waters and water courses ⇐51

A channel or water course need not be an ancient one in order to render it immune from obstruction.

22. Waters and water courses ⇐118, 119(2)

The burden of surface waters must be borne by owners of properties on which it originates and onto which it naturally flows by reason of slope or contour of the land, and they are not privileged to erect barriers or ditches that will increase flow on neighboring lands.

23. Waters and water courses ⇐179(6)

In action for damages allegedly caused by diversion of storm waters from natural water course, whether defendant railroad and another performed any act or omission which resulted in diversion of flow of water from natural water course was for jury.

24. Waters and water courses ⇐179(6)

In action for damage allegedly caused by diversion of storm waters from natural water course, in view of evidence regarding acts of defendant railroad and another in filling culvert through which water had passed and could have continued to pass under railroad and in constructing artificial channel along side of railroad in which water was compelled to flow, question of proximate cause of overflow and of resulting damage was for jury.

25. Levees and flood control ⇐36

In action for damages allegedly caused by diversion of storm waters from natural water course, evidence that defendant flood control district and its officers and employees had performed any act which was direct or proximate cause of damage was insufficient for jury. Gen.Laws, Act 4463.

26. Eminent domain ⇐2(10)

Where overflow causing damage to plaintiffs' properties was natural result of too much water in natural water course, failure of flood control district to construct an indestructible wall along the channel was not an act constituting the "taking or damaging" of private property for public use for which compensation would be required. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Damaging" and "Taking".

27. Appeal and error ⇐843(3)

Admissibility of evidence was not required to be determined where evidence, if admitted, would not have changed result of action.

28. Evidence ⇐117, 527

Where expert hydraulic and hydrological engineer had stated grade of surface of land, his testimony as to what natural consequence would be of those differences of grade on deposit of detritus was admissible, since sufficient foundation had been laid and question was proper one to be answered by witness.

29. Evidence ⇐117

Question asking expert hydraulic and hydrological engineer as to what effect a change in channel along northerly line of railroad right of way and difference of elevation would have was proper and was justified by evidence.

30. Evidence ⇐117

Where evidence showed difference in elevation of land and change in channel along railroad right of way, question as to where, in expert witness' opinion, waters of channel would have flowed assuming that there had been no obstruction along railroad right of way, was appropriately propounded to expert witness and had sufficient foundation in evidence.

Appeal from judgments of the Superior Court of Los Angeles County, from orders re disqualification of trial judge, and from order denying new trial. Charles S. Burnell, Judge. Judgments affirmed and reversed; orders re disqualification affirmed; appeal from order denying new trial dismissed.

Actions by Robert Weck and others, by W. R. Kratka and others, by Domenico Tonso and others, by George M. James and others, by Clotildis Kerns and others, by Bruce H. Kratka, by Richard B. Reinert, by Jean Church Jahns, and by Carl Richard H. Mueller against Los Angeles County Flood Control District and others, to recover damages claimed to have been caused to their respective properties by the diversion of storm waters from what they alleged to be a natural water course. The actions were consolidated for trial. The court directed the jury to render verdicts for defendants. From judgments entered on the verdicts, the plaintiffs appeal.

Judgment in favor of defendant Southern Pacific Company and Southern Pacific Railroad Company reversed, and judgment affirmed as to all other defendants.

B. J. Bradner, William L. Murphey, and Stewart, Shaw & Murphey, all of Los Angeles, for appellants.

Harold W. Kennedy, Co. Counsel, S. V. O. Prichard, First Asst. Co. Counsel, Roy W. Dowds, Asst. Co. Counsel, and Loton Wells, Deputy Co. Counsel, all of Los Angeles, for Los Angeles County Flood Control District et al., respondents.

Frank Karr and C. W. Cornell, both of Los Angeles, for Southern Pacific Co. et al., respondents.

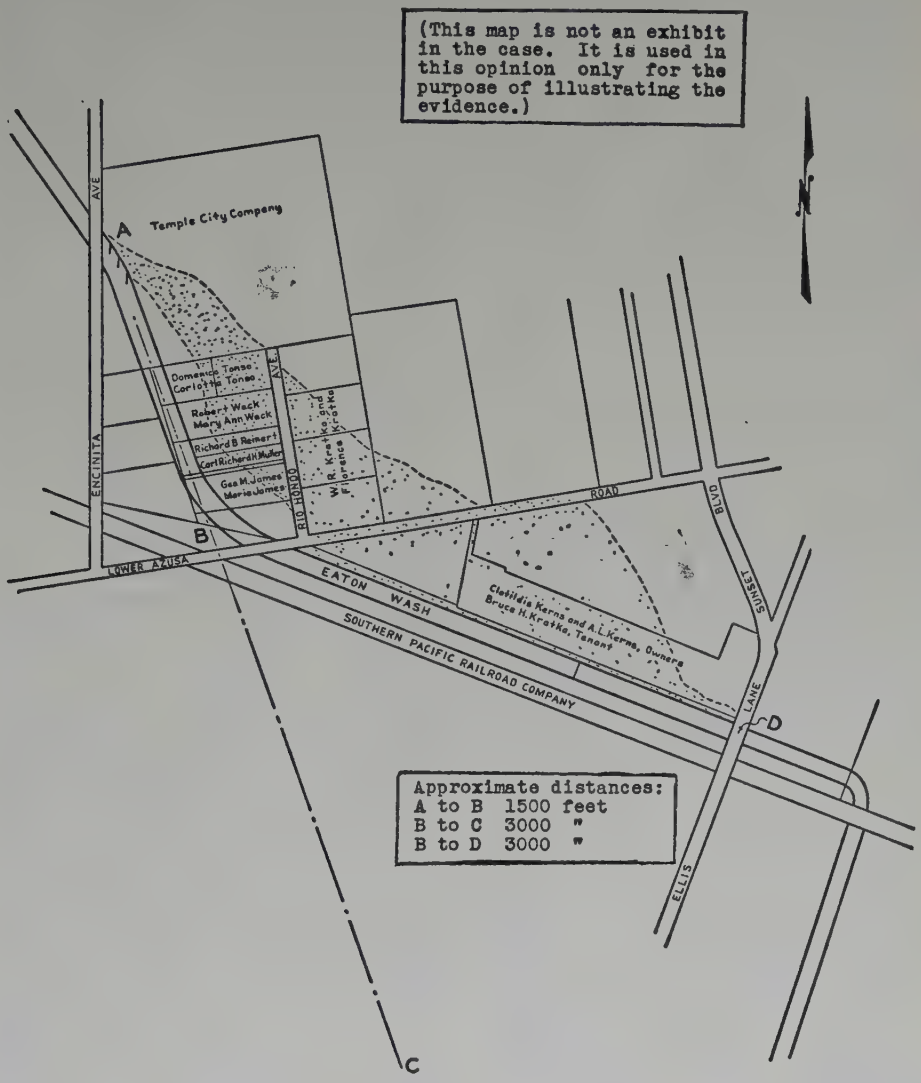
WILSON, Justice.

The nine actions above entitled were commenced by plaintiffs to recover damages claimed to have been caused to their respective properties by the diversion of storm waters from what they allege to be a natural watercourse or channel known as Eaton's Canyon Wash. The actions were consolidated for trial. At the conclusion of the evidence the court directed the jury to render verdicts in favor of defendants. Verdicts were returned as ordered and judgments were entered thereon from which plaintiffs have appealed on a joint transcript.

[1, 2] Plaintiffs have also appealed (1) from the orders made after trial and before the hearing of the motions for a new trial determining that the Honorable Charles S. Burnell was not disqualified to have heard the actions and that he was not disqualified to hear the motions for a new trial, and (2) from the order denying the motions for a new trial. Since the orders first mentioned are not discussed in plaintiffs' briefs the appeal therefrom is presumed to have been abandoned and the orders will be affirmed. The order denying a new trial is not an appealable order and the purported appeal will be dismissed.

For brevity defendant Los Angeles County Flood Control District will be hereinafter referred to as District, defendant Southern Pacific Company as Company, defendant Southern Pacific Railroad Company as Railroad, and Eaton's Canyon Wash as Wash. The evidence will be more clearly understood from the appended map showing the course of the Wash, the railroad right of way, adjacent streets and roads, and the location of the properties of the several plaintiffs. The map is not an exhibit in evidence. It was attached to one of the briefs for the purpose of illustration and is inserted here for the same purpose.

The approximate distances between the lettered points on the map are: From A to B, 1500 feet; from B to C, 3000 feet; from B to D, 3000 feet.



The object of the actions is thus summarized in plaintiffs' brief: to recover for damages to their real and personal property by reason of storm waters leaving the Wash on March 4, 1943, "as a direct and proximate result of (1) the obstruction and diversion of the waters from said natural water channel in an artificial channel; (2) the negligent operation and maintenance of said artificial channel; (3) the improper design and careless construction of flood control works upon said natural channel; (4) the negligent operation and maintenance of said natural channel and flood control works thereon."

The statute of limitations was not pleaded by any of the defendants.

It is conceded that plaintiffs' properties were damaged by the flood waters that flowed over them, but the basic question is, as in any character of action alleged to arise from negligent acts, that of proximate cause. Did any act of defendants, or of any of them, proximately cause the errant waters to flow across the respective properties of plaintiffs?

[3-5] In Baillargeon v. Myers, 180 Cal. 504, 508, 182 P. 37, the court held the following to be a satisfactory definition of proximate cause: "[T]he 'proximate cause' of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred; it is the efficient cause, the one that necessarily sets the other cause in operation." In order to maintain an action for damages based on the wrongful act or neglect of another, it must be alleged and proved that such act was a direct and proximate cause of the injury. In determining the question of proximate cause there are two separate and distinct elements that must not be confused: (1) That which causes the injury, and (2) that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not. Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 237, 87 P.2d 917. It must appear not only that the injury complained of was the natural and probable consequence of the negligent or wrongful act, but further that such consequence ought reasonably to have been foreseen by a person of ordinary intelligence in the light of attending circumstances, unless the act is one of wanton wrong. Id., 31 Cal.App.2d at page 238, 87 P.2d 917.

[6, 7] Proximate cause need not be proved to the point of demonstration but may rest on reasonable inferences that may be drawn from the evidence, provided there is proof of negligence. Gorman v. County of Sacramento, 92 Cal.App. 656, 661, 268 P. 1083; Keena v. United Railroads, 197 Cal. 148, 155, 239 P. 1061. Nevertheless the proximate cause of the damage to plaintiffs' lands will not be inferred against the District in the absence of allegation and proof of careless or defective construction or maintenance of the flood protection works installed by the District, nor against the Company and the Railroad unless it be shown that they committed a negligent or wrongful act or that there was a dereliction of duty on their part that tended to cause the overflow of water. Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 588, 159 P.2d 674.

[8-13] The following rules governing the granting of a motion for a directed verdict are established and will control the disposition of these appeals: (1) A directed verdict may be ordered "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given." (2) Unless as a matter of law, when so considered, no other reasonable conclusion is legally deducible from the evidence and any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside, the court may not take the case from the jury. (3) A motion for a directed verdict concedes as true the evidence on behalf of the plaintiff, with all fair and reasonable inferences to be deduced therefrom. The fact that the court might be justified in granting a new trial if a verdict should be rendered for the plaintiff does not necessarily warrant the directing of a verdict on the same evidence. The court has no power to weigh the evidence but is bound to view it in the most favorable light in support of the plaintiff's cause. (4) The court may direct a verdict only when, disregarding conflicting evidence and giving the plaintiff's evidence all the value to which it is entitled, including every legitimate inference that may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such verdict were given. In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Thomsen v. Burgeson, 26 Cal.App.2d 235, 240, 79 P.2d 136; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 66, 77 P.2d 1059; Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 572, 90 P.2d 792. (5) Evidence produced by the plaintiff under section 2055 of the Code of Civil Procedure is not binding on him but on a motion for a directed verdict weighs for him as far as it is fa-

vorable and must be disregarded as far as it is unfavorable. People v. Mahoney, 13 Cal.2d 729, 736, 91 P.2d 1029; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 722, 38 P.2d 825; Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529.

Defendants rely on cases holding that when a motion for a directed verdict is made after the defendant's evidence has been introduced the court must consider all the evidence and should grant the motion if the evidence on behalf of the defendant has not been contradicted and has made out a complete defense, or if, upon the whole evidence, the court would be compelled to set aside a verdict for the plaintiff as wholly unsupported by the evidence, citing In re Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267; In re Estate of Smethurst, 15 Cal.App.2d 322, 326, 59 P.2d 830; Ritchie v. Long Beach Community Hospital Ass'n, 139 Cal.App. 688, 692, 34 P.2d 771; Kohn v. National Film Corp., 60 Cal.App. 112, 116, 212 P. 207; Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 334, 54 P.2d 709; and Blank v. Coffin, 20 Cal. 2d 457, 460, 126 P.2d 868. But in these cases it is pointed out that a motion for a directed verdict cannot be granted when there is a conflict of a substantial kind; that a "bare conflict" is not substantial and that it must appear that the evidence utterly fails in the essentials necessary to be produced to prove the plaintiff's cause of action. In the Lances, Flood and Gish cases, supra, motions were made and granted after all the evidence for both parties had been introduced and in each case the judgment entered on the verdict was reversed.

[14] In reviewing the question whether there was such a deficiency of evidence on the part of plaintiffs in the instant action as to warrant the direction of a verdict in favor of defendants, it must be borne in mind that although a person may lawfully use such means as are necessary to confine water in its channel in order to protect his own property (Weinberg Co. v. Bixby, 185 Cal. 87, 97, 196 P. 25; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 406, 188 P. 554, 9 A.L.R. 1200) no one has the right to obstruct or divert the flow of water from its natural channel or watercourse in such manner as to damage the property of another. Smith v. City of Los Angeles, 66 Cal.App.2d 562, 572, 153 P.2d 69; Hellman, etc., Bank v. Southern Pacific Co., 190 Cal. 626, 636, 214 P. 46; Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34; Weinberg Co. v. Bixby, supra, 185 Cal. at page 96, 196 P. 25.

Defendants have misconceived the power of this court on an appeal from a judgment on a directed verdict. They have argued the case on the theory that we must decide whether from the entire evidence it can be said that they, or any of them, performed any act that caused the overflow of waters on plaintiffs' lands on March 4, 1943. To state defendants' theory in another way, would a finding to that effect, if the case had been tried without a jury, be sustained by the evidence? The evidence introduced by defendants is emphasized as showing the absence of liability on their part. We cannot consider the case in that manner. We are required to determine only whether there was sufficient evidence concerning defendants' acts or omissions, disregarding all evidence favorable to their defense, to require the submission of the case to the determination of the jury.

Governed by these rules we arrive at the consideration of the evidence, indulging every intendment and every reasonable inference favoring plaintiffs' causes of action that can be drawn and that could have been drawn by the jury from the evidence and disregarding all evidence produced by defendants favorable to their defense.

Since the acts charged against the Railroad and the Company are not, except in a few instances, alleged to have been committed jointly with the District and its officers, we shall consider the evidence as to each group of defendants separately in determining whether it was sufficient to debar the court from taking the case from the jury.

[15-18] 1. *Is Eaton's Canyon Wash a Natural Watercourse?* The Wash has its source in Eaton's Canyon in the Sierra Madre Mountains several miles northerly from the area shown on the map and it

extends to and below the area involved in these actions. During dry seasons there is no water in the Wash but during rainy periods water flows from the canyon along the course of the Wash for greater or less distances, depending upon the amount of rainfall. Before the territory intermediate the canyon and the area in question became settled the waters did not flow so far into the valley as they did after the land became occupied and houses were constructed and streets were paved, resulting in a decrease of the absorbent area. The waters originating in the mountains were flood waters as distinguished from surface waters. Flood waters are those that were once a part of a stream or natural watercourse and that have escaped from it, overflowing land not usually thus covered. Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34; Stewart v. Erskine-Bolst, 66 Cal.App. 461, 468, 226 P. 644. They are a common enemy against which every man has a right to defend himself. McDaniel v. Cummings, 83 Cal. 515, 520, 23 P. 795, 8 L.R.A. 575. Surface waters are those arising from rains, springs or swamps and not collected in a channel. San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 398, 188 P. 554, 9 A.L.R. 1200. Owners of property adjacent to the Wash, as they were legally entitled to do (Weinberg Co. v. Bixby, 185 Cal. 87, 97, 196 P. 25; San Gabriel Valley Country Club v. County of Los Angeles, supra, 182 Cal. at page 406, 188 P. 554, 9 A.L.R. 1200), built dikes, bulkheads and other constructions in order to confine the water in its channel as a protection of their cultivated land from damage by the spreading waters. The reduction of the absorbent area and the confinement of the water in the channel caused it to flow in greater quantities into the valley progressively as the constructions increased.

[19] A channel or watercourse may be created as the result of settlement of the adjacent territory. It is natural in the sense that it was made by the waters themselves and not by man. When it has existed for a long period of time as a channel for natural drainage of the watershed tributary to it the manner of its creation is not material and it has all the attributes of a natural channel. It is a watercourse in a legal sense although dry except in time of rain. San Gabriel Valley Country Club v. County of Los Angeles, supra, 182 Cal. at page 397, 188 P. 554, 9 A.L.R. 1200; Chowchilla Farms, Inc., v. Martin, 219 Cal. 1, 14, 25 P.2d 435.

Defendants contend that there is no evidence that the waters of the Wash reached as far south as the railroad until about 1900, when the growth of the community north of the railroad and the confinement of the water within banks constructed by the property owners caused it to flow to the area in question. We do not so interpret the evidence.

The main line of the railroad between Los Angeles and the east was constructed in 1873. The location map by which the railroad was constructed shows a 10-foot culvert near where the Lower Azusa Road crossing is now situated. At the trial it was stipulated as facts that in 1874 an opening 10 feet wide was installed under the tracks at a point approximately 528 feet east of Lower Azusa Road; it was taken out in 1892; in 1902 another culvert 37½ feet wide was installed under the tracks at a point 35 feet east of Lower Azusa Road. The latter was in a direct line in which the Wash extended from Encinita Avenue southerly. Railroad companies do not construct culverts under their tracks unless there is necessity for the passage of water. The installation of small culverts when the railroad was constructed, another in 1874, and still another at a later date gives rise to the inference that at the time the railroad was built and continuing thereafter there was a flow of water in the Wash that made necessary a means by which it could pass under the railroad tracks.

M. E. Salsbury, Acting Chief Engineer of the District, testified that the Wash is a natural watercourse or channel from its source in the Sierra Madre Mountains to a point below plaintiffs' properties.

Plaintiff Albert L. Kerns, who had resided on Ellis Lane for 50 years, testified as follows: He had gone over the

course of the Wash up to the Sierra Madre Mountains; it is a natural watercourse extending from the mountains to Rio Hondo River (south of his property) and from there to the sea; 50 years ago it was a small ditch, 20 or 30 feet wide and 3 or 4 feet deep; at Encinita Avenue it made a turn and ran south to the railroad, through the tracks and down to Valley Boulevard; there was a culvert under the tracks 6 or 8 feet wide and the tracks were 4 or 6 feet high; in 1899 or 1900 the culvert was washed out by the storm waters and employees of the Company, using Company equipment, at that time installed a culvert 20 to 30 feet wide and 4 or 5 feet deep; above Encinita Avenue there was a small channel and south of Encinita the water ran over the sand flat and when it hit the track it ran through the culvert.

Eugene D. McSweeney testified that in 1897 he examined land near the area in question; the channel was 10 feet wide and 1 or 1½ feet deep at Rosemead Avenue, a short distance north of Encinita Avenue; at the latter street it was about the same size but irregular; he saw storm waters flowing in the Wash on several occasions after 1897. Other witnesses testified concerning the flow of water in the Wash to, through and below the railroad tracks for 40 years or longer prior to the flood that caused the damage to plaintiffs' properties.

Defendants Railroad and Company refer to evidence given on their behalf by their Assistant Division Engineer and by a civil engineer employed by the Pacific Electric Railway interpreting the railroad map of 1873 as indicating a wide, shallow depression at Lower Azusa Road. They also rely on a United States Geodetic Survey map introduced by them showing the termination of the Wash in 1894 at a point about 4 miles north of the railroad track. Defendants contend that because the latter map is official it should be declared as a matter of law that the Wash was not a watercourse in 1943 when plaintiffs suffered their damage.

A legend on the geodetic map states that the surveys which it depicts were made in 1894. The topography shown on the map is not the same as of today. It is common knowledge that conditions have changed materially in the territory covered by the map during the 50 years intervening between the date of the survey and the time of the flood in 1943. Much of the area covered by the map has been subdivided, thousands of buildings have been erected, streets and roads have been paved, all contributing to the reduction of the absorbent area and to the increase of the amount of water cast into the Wash. As more water entered the streambed it would naturally flow further and in increased quantities into the valley.

[20] The overwhelming positive evidence of the witnesses who have resided in the vicinity for 40 or 50 years and during that time have seen water flowing in the Wash on many occasions, the admission of the Chief Engineer of the District that the Wash is a natural watercourse, the presence of culverts from the time the railroad was constructed, and the changed conditions since the geodetic survey was made together so completely submerge the theoretical evidence of witnesses interpreting the railroad map that there can be no doubt that the Wash was and is a natural watercourse or channel that cannot be obstructed with impunity.

[21, 22] Furthermore, a channel or watercourse need not be an ancient one in order to render it immune from obstruction. The burden of surface waters must be borne by the owners of properties on which it originates and onto which it naturally flows by reason of the slope or contour of the land, and they are not privileged to erect barriers or ditches that will increase the flow on neighboring lands. Nevertheless surface waters may, without artificial aid, converge so as to form a defined channel and if they would naturally flow therein it would be construed to be a natural watercourse from the point at which the channel begins to take form. Consequently whether the Wash has been formed by waters arising in the mountains and flowing from Eaton's Canyon, or by storm waters originating in the territory below the mountains, or by

surface waters that have naturally converged and formed the channel, it cannot be so obstructed as to cause the water to flow where in a state of nature it would not have gone.

2. *The case against Southern Pacific Company and Southern Pacific Railroad Company.*

(a) One of the grounds of the motion for a directed verdict on behalf of these defendants was that the evidence failed to show which, if either of them, committed any of the acts or omissions complained of. During the trial no differentiation was made between the two companies. All counsel, including the attorney for the two companies, and the witnesses referred indiscriminately to "Southern Pacific" without specifying either company. No objection was made and no demand or suggestion was voiced that the full name of either company be designated. The motion for a directed verdict was made on behalf of all defendants by counsel for the District. He and not counsel for the Company and the Railroad advanced the ground of the motion under discussion. Since no distinction was made at the trial and since these defendants did not think it important to stress this ground at the close of the trial and have not argued it in their briefs, we shall consider the evidence as referring to the two companies jointly.

(b) Defendants Railroad and Company contended that the evidence affirmatively shows that no act was performed by either of them to divert the flow of water in the Wash. They have bypassed all evidence given in behalf of plaintiffs and state that the uncontradicted evidence affirmatively shows that if any act of diversion was committed other persons were the offenders.

Their contention that the only time during the 70-year period from 1873 to 1943 when it was possible for water to flow under the railroad tracks or across the right of way was from 1902 to 1907, during which time it was stipulated that a culvert was maintained through which the water could flow, is contradicted by the evidence heretofore related, by the location map of the railroad, and by the stipulation to which we have previously referred relative to the existence of culverts from 1873 until 1902. It was also stipulated that in 1907 the "Southern Pacific" removed and filled the culvert, and installed two wooden box culverts, each assembly being 3 feet high and 12 feet wide, at points east of Lower Azusa Road; that these two culverts were, sometime after 1907 and prior to 1936, filled up, and the roadbed and rails were raised 6 or 8 feet between Lower Azusa Road and Ellis Lane.

Albert L. Kerns, in addition to the evidence which we have outlined, testified concerning the existence of the culverts and that he saw employees and equipment of the "Southern Pacific" covering up the culverts and excavating land along the north side of the tracks as far as Ellis Lane. Mr. Kerns and other witnesses testified concerning various storms and the action of the water both before and after the culvert was filled and the excavation made along the tracks.

B. J. Bradner testified that in 1906 he drove over the channel of the Wash on Lower Azusa Road; he saw the Wash to the north and to the south he saw a trestle 35 feet long; at that time the Wash went through the culvert under the railroad; the culvert was 30 or 35 feet wide. In 1907 Mr. Bradner saw that the railroad tracks had been raised and the culvert was gone; a bulkhead was constructed of railroad ties standing on end for a distance of 800 to 1,000 feet; there was a wash along the north side of the railroad; the ties were on the south side of the wash; there was no bank on the north side of the wash and there was no culvert under the tracks. In 1906 he did not see any channel along the north side of the railroad.

Other witnesses testified that in 1906 the storm waters of the Wash went under the railroad track, and that very little water flowed along the north side of the track until 1906 or 1907, when the culvert was removed and the bulkhead made of railroad ties was installed.

Witnesses called by defendants testified concerning the erection by the owners of property south of the railroad of bulkheads and other obstructions westerly from Ellis Lane parallel with the railroad. Such evi-

dence, they contend, effectively disposes of their liability for damage to plaintiffs' properties. This element is one that should have been submitted to the jury along with the other disputed issues in the case.

Prior to the diversion of the stream it flowed from point A to point B and approximately straight down the grade to point C as these points are designated on the accompanying map. There is evidence that, save for the closing of the culvert and the obstruction of the Wash, the water would have continued from B to C instead of running along the north side of the railroad from B to D where it flowed after the culvert had been filled. The gradient from Encinita Avenue to Lower Azusa Road (A to B) was 1.31 per cent. The gradient from point B to C was practically the same. The water was diverted by the closing of the culvert so that it flowed from Lower Azusa Road to Ellis Lane (B to D), where the gradient was .85 per cent.

Harold L. Conkling, a consulting engineer in hydraulics and hydrology, testified that the carrying power of flood water depends on its velocity and that the effect of a curve in a stream is to decrease its velocity and therefore its carrying capacity. The sharper the curve the more the force of the stream is absorbed in going around the curve, and the power of the stream to carry detritus is diminished, causing the deposit of detritus by the slowing of the velocity. The same result obtains when the grade has become flattened. A stream flows faster as the grade is steeper. When a deposit of detritus is made on a grade that is flatter than another portion of the streambed the velocity of the water is immediately affected upstream progressively —the deposit will gradually creep upstream. He testified that the flow of the water in the Wash was slowed by two factors—the curve at point B, and the fact that the gradient from B to D was less than that from A to B. By reason of these interferences with the law of nature, said the witness, the speed of the water was slowed to such an extent that a greater amount of silt and detritus was deposited along the north side of the railroad from B to D than would have settled if the water had gone along the line A B C. When a deposit of silt begins it moves upstream, and where the grade has been changed artificially the deposit will continue upward until a restoration to an equal grade has been brought about. Mr. Salsbury, Chief Engineer of the District, testified to the same effect.

Mr. Conkling gave his opinion as an expert that if there had been no change in the channel of the Wash turning it along the north side of the railroad and no embankment constructed, the water would not have turned at Lower Azusa Road (point B) but would have gone down the steeper slope (toward point C) and the channel would have cut itself down to a grade on which it could have carried the load of water. In that event there would have been no overflow onto the lands of plaintiffs.

There is evidence that as a result of the curve and the change of the gradient detritus was deposited in the channel as far north as Encinita Avenue (point A) 4 to 5 feet in depth, practically filling it to the level of the adjacent property.

[23] The closing of the culvert, the curve which the stream was caused to take, the turning of the water onto a gradient less than that existing above the curve, and the filling of the channel with detritus, were elements that the court had no right to remove from the consideration of the jury. It was the jury's province to consider all these circumstances in determining whether they, or any of them, caused the deposit of detritus in greater quantities than would have resulted if the water had flowed approximately in a straight line, and if so whether the deposit had backed upstream to such a distance as to fill the streambed and cause the water to depart from its accustomed channel onto plaintiffs' properties.

[24] (c) The third and last contention of these defendants is that assuming that there was a diversion of water from a natural watercourse the evidence fails to show that any act or omission on their part was a proximate cause of the flood, and that this court should so declare. In view of the evidence which we have related concerning the physical aspects of the Wash and of the territory adjacent to its inter-

section with the railroad right of way, the acts of these defendants in filling the culvert through which the water had passed and could have continued to pass under the railroad and in constructing an artificial channel along the north side of the railroad in which the water was compelled to flow, and the increased deposit of detritus caused by the curve in the stream and by the lessening of the gradient, the question of proximate cause of the overflow and of the resulting damage, like the other questions in issue, should have been submitted to the jury.

Under the rules which we have stated relating to directed verdicts it was the duty of the jury and not of the court to determine from the evidence whether the acts of these defendants were negligent and if so whether they were the proximate cause of the damage, and in so doing to draw its own inferences from all the evidence.

[25] 3. *The case against the Flood Control District and its officers.* The complaints allege that about the year 1915 the District took possession of the natural channel of the Wash as it then existed and at all times thereafter has undertaken to control the storm waters of the Wash. The District was created by law in 1915. Stats. 1915, ch. 755, p. 1502, 1 Deering's General Laws, 1937 Ed., Act 4463, p. 2006. The fact is that it did no work on the Wash at or near Lower Azusa Road until 1934 or 1935. At that time the culvert under the railroad had been closed and the water had been flowing along the north side of the railroad for 28 years—long before the District existed. Under the conditions which it had no part in creating and for which it was not in any manner responsible, the District undertook the construction of flood protection works along the channel from Encinita Avenue to Lower Azusa Road and thence parallel with the railroad to Ellis Lane. Obviously such negligent acts as had been performed by the Railroad, the Company and the owners of property south of the railroad before the creation of the District cannot be charged as negligence on its part.

The work performed by the District was in an effort to retain the flood waters within the streambed. There is no evidence that any structure erected by it diverted the water from its natural channel.

The history of the flood protection work performed on the Wash by the District adjacent to the lands of plaintiffs is gathered from the testimony of the various witnesses. In January, 1936, pipe and wire protection fences with brush were installed immediately north of Encinita Avenue down to the north line of the Temple City property, the effect of which was to confine the water in that area to the extent of the capacity of the channel. The banks on the east side of the Wash southerly from Encinita Avenue for a distance of 700 feet were constructed between 1934 and 1936 according to one witness and in 1938 according to another, the protection works being double pipe and wire fence. Part of this was taken out by the waters in 1938. Following this storm the banks and protection works were reconstructed to approximately their former condition, with the fence of identical height and measurement. After that storm a channel downstream from Lower Azusa Road toward Ellis Lane was excavated for a distance of a quarter of a mile. Since that time the District has performed maintenance work on the channel at various times. The bank on the north side of this channel was approximately 10 feet high; the levees and fences were reconstructed as they had formerly existed from Lower Azusa Road up to Encinita Avenue. There was a rainfall on January 22 and 23, 1943, that damaged a section of the fence along the bank below Encinita Avenue. The fence was washed out completely for a greater part of this distance and the water cut into the sand embankments which the District had constructed.

Following the rains of January, 1943, an emergency crew of the District placed sandbags along the damaged section of the levee and fence. Within a week or two later 4 pipe and wire wing fences were installed along the east bank of the channel below Encinita Avenue, each approximately 50 feet long, set at an angle of 45 degrees from the bank and additional sandbags were placed. The wing fences were installed as a temporary emergency measure prior to the storm of March, 1943. They were

placed along the bank and did not project out into the stream flow. Wing fences catch debris from the water and build up their own banks and slow down the water. This is first aid work and is not used as regular bank construction. The bank was reconstructed with dirt as it had theretofore existed to its original height. Following the storm of January, 1943, there was a deposit of detritus in the channel below Encinita Avenue of about two feet above the former grade of the streambed. The maximum rate of flow in the Wash was approximately 2280 second feet during the storm of January, 1943, and 1600 second feet in March, 1943.

In 1935 the District obtained easements from the Company and the Railroad along the north side of the right of way, built higher fences and widened the channel. After the storm in 1934 the channel east from Lower Azusa Road was cleaned out, detritus was thrown on the bank making it much higher than formerly along the Kerns property on the north side of the Wash. In 1938 the channel from Lower Azusa Road to Ellis Lane was cleaned out, the banks were made higher and wider and the channel was made wider. Some of the banks were 15 feet high. After the storm of 1938 the channel was changed to some extent toward the east near Encinita Avenue. High and expensive banks were built on the east side of the Wash from Lower Azusa Road to Encinita Avenue and a riprap of wire and brush was installed for a part of that distance.

Plaintiffs contend that the structures erected by the District were improperly designed and for that reason did not retain the water in its channel. Mr. Conkling, the hydraulic engineer who testified at great length on behalf of plaintiffs, testified that if the structures had been stronger they would have resisted the water but he admitted that they did not cause the water to go out of the streambed. He stated that under the conditions existing in 1943, if there had been no flood protection work at all below Encinita Avenue the water "would have gone to about where it did go;" that the stream would have left the channel approximately at the point where it overflowed onto plaintiffs' properties; that with the curve below Lower Azusa Road as it then existed the channel would have "silted up" and the water would have flowed over the adjacent ground and would not have confined itself to a definite channel.

Mr. Conklin expressed the opinion that the wing fences were not in accordance with sound engineering principles by reason of their being constructed on a curve of the stream, the angle at which they were placed, and the length of the fence and of the wing walls, but he stated that the wing fences were a good first line of defense and that they would retard the failure in the main defenses. He was of the opinion that in this particular flood the bank and revetments were inadequate to hold the amount of flow that came in the storm of March, 1943, because the streambed had been raised below, referring to the channel along the railroad below the curve at Lower Azusa Road. His theory was that the installations were weak because (1) Encinita Avenue was paved and the pavement would tend to hold up the flow even if there had been no flattened grade below Lower Azusa Road; (2) experience had shown that the double pipe and wire revetments were insufficient at this point because they went out in January, 1943; and (3) the wing walls extended into the stream and took its force much more directly than the walls around the curve.

We find nothing in the evidence indicating or from which it can be inferred that any act of the District was a direct or proximate cause of the damage. Neither the wing walls nor any other structure installed by the District caused the water to flow out of the channel. Their mere failure to retain the water within the streambed did not constitute negligence. No inference of negligence is furnished either by Mr. Conkling's opinion that the protective works were shown to be insufficient because they were carried out by the flood in January, 1943, and that the wing walls were not good engineering practice, or the fact that the structures did not withstand the force of the water. Nor is there an inference that the result might have reasonably been foreseen by persons of reasonable intelligence. It does not appear

that the damage was the natural or probable consequence of a negligent or wrongful act on the part of the District or its officers.

[26] Only 42 days elapsed between the January and March floods. Emergency repairs were made after the January storm. There is no evidence that the protective structures were inherently defective. No duty rested on the District to keep the water out of plaintiffs' lands, as contended by plaintiffs. The statute creating the District contained no mandatory direction to build public improvements of any particular character or design, or any improvement at all. Its failure to construct an impervious and indestructible wall along the Wash was not an act constituting the taking or damaging of private property for public use for which compensation would be required. See Const., Art. I, sec. 14. The overflow was the natural result of too much water in the channel. It was not caused by the acts of the District in attempting to control it.

Mr. Conkling, while expressing the opinion above mentioned, admitted that wing walls were a good first line of defense. He also admitted that if no protective works had been installed the water would have gone over plaintiffs' properties exactly where it did go. His opinion, which was concurred in by defendants' witnesses, was that the closing of the culvert under the railroad, the establishing of the curve in the channel at Lower Azusa Road (point B), and the flattening of the grade from that point to Ellis Lane (point D) resulted in the deposit of silt in the channel up to Encinita Avenue. These conditions which existed when the District commenced its protective work and which had existed for 28 years previously are not chargeable to the District.

The evidence shows that if the culvert had not been closed and the stream deflected easterly along the north side of the railroad the water would have naturally flowed practically straight southerly to point C as shown on the annexed map, which was a steeper gradient than from point B to point D. In that event there would have been but little if any deposit of detritus between points A and B. But the District had no part in altering the course of the stream. In doing the protective work it had to accept the situation as it existed when the flood protection work was commenced. It could not open the culvert which had so long previously been closed by the Railroad and the Company and thereby make the crooked channel straight.

The case of House v. Los Angeles County Flood Control District, 25 Cal. 2d 384, 153 P.2d 950, presents a situation different from that shown by the evidence in the instant case. In the House case the District removed permeable dikes, piling, wire mesh and groins bordering the Los Angeles River adjacent to the plaintiff's land and replaced the installations with levees. The effect of the obstructions that were removed had been to reduce the high velocity of the river waters by permitting them to spread over an extensive overflow area, leaving a deposit of silt. Upon the removal of the protective structures and the building of the levees along the river banks there was no provision for the overflow to spread on adjoining lands. The result was the confinement of the waters to a smaller area and the increase of their velocity. No such acts were committed by the District along the Wash. The District never provided for an overflow of the Wash. All its structures were installed with a view to confining the water within defined banks. Such structures as were removed were replaced by others for the same purpose. At all times the effort of the District was to prevent a spread of the waters over the surrounding area.

The channel from B to D along the railroad had existed since 1907. In its effort in 1935, when it first undertook flood protection work, to provide a better means of carrying the water the District obtained easements from the Company and the Railroad, widened the channel, cleaned out the detritus, and built the banks higher. These attempts to improve the situation which it found when it entered on the scene did not make it a joint tort feasor with the Company and the Railroad and did not render it liable for the damages that were brought

about by acts that the latter committed 28 years previously.

What we have said with reference to the District is applicable to its officers and employees. Since there is no liability on the former there is none on the latter.

[27] 4. *Alleged errors in rulings on evidence.* Plaintiffs specify five errors alleged to have been committed in sustaining objections to evidence. Two are with reference to the liability of the District. Offers of proof were made following the orders sustaining the objections. The evidence, if admitted, would not have changed the result of the action as to the District and those objections need not be considered.

Since the case may be retried as against the Company and the Railroad we deem it proper to pass upon the erroneous rulings of the court rejecting evidence relating to those companies.

[28] (a) After Mr. Conkling, plaintiffs' expert witness, had given his testimony that the grade of the surface of the land from Encinita Avenue (point A) to Lower Azusa Road (point B) and southerly therefrom (toward point C) was 1.31 per cent and the grade from Lower Azusa Road (point B) to Ellis Lane (point D) was .85 per cent and had stated that water channels usually follow the surface of the ground, he was asked to state what the natural consequence would be of those differences of grade upon the deposit of detritus. Objection was made that no proper foundation had been laid. The question was a proper one to be answered by the witness as an expert hydraulic and hydrological engineer and a sufficient foundation had been laid for it.

[29] (b) The same witness testified that a survey showed that the natural ground surface of Ellis Lane (point D) was 297 feet above sea level and that the elevation on a projected line of the natural channel south of the railroad at the same distance as Ellis Lane (at the point designated C) was 288.3 feet above sea level, the latter being 8.7 feet lower than the former. He was asked his opinion as to what effect a change in the channel along the northerly line of the right of way and the difference in elevation would have. An objection on the ground that the question assumed a fact not in evidence was sustained. The evidence is undisputed that the course of the channel was changed. The witnesses had already testified (1) to the fact that the gradient in the channel along the railroad was flatter than the grade where the water formerly flowed from point B to point C, (2) to the percentages of the two gradients, and (3) to the elevation above sea level of points C and D. The question was proper and all necessary facts were in evidence to justify an answer.

[30] (c) The witness was further asked where in his opinion the waters of the Wash would have flowed assuming that there had been no obstruction along the railroad right of way. An objection on the ground that the question was incompetent, irrelevant and immaterial and no foundation laid for a hypothetical question of that type was sustained. The evidence above related furnished a foundation for the question which was appropriately propounded to the expert witness.

The judgment in favor of defendants Southern Pacific Company and Southern Pacific Railroad Company is reversed and it is affirmed as to all other defendants. The orders holding that the trial judge was not disqualified are affirmed. The purported appeal from the order denying a new trial is dismissed.

MOORE, P.J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

80 Cal.App.2d 372

PEOPLE v. ONE 1940 OLDSMOBILE CLUB COUPE, etc., et al.

Civ. 15566.

District Court of Appeal, Second District, Division 1, California.

June 17, 1947.

Rehearing Denied July 3, 1947.

Hearing Denied Aug. 14, 1947.

1. Intoxicating liquors ⇐246

The placing of case of whiskey on back seat of locked automobile by owner constituted a "concealment" of whiskey within statute subjecting automobile to forfeiture to state, in view of evidence that owner made several sales out of such case. Gen.Laws, Act 3796, §§ 3, 51, subd. 4, 51g.

See Words and Phrases, Permanent Edition, for all other definitions of "Concealment".

2. Intoxicating liquors ⇐247

Under statute making it unlawful to use automobile to conceal or transport alcoholic beverages subject to seizure, concealment of such liquor in automobile authorizes forfeiture without proof of transportation. Gen.Laws, Act 3796, § 51g.

3. Evidence ⇐207(4)

Defendant's plea of guilty to criminal complaint charging violation of Alcoholic Beverage Control Act by possession or concealment of intoxicating liquors in automobile owned by defendant was admissible as admission in subsequent proceeding growing out of same transaction to forfeit same automobile to state. Gen. Laws, Act 3796, §§ 3, 51, subd. 4, 51g.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by the people of the State of California to forfeit One 1940 Oldsmobile Club Coupe, Serial No. CG-519379, Engine No. G-163646, 1945 California License PC F 111, for violation of the Alcoholic Beverage Control Act, in that such automobile was allegedly used to conceal alcoholic beverages, which automobile is claimed by Maria R. Lopez, registered owner. From a judgment ordering the vehicle forfeited to the State, the registered owner appeals.

Affirmed.

Myer B. Marion and Eugene L. Wolver, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

This is an appeal by Maria R. Lopez, the registered owner of a 1940 Oldsmobile Club Coupe, from a judgment ordering such vehicle forfeited to the State for a violation of the provisions of sections 3, 51 (subd. 4) and 51g of the Alcoholic Beverage Control Act, Stats.1935, p. 1123, and amendments thereto, 2 Deering's General Laws, Act 3796, in that it was being unlawfully used on December 7, 1945, to conceal alcoholic beverages.

Appellant urges (1) that the evidence does not support the finding that she used the seized vehicle to conceal alcoholic beverages with the intent to sell the same without a license; (2) that concealment in, without transportation by, of alcoholic beverages is insufficient to justify the forfeiture of a vehicle; (3) that the record of a former proceeding against appellant in the Municipal Court was inadmissible herein.

State Liquor Control Officer Franco, one of the arresting officers, testified that at 1:00 a. m. on December 7, 1945, in company with two girls he entered the La Fiesta Inn on Sunset Boulevard in the city of Los Angeles and inquired of a waitress if he could buy a pint of whiskey; the waitress referred him to appellant Lopez, who said she had no pints but could let him have a fifth for $10.00; that he indicated his willingness to pay that price, whereupon he saw appellant leave the premises; that upon her return within five or seven minutes, she called him to the back of the room and handed him a bottle in a paper bag; that he gave her a five dollar bill and five ones, making a memorandum of the serial numbers thereof; that the bottle in the bag which he re-

ceived from appellant contained a fifth of whiskey labeled "Hill and Hill, Bourbon Whiskey, a Blend." The witness identified a fifth of Hill and Hill Bourbon Whiskey as the same bottle which appellant gave him, and it was stipulated that the bottle contained whiskey. Said witness further testified that after he received the bottle from appellant he placed it in the booth where he was seated with his companions and then walked to the door and signaled to some officers who then entered the establishment.

State Liquor Control Officer Pilkington, who was present when appellant was arrested on December 7, 1945, testified he was in charge of the group of officers making an investigation of reported bootlegging at the La Fiesta Inn; that at the time of appellant's arrest, he had seized a 1940 Oldsmobile coupe, California License No. PC F 111, which he saw for the first time that evening when it was parked on the south side of Sunset facing east and a little west of the La Fiesta Cafe; that he had come to the cafe with other officers; that officer Franco entered the cafe and the witness and the other officers walked across the street and watched the door of the cafe; that the witness knew appellant by sight; that he saw her come out of the cafe, walk to the automobile, reach in the car and take an object out and then walk down the sidewalk toward the cafe; that he could not tell what the object was; that a car then drove up to the cafe, some people got out and talked to appellant, who was standing on the sidewalk about halfway between the entrance to the cafe and appellant's parked Oldsmobile; that at the end of this conversation, appellant handed to these people the object she was carrying; that said witness could not definitely say that any money was transferred but "there was an exchange of hands on the sidewalk * * * there was an exchange of something"; whereupon appellant went back into the cafe; that a few minutes later appellant "came out of the cafe, went to the same automobile, opened the same door on the street side, took another object out of the automobile and went into the cafe with the object." Officer Pilkington further testified that shortly thereafter officer Franco came to the door of the cafe and signaled, whereupon the witness and the other officers accompanying him went into the cafe and placed appellant under arrest; that the witness then demanded of appellant that she return the money which officer Franco had given to her; that she denied she had it, a search of the entire building failing to disclose it; that appellant was searched at Lincoln Heights jail and that the money was handed to the witness in appellant's presence; that the witness checked the serial numbers on the money with the memorandum recorded in his book, whereupon appellant said, "Well, what is the use, you have got me * * * What is the use of checking these serial numbers? I am going to sell the business and quit bootlegging." Officer Pilkington also testified that he did not make the first search of the Oldsmobile nor did he examine it until appellant was taken to the Lincoln Heights jail. On cross-examination, said Officer testified that the liquor bottles produced in evidence were in appellant's car when he first saw them—"It is a coupe and they were in the back of it. I don't mean the turtle back but I mean kind of a little back seat"; that the box in the car contained nine bottles and six empty spaces.

Officer Tripp, who was with officer Pilkington when appellant was arrested on December 7, 1945, testified that he saw the 1940 Oldsmobile Club Coupe. License PC F 111 and received instructions from officer Pilkington to guard it while Pilkington went into the cafe; that said witness found the car locked and that officer Patterson gave him the keys, whereupon he unlocked the car and searched it; that he found a case with nine bottles of Hill and Hill Bourbon Whiskey on the back seat; that the case was broken open but the covers were down on top.

Officer Armour testified that he filed a criminal complaint against appellant based upon the same transaction here involved, and over appellant's objection the court admitted into evidence a certified copy of the record of People v. Mrs. Maria R. Lopez, Los Angeles Municipal Court No. 39209, showing that she had entered a plea of guilty to a charge of violation of sections

3, 51, subdivision 4, and 51g of the Alcoholic Beverage Control Act.

Appellant took the stand in her own defense and testified that her son was the owner of the La Fiesta Inn where she worked week-ends; that she had seen officer Franco at the cafe four or five times prior to December 7, 1945; that on that date he first talked to a waitress and later asked appellant for liquor; that to his request appellant said she had some liquor in her car and Franco offered to buy it for $10, and that she sold him the liquor to accommodate him. Appellant also testified that she had ten bottles of liquor in her car which she had purchased for a party to be given in connection with the opening of a dress shop in which she had an interest. A printed invitation to such open house was introduced in evidence as well as a copy of a document entitled "Co-partnership Agreement" listing appellant as one of the owners of said business. Appellant further testified that she bought the ten bottles of Hill and Hill whiskey at Lloyds on Beverly Boulevard; that she purchased ten bottles and not a full case, and the case when she purchased it was in the same condition as it was at the time of the trial; that the case was not sealed and the serial number thereon was legible and unobliterated; that she paid $4.00 per bottle and sold one bottle to officer Franco for $10.00. Appellant admitted that neither she nor the La Fiesta Cafe had a license to sell liquor at the time of the sale on December 7, 1945; that the money she received from officer Franco she originally placed in her purse, but that she later hid it in her stocking. On cross-examination, appellant declared she was the legal and registered owner of the automobile here involved, having paid off the loan thereon to the Bank of America.

[1] In connection with her first point, appellant urges that while the notice of seizure and intended forfeiture was predicated upon the theory that the automobile was being used to unlawfully *conceal,* convey or transport alcoholic beverages and the court found that said vehicle was being used to conceal such beverages, nevertheless there is "no evidence of any act on the part of appellant which approximates any concealment or attempted concealment of the liquor in the vehicle here involved."

Appellant testified that she worked week-ends for her son who owned the cafe in question and that neither she nor the cafe had a license to sell liquor; that she had ten bottles of bourbon in her automobile, which was parked outside the cafe; that she sold one bottle to officer Franco for $10, although she purchased it for $4 per bottle. While it it true that the case containing the bottles of whiskey was resting on the "little back seat" of the club coupe, which appellant claims was a place within easy view of any one looking through the window, and therefore did not constitute a concealment, it should not be overlooked that appellant kept the car locked and that the record discloses no evidence that the case of liquor could be seen from outside by one looking through the window of the automobile.

The word "conceal" is defined by Webster's New International Dictionary, 2d Ed.: "To hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of." In the circumstances here presented, the placing of the case of liquor on the small back seat of the locked club coupe, effectively withdrew it from observation and constituted a concealment thereof under the statute.

[2] Appellant also urges that concealment without transportation is insufficient to justify a forfeiture. Section 51g of the Alcoholic Beverage Control Act, supra, with a violation of which appellant is here charged, reads: "It shall be unlawful for any person to use any automobile or other vehicle to *conceal,* convey, carry, or *transport* any alcoholic beverages which are subject to seizure under the provisions of this act * * *. Any automobile or other vehicle used [contrary to the provisions of this section or section 51a] shall be forfeited to the State of California." (Emphasis added.) Thus, either concealment *or* transportation is sufficient justification for a forfeiture.

In People v. One 1940 Buick Sedan, 71 Cal.App.2d 160, 161, 162 P.2d 318, 319, a

proceeding to forfeit an automobile under section 11610 of the Health and Safety Code which provides that "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State", the court held that "the statute may become operative on (1) transportation of any narcotic, (2) keeping, depositing or concealing any narcotic, (3) possession of any narcotic if the possessor is an occupant of the vehicle."

[3] With respect to appellant's contention that the record of the former proceeding against her in the municipal court was inadmissible and constituted prejudicial error, respondent, while admitting the general rule that "a judgment of conviction or acquittal of a party charged with crime cannot be given in evidence in a civil action to prove or negative the facts upon which it is rendered", states that there is a well-recognized exception to such rule as enunciated by the case of Olson v. Meacham, 129 Cal.App. 670, 675, 19 P.2d 527, 529, wherein an assignment of error was based upon the admission of a certain criminal complaint and the plea of the defendant thereto. In the cited case it is stated: "In 31 A.L.R., p. 278, is a list of decisions from twenty-four different states supporting the following statement: 'An exception to the rule that a judgment in a criminal prosecution cannot be received in a civil action, to establish the truth of the facts on which it was rendered, has been held to arise where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in evidence in a civil action against him growing out of the same offense, such a record being admitted not as a judgment establishing the fact, but as the deliberate declaration or admission against interest that the fact is so, or, in other words, a solemn confession of the very matter charged in the civil action.'"

The instant forfeiture and the municipal court case arose out of the same transaction, hence under the rule stated, the plea of guilty on the criminal charge was properly admitted herein as an admission of appellant on an issue material to the forfeiture proceeding.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

80 Cal.App.2d 269

CARPENTER et al. v. GIBSON et al.

Civ. 15535, 15536.

District Court of Appeal, Second District, Division 3, California.

June 11, 1947.

Hearing Denied Aug. 7, 1947.

1. Negligence ⇐93(3)

Alleged negligence of driver of automobile was not imputable to the minor children of driver who were in automobile at time of collision.

2. Automobiles ⇐168(6), 245(44)

A speed of 20 miles per hour in approaching intersection of city street in residential district was not a negligent speed as a matter of law in and of itself, but whether it was reasonable depended upon the surrounding conditions, including the observations made by automobile driver in approaching and passing through intersection.

3. Appeal and error ⇐999(3)

Determination of jury on what may or may not be reasonably characterized as negligent conduct in driving an automobile is conclusive on appeal, and what must be classified as negligent conduct is a question of law.

4. Automobiles ⇐245(14, 44)

In actions for injuries from automobile collision at intersection, negligence of defendant was for jury under evidence that defendant approached intersection at 20 miles per hour and before reaching intersection had unobstructed view to right and looked for about a second to right but saw no automobile coming from right and did

not see automobile in which plaintiffs were riding, coming from right at about 45 miles per hour, until defendant entered intersection when defendant endeavored to stop.

5. Trial ⇐296(4)

In action by minor plaintiffs for injuries from collision between automobile in which minors were riding with their father as driver and another automobile, instruction requiring verdict for defendant if minors' father was negligent and his negligence was sole proximate cause of the collision was not error as attempting to impute father's alleged negligence to the minors, where the law was correctly stated in other instructions.

6. Witnesses ⇐216

Testimony of traffic officer relating to statement made by motorist to officer at scene of collision relative to how collision occurred was not confidential under statutes prohibiting use of statements as evidence which were made in required written report of accident to police, where testimony was not shown to be an oral statement of motorist's report or part of it. Vehicle Code §§ 484, 486–488.

7. Appeal and error ⇐1050(1)

Alleged error in admitting motorist's statement at scene of collision on ground that it was confidential and excluded under the statute was harmless, where it did not differ from motorist's testimony given at time of trial. Vehicle Code, §§ 484, 486–488.

8. Evidence ⇐560

A letter, written by father of injured minor some eight months after the accident, indicating that the minor was having trouble with his feet and hips, was admissible where the father had given expert testimony as to the condition of his son, since, if the statements were consistent therewith, no harm resulted, and, if inconsistent, they were properly placed before the jury as part of cross-examination.

9. New trial ⇐99

A motion for a new trial was properly denied, where the evidence would have been cumulative, only slight diligence had been shown in contacting the witness who was to give the evidence, and the evidence would have been of problematical value.

10. New trial ⇐108(1)

Trial judge was required to deny a motion for new trial for newly discovered evidence unless it appeared that the evidence would probably result in a different verdict.

11. Appeal and error ⇐977(5)

An order denying a motion for new trial for newly discovered evidence would not be reversed except for manifest abuse of discretion.

Appeals from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Consolidated actions by Charles Milton Carpenter, a minor, by his guardian ad litem, Charles H. Carpenter, M. D., and by Lucia Jane Carpenter, a minor, by her guardian ad litem, Charles H. Carpenter, M. D., against Hugh C. Gibson, and Eva Gibson and others for injuries sustained in an automobile collision. From adverse judgments, plaintiffs appeal and attempt to appeal from orders in each action denying motions for new trial.

Judgments affirmed. Attempted appeals dismissed.

Morris Lavine, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

In these consolidated actions by minor plaintiffs to recover on account of injuries sustained in an automobile collision, separate verdicts were returned in favor of defendants, and judgments were entered accordingly. Plaintiffs made a motion in each action for a new trial, the motions were denied, and they have appealed from the judgment in each case and have attempted to appeal from the respective orders denying their motions for new trial.

Plaintiffs, aged, respectively, 12 and 7 years, were riding with their father, Charles H. Carpenter, M. D., who was returning them to school in the middle of the

day. Defendant Eva Gibson was driving a car belonging to her husband, Hugh C. Gibson, with his consent and allegedly as his agent.

[1-4] The finding, implicit in the verdicts, that the collision of the two cars resulted solely from the acts of Dr. Carpenter and without negligence on the part of Mrs. Gibson, is challenged on the appeal, the contention being that the evidence demonstrated as a matter of law that Mrs. Gibson was driving her car, a Willys, in a negligent manner when it collided with Dr. Carpenter's Cadillac. Mrs. Gibson was driving east on Patterson Street (30 feet wide) and Dr. Carpenter was driving north on Highland (58 feet wide) in Glendale, as they approached a right-angle intersection of the two streets. The surfaces of the streets were described as very rough and the streets and the weather as dry. Mrs. Gibson testified that she was driving at 20 miles an hour and that Dr. Carpenter was driving at a speed which she judged to be 45 miles an hour. The right front fender of the Willys struck the left front fender of the Cadillac. The Willys was turned around in its tracks so that it was headed west, and the Cadillac proceeded for another 40 feet or more until it came to a stop. The Cadillac left skid marks of 10 feet to 14 feet before the point of impact, and extending 34 feet to 42 feet beyond that point; the Willys left only "brush" marks as it was shoved around. The collision occurred in the southwesterly area of the intersection, 38 feet east of the west curb of Highland and 10 feet north of the south curb of Patterson. Since the negligence, if any, of Dr. Carpenter was not to be imputed to the minor plaintiffs, the sole question on the first point is whether there was substantial evidence, or reasonable inferences from the evidence, that Mrs. Gibson was not guilty of negligence. The answer depends upon the speed at which she was driving, considered with the surrounding circumstances, and the precautions which she took to detect and avoid danger. A speed of 20 miles an hour was not in and of itself a negligent speed as a matter of law. Whether it was a reasonable and prudent speed depended upon the surrounding conditions, including the observations which Mrs. Gibson made in approaching and passing through the intersection. As she approached Highland Avenue she passed in front of a residence on the south side of Patterson and she could then see almost a block south on Highland. The house was about 100 feet west of Highland and in her testimony she indicated a point from which she looked to her right and from this point, it is conceded, she would have had a view of Highland for at least 200 feet south of Patterson. She testified that she took a good look south on Highland for the duration of "probably about a second"; that at that time she was going about 20 miles an hour and that she saw no vehicle approaching from the south. She then looked toward the north and saw no vehicle approaching. She was then about at the intersection. She entered the intersection and looked again to her right, when she saw the Carpenter car approaching at about 45 miles an hour. She realized the imminence of a collision and endeavored to stop. Dr. Carpenter testified in his deposition that he was driving about 25 miles an hour, that he did not know where the front of the Willys was with relation to the west curb line of Highland when he first saw it; that he was depending on his "side vision" to locate any cars, and that they could not be located by depending upon "side vision." He testified that as soon as he saw the Willys car he immediately applied his brakes and that he judged it was coming at about 35 or 40 miles an hour. Ivan A. Robinson, a Glendale traffic officer, came to the scene of the accident, made an investigation and talked with Dr. Carpenter. He testified that the latter said, "I was driving north on Highland approximately 25 to 30 miles per hour and I did not see the other car until it was nearly on top of me, and I slammed on my brakes but could not stop." The jury were justified in believing that Dr. Carpenter was driving at about 45 miles an hour, that he did not see the Gibson car as it entered the intersection and crossed through the west half of Highland, nor until it was within a comparatively few feet of him, and that he did not attempt to slacken his speed until he applied his brakes a short distance before the skid marks commenced. In this

view of the facts it would appear that Mrs. Gibson, although she looked to her right, failed to see a car that was approaching at 45 miles an hour until it was too late to avoid a collision with it. That she could have seen the car cannot be questioned, but her failure to see it might have resulted from a failure to anticipate that a car would be approaching at such a speed. A fair inference would be that she did not anticipate the approach of such a fast-moving car and therefore failed to look far enough to the south on Highland. But it must be assumed by us that she did look, as she testified, and only saw the Cadillac when it was too late. And instruction was given at the request of plaintiff that a speed in excess of 25 miles an hour in a residence district is prima facie unlawful, and we may assume, from the fact that plaintiffs requested that instruction, that the accident occurred in a residential district. The jury, in determining whether Mrs. Gibson looked carefully, no doubt took into consideration the speed of the Carpenter car and were of the opinion that Mrs. Gibson was not negligent in failing to anticipate the approach of a car at that speed. She entered the intersection first and therefore had the right of way. This, of course, would furnish no excuse for a failure to exercise care in her driving, but it was one of the circumstances to be weighed by the jury. Appellants argue that if Mrs. Gibson had looked carefully before entering the intersection she would have seen the Carpenter car, that to look carelessly is no better than not to look at all, and that to look in such a manner as not to see objects which are in plain sight is to look carelessly. Upon this reasoning findings of negligence have often been upheld upon evidence of conduct comparable to that of Mrs. Gibson. If the jury had made such a finding we would not hesitate to uphold it. But appellants' argument fails to recognize the difference between what may or may not reasonably be characterized as negligent conduct, and what must be so classified. As to the former, the decision of the jury is conclusive on appeal; as to the latter, the question is one of law. From a consideration of the evidence as to the speed of the Carpenter car and the circumstances mentioned, we are unable to say that Mrs. Gibson's conduct, as described by her, could not reasonably be reconciled with the exercise of ordinary care or, in other words, that that question was one for the jury. See Breland v. Taylor Engineering & Mfg. Co., 52 Cal.App. 2d 415, 126 P.2d 455; Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8; Lundgren v. Converse, 34 Cal.App.2d 445, 93 P.2d 819; De Priest v. City of Glendale, 74 Cal. App.2d 464, 471, 169 P.2d 17.

[5] The court gave an instruction at the request of defendant, reading as follows: "You are instructed that if you find from the evidence that Dr. Charles H. Carpenter, the driver of the Carpenter automobile involved in the accident, was negligent and that such negligence, if any, was the sole proximate cause of the accident, your verdict must be in favor of defendants and against plaintiffs." It is claimed that it was error to give this instruction, for the reason that the defendants pleaded that the accident was unavoidable and that it was not pleaded that Dr. Carpenter's negligence was the cause of the accident. It it said, "the instruction was very evidently an attempt to impute negligence to the plaintiffs' guardian ad litem," etc., and that plaintiffs, being guests, were not chargeable with his negligence. Such was not the purpose or the effect of the instruction. The law was fully and correctly stated in other instructions.

The jury was instructed at the request of plaintiffs that if it should be determined that the defendants, or either of them, were negligent, and that such negligence was a proximate cause of the injury to the plaintiffs, they should then find what damages the respective plaintiffs had suffered and return verdicts for the amounts thereof. Also, "Even if it should appear to you from the evidence in this case that there was negligence on the part of Dr. Carpenter, one of the parents of the plaintiffs, in the manner in which he operated his automobile at or near the intersection, such acts or omissions of Dr. Carpenter may not be imputed to the plaintiffs, as minor children, and shall not constitute a bar to recovery by them, if otherwise they are entitled to recover." Another instruction read: "If

you find from the evidence, that Eva Gibson, in the operation of an automobile upon a public highway, failed to exercise ordinary care in looking for or anticipating the presence of and seeing the Cadillac automobile at all times, and that such failure was a proximate cause of the injury to the respective plaintiffs, then I instruct you to return a verdict in favor of the respective plaintiffs."

The criticized instruction, read with the others, could not reasonably have been understood as stating that the negligence of Dr. Carpenter, if it contributed proximately to the accident, would have constituted a defense. The question was, of course, whether the conduct of Dr. Carpenter—the manner in which he drove—was the sole cause of the accident. It appears to be the theory of plaintiffs that the jury was required to determine whether Dr. Carpenter was solely responsible for the accident, without taking into consideration whether he was driving carelessly. This would have been extremely difficult. Under the circumstances Dr. Carpenter could not have been solely responsible unless he had also been negligent. As applied to the evidence, the instruction meant only that if the jury determined that Dr. Carpenter was driving at a speed that was not prudent and reasonable, or if he was not exercising care to observe the approach of other vehicles, and if this conduct on his part was the sole cause of the accident, the verdict must be in favor of defendants. There is no reason to doubt that the instruction was so understood by the jury. We think the jury would have been confused by an instruction that in determining whether Dr. Carpenter's acts were the sole cause of the accident, the jury were not to consider whether in the commission of those acts he failed to exercise ordinary care. The objection to the instruction is hypercritical.

The third assignment of error relates to the interrogation of Officer Robinson on cross-examination with relation to the statement of Dr. Carpenter, which we have already quoted. The objection was on general grounds and the further ground that Dr. Carpenter's statement was a privileged communication. Plaintiffs cite sections 484, 486, 487, and 488 of the Vehicle Code. These sections require drivers of vehicles involved in an accident resulting in injury or death to make a written report to the Highway Patrol or Police Department upon a form approved by the department, and such reports are declared to be confidential and not admissible in evidence in any civil or criminal trial arising out of the accident, with some exceptions not material here.

[6, 7] It was not shown that the testimony of the officer was a disclosure of a statement made by Dr. Carpenter in any report made pursuant to the requirements of the Vehicle Code. The Vehicle Code does not declare that statements made at the scene of the accident by the participants therein are inadmissible, but only that the required reports may not be used as evidence. It was not shown that the testimony of the officer was an oral statement of Dr. Carpenter's report or part of it, and the statement was therefore not confidential. Dwelly v. McReynolds, 6 Cal.2d 128, 56 P.2d 1232; Stroud v. Hansen, 48 Cal.App.2d 556, 120 P.2d 102; Inouye v. McCall, 35 Cal.App.2d 634, 96 P.2d 386. Furthermore, Dr. Carpenter's statement to the officer differed in no substantial respect from the testimony he gave at the trial.

[8] A letter written by Dr. Carpenter to the principal of the school attended by his son Charles, some eight months after the accident, was received in evidence over plaintiffs' objection. It read, in part: "This is to certify that Charles Milton Carpenter has been having considerable trouble with his right knee and both hips, which has been more marked in the last two or three months." It is now objected to upon the ground that it was hearsay as to the plaintiffs and that its use was not proper cross-examination. Dr. Carpenter had given expert testimony as to the condition of his son and we see no reason why his statements on that subject should not have been received in evidence. If they were consistent with his testimony, no harm could have resulted; if they were inconsistent, it was proper to place them before the jury as part of the cross-examination.

[9–11] One of plaintiffs' witnesses was Louis J. Fuller, a lieutenant of police, an

expert in physical laws concerning the operation of motor vehicles and their movements in collisions. He was shown photographs of the cars as they came to rest after the accident, which photographs also showed certain skid marks and brush marks on the pavement, and he was asked a hypothetical question describing the cars and assuming that the marks were of the dimensions we have already stated. In answer to the question, he gave it as his opinion that the Cadillac was going in the neighborhood of approximately 25 to 28 miles an hour. Plaintiffs made a motion for a new trial, urging, among other grounds that of newly discovered evidence. A few days after the trial was concluded, Dr. Carpenter consulted a Mr. Harper, another expert in the field of motor vehicle collisions, and had him examine the evidence as to the circumstances of the collision. Mr. Harper made affidavit for use on plaintiffs' motion for a new trial, in which he stated his opinion to be that the Gibson car was going somewhere between 31 and 35 miles per hour, and that the Cadillac was going at about 25 miles per hour when they collided. It is urged that the evidence consisting of Mr. Harper's opinions was newly discovered and that it was of such weight and value as would probably have led to a different verdict on a retrial of the action. The motion upon this ground was so obviously without merit as to require slight comment. Several years elapsed between the date of the accident and the trial. Plaintiffs produced some expert testimony in the field of Mr. Harper's special training. No good reason was shown why Mr. Harper could not have been produced at the trial, except that he was discovered after the trial had been concluded. It appears that he was discoverable at all times after the date of the accident. Furthermore, the evidence was purely cumulative of the testimony given by Dr. Carpenter and Lieutenant Fuller, and, finally, we can see no reason why the trial judge should have considered that the opinion of Mr. Harper as to the speed of the cars would have had such persuasive force with the jury as to render it probable that upon another trial Mrs. Gibson would have been found guilty of negligence. It was the duty of the trial judge to deny the motion for new trial unless it appeared that the alleged newly discovered evidence would probably result in a different verdict. Proctor v. Smith, 214 Cal. 227, 234, 4 P.2d 773; Van Der Veer v. Winegard, 41 Cal.App.2d 518, 521, 107 P.2d 97. The order denying the motion is sustainable upon each of the grounds mentioned. The evidence of Mr. Harper would have been cumulative, only slight diligence had been shown in contacting this expert witness, and the evidence, itself, would have been of problematical value. An order denying a motion for a new trial will not be reversed except for a manifest abuse of discretion. The order was proper and not subject to criticism.

The judgments are affirmed. The attempted appeals from the orders denying motions for new trial was dismissed.

WOOD, J., and KINCAID, Justice pro tem., concur.



80 Cal.App.2d 691

PEOPLE v. BECKER.

Cr. 2006.

District Court of Appeal, Third District, California.

July 1, 1947.

1. Infants ⇐20
Sodomy ⇐6

Evidence sustained conviction of violations of section 288 and of attempted violation of section 288a. Pen.Code, §§ 288, 288a.

2. Criminal law ⇐507(7)

Lewd and lascivious conduct of an adult person upon infants under the age of 14 years does not require corroborations, since such infants are not considered accomplices. Pen.Code, § 1111.

3. Criminal law ⇐1088(1)

The record of a criminal case includes the information, the minutes showing adjudication of conviction, and the judgment.

4. Criminal law ⇐1134(1)

In determining the offense for which the defendant is sentenced, the entire record may be examined.

5. Criminal law ⇐995(3)

An erroneous statement of the offense will not vitiate the judgment when the record fully discloses the crime of which the defendant was charged and convicted.

6. Criminal law ⇐995(3)

A judgment is not fatally defective when the information, proceedings of trial, judgment of conviction, and commitment taken together sufficiently show the crime of which a defendant has been convicted and sentenced so as to protect him against a subsequent prosecution for the same offense.

7. Criminal law ⇐1177

When judgment record, by reference to indictment, information, or complaint to which reference is specifically made, sufficiently shows the offense of which a defendant has been convicted and for which he is sentenced, reference to or description of the offense is sufficient, and defendant is not prejudiced by inaccurate statements with relation thereto and judgment is not void on that account.

8. Criminal law ⇐995(3)

Where the fifth count of information charged defendant with attempt to commit offense penalized by section 288a and trial court in announcing judgment of conviction and in pronouncing sentence and in commitment invariably referred to "conviction of the crime of violation of section 288a of the Penal Code as charged in count 5, as charged in the information," the judgment was not void with respect to such count on theory that the court had erroneously found defendant guilty of the actual violation of such section. Pen.Code, § 288a.

9. Criminal law ⇐1177

Where an examination of the entire record left no doubt of the fact that the trial judge had acquitted the defendant of the crimes alleged in the first and fourth counts of the information, defendant was not prejudiced by inadvertent statement including count 1 in sentences, which were to run concurrently.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

William Becker was convicted of violation of section 288 and of attempting to commit the crime prohibited by section 288a of the Penal Code, and, from such convictions and order denying new trial, he appeals.

Affirmed.

James F. Gaffney, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, of Sacramento, for respondent.

THOMPSON, Justice.

The defendant was charged by an information filed against him in Sacramento County with five separate crimes consisting of lascivious acts perpetrated, or attempted to be perpetrated, upon two thirteen year old boys. The first two counts charged violations on different dates of Section 288 of the Penal Code, by lewd and lascivious acts performed on defendant's stepson, Howard Thompson. The third count charged defendant with a similar offense performed on April 19, 1946, upon Joe Urrutia. The fourth count charged the defendant with attempting to perpetrate the crime prohibited by Section 288a of the Penal Code, upon his stepson. The fifth count charged him with attempting to perform the last mentioned crime upon Joe Urrutia. The cause was tried by the court sitting without a jury. The defendant was acquitted of the charges contained in the first and fourth counts. The court, however, found him to be guilty of the second, third and fifth counts. The defendant was sentenced upon the last mentioned three counts to imprisonment in state prison at San Quentin for the terms prescribed by law, said sentences to run concurrently. A motion for new trial was denied. From the

judgment and the order denying a new trial the defendant has appealed.

The appellant contends that the judgment and commitment are not supported by the evidence; that the defendant was convicted on the uncorroborated testimony only of accomplices to the crimes; that the testimony of the two boys was inherently improbable and unbelievable, and that the court erred in convicting and sentencing the defendant of and for the violation of Section 288a of the Penal Code, upon the fifth count of the information, which merely charged him with the offense of an *attempt* to commit that crime.

[1] There is an abundance of evidence to support the judgments of conviction of the separate offenses charged in counts two, three and five of the information. The defendant was a witness in his own behalf and flatly contradicted the testimony of both boys with relation to each of the said charges. The cause was tried by an experienced judge sitting without a jury. The convictions rest primarily upon the credibility of the defendant and the two boys who were involved in the offenses. The defendant was successfully impeached. He admitted that he had been previously convicted of the crimes of "receiving stolen property, and counterfeiting." One of his character witnesses, who testified as to his good reputation for morality was also impeached. He admitted that he was convicted of the crime of counterfeiting and served sentence therefor in the Federal prison at McNeil Island. There is evidence tending to discredit the prosecuting witness, Howard Thompson, by showing that he had expressed enmity toward his stepfather, and that he had been committed to the Detention Home. The credibility of his evidence was primarily a matter for the determination of the trial judge. Joe Urrutia's evidence, with respect to the offenses charged in counts three and five of the information, was corroborated in essential details by Howard Thompson. There was no effort to impeach Urrutia's testimony. The testimony of these boys does not appear to be inherently improbable, or unbelievable. We conclude that the judgments of convictions of the second, third and fifth counts of the information are adequately supported by the evidence. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; 16 Cal.Jur. 14, sec. 11.

[2] The appellant asserts that he was unlawfully convicted upon the uncorroborated testimony of the two boys who were accomplices in the alleged offenses. There is no merit in that contention. The offenses were committed on boys who were under the age of fourteen years. The rule is well established that lewd and lascivious conduct of an adult person upon infants under the age of fourteen years, is not required to be corroborated under Section 1111 of the Penal Code, for the reason that they are not ordinarily considered as accomplices. People v. Troutman, 187 Cal. 313, 317, 201 P. 928; People v. Smittcamp, 70 Cal.App. 2d 741, 749, 161 P.2d 983; People v. Becker, 140 Cal.App. 162, 164, 35 P.2d 196; People v. Kocalis, 140 Cal.App. 566, 35 P.2d 584; People v. Anastasion, 79 Cal.App. 268, 249 P. 209; 16 Cal.Jur. 12, sec. 10; 8 Cal.Jur. 176, sec. 254. Moreover, there is corroborating evidence of the offenses charged in counts two, three and five of the information, sufficient to fulfill the requirements of Section 1111 of the Penal Code. Those offenses were committed in the bedroom of defendant's home, on the night of April 19, 1946. Howard, the defendant's stepson, and his friend Joe Urrutia, were sleeping together in that room, when the defendant entered and committed the separate offense prohibited by Section 288 of the Penal Code, first upon Howard, and then upon Joe. The defendant later that same night attempted to perpetrate the crime upon Joe under Section 288a, as alleged in the information. The boys testified to many circumstances with relation to each of those crimes of which the defendant was convicted. The evidence indicates that neither of the boys willingly submitted to the offenses. There is convincing evidence that the attempted crime of fellatio was committed upon Joe by means of force, threats and coercion on the part of the defendant.

[3-7] The appellant contends that the judgment is void with respect to the fifth count of the information for the reason that the defendant was charged therein with an *attempt* only to violate Section 288a of the Penal Code, and that the court

lacked jurisdiction to find him guilty of the actual violation of that statute. We are convinced that the record clearly shows the court did not determine that the defendant was guilty of actually violating Section 288a. In announcing the judgment of conviction, in pronouncing sentence, and in the commitment, the trial court invariably referred to "conviction of the crime of violation of Section 288a of the Penal Code, *as charged in count 5, as charged in the Information.*" Reference was thereby made to the allegations of count five of the information, which charged an *attempt* to commit that offense, and not an actual perpetration of the offense. The defendant could not be misled or prejudiced by that language. The information is a part of the record. It was read to the defendant upon his arraignment. The record of a criminal case includes the information, the minutes showing the adjudication of conviction, and the judgment. People v. Camp, 42 Cal.App. 411, 422, 183 P. 845. It is true that, upon pronouncing judgment, the defendant is entitled to be informed of the crime with which he is charged. Penal Code, sec. 1200. The judgment should state briefly the offense for which the conviction was had. Penal Code, sec. 1207. But the entire record may be examined in determining the offense for which the defendant is sentenced. An erroneous statement of the offense will not vitiate the judgment when the record fully discloses the crime of which he was charged and for which he was convicted. In re Basuino, 22 Cal.2d 247, 251, 138 P.2d 297. Departure from the form prescribed by the Penal Code with respect to pleadings or proceedings of a criminal case, and errors or mistakes therein, which do not actually prejudice the defendant, do not render the judgment void. Penal Code, sec. 1404. A judgment is not fatally defective when the information, proceedings of trial, judgment of conviction and commitment, taken together, sufficiently show the crime of which a defendant has been convicted and sentenced so as to protect him against a subsequent prosecution for the same offense. 8 Cal.Jur. 477, sec. 492. It has been frequently held that when the judgment record, by reference to the indictment, information or complaint, to which reference is specifically made, sufficiently shows the offense of which a defendant has been convicted, and for which he is sentenced, the reference to or description of the offense is sufficient, and that the defendant is not prejudiced by inaccurate statements with relation thereto, and the judgment is not void on that account. In re Basuino, supra; People v. Dorius, 49 Cal.App.2d 259, 263, 121 P.2d 508; Ex parte Bagshaw, 152 Cal. 701, 704, 93 P. 864; People v. Terrill, 133 Cal. 120, 65 P. 303; Ex parte Murray, 43 Cal. 455; In re Parsons, 84 Cal. App. 267, 257 P. 881; People v. Camp, supra, 42 Cal.App. at page 421, 183 P. 845; 8 Cal. Jur. 477, sec. 492; 24 C.J.S., Criminal Law, § 1601, p. 132; 14 A.L.R. 994, note. We conclude that the judgment of commitment in this case is not void for lack of jurisdiction, or otherwise, and that the defendant was sufficiently informed of the offense of attempt to violate Section 288a, with which he was charged and the crime for which he was convicted and duly sentenced.

[8, 9] There is no merit in the appellant's contention that the court wrongfully sentenced the defendant to imprisonment in state prison for violation of count one of the information, of which alleged crime he had been formally acquitted by the trial judge. It does appear in the transcribed phonographic notes of proceedings of sentence that "Count one" was inadvertently included. However, in that same proceeding the Judge later correctly stated that the sentences "as to each one of the counts, two, three and five, shall run concurrently." In the Clerk's transcript of proceedings it correctly and definitely appears, in the adjudication of conviction, in the sentence and in the commitment, that the defendant was formally acquitted of the first and fourth counts, and that he was convicted and sentenced only for the second, third and fifth counts. An examination of the entire record leaves no doubt of that fact. The defendant was not prejudiced by the said inadvertent statement.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.

80 Cal.App.2d 536

DRESSEL v. PARR CEMENT CO. et al.

Civ. 15627.

District Court of Appeal, Second District, Division 1, California.

June 24, 1947.

1. Appeal and error ⇐989

Where a verdict is attacked as unsupported by the evidence, power of Appellate Court begins and ends with a determination of whether there is any substantial evidence contradicted or uncontradicted that will support the conclusion reached by the jury.

2. Appeal and error ⇐996

When two or more inferences may be reasonably drawn from the facts, the reviewing court is without power to substitute its inferences for those of the trial court.

3. Negligence ⇐136(22, 26)

In action by employee of roofing contractor against owner of subdivision for personal injuries resulting from fall of small porch which fell when employee stepped on it, negligence of defendant and contributory negligence of plaintiff were for jury.

4. Principal and agent ⇐178(1)

The principal is chargeable with and is bound by the knowledge of or notice to his agent received while the agent is acting within the scope of his authority and which is in reference to matter over which his authority extends.

5. Evidence ⇐243(2)

In action against owner of subdivision by employee of roofing contractor for personal injuries, statements of superintendent in charge of job showing knowledge of dangerous condition were properly received in evidence though statements were made after the accident.

6. Evidence ⇐243(2)

Post rem statements of an agent may be introduced in evidence against the principal for the purpose of showing knowledge of the transaction.

7. Trial ⇐59(2)

The trial court has wide power in determining the order of the trial.

8. Trial ⇐62(3)

Permitting the plaintiff to testify on rebuttal to statements made by superintendent of defendant to show knowledge of dangerous conditions was not an abuse of discretion particularly where there was no request by defendant for permission to offer further evidence to offset such testimony and there was no cross-examination and the case was closed immediately after such evidence was given by plaintiff.

9. Appeal and error ⇐1001(1)

Where there was substantial evidence to support the verdict and no prejudicial error appeared of record, judgment would be affirmed.

10. Appeal and error ⇐782

An attempted appeal from an order denying a new trial would be dismissed.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Segal O. Dressel against Parr Cement Company and others for personal injuries. From a judgment for plaintiff against the defendant Eric Flodine, and from an order denying motion for a new trial, such defendant appeals.

Judgment affirmed and attempted appeal from order denying a new trial dismissed.

Peter Youngdahl, of Los Angeles, for appellant.

Faries & McDowell, C. E. McDowell, McIntyre Faries and Willard J. Stone, Jr., all of Los Angeles, for respondent.

DORAN, Justice.

The complaint herein alleged that Eric Flodine, the appellant, was the owner and in possession of a certain subdivision located in North Hollywood, and that through the instrumentality of various subcontractors, was engaged in the erection of 156 residences in such subdivision. It further appears that the Valley Shingle Company had undertaken to shingle the roofs of these houses; that the plaintiff was employed by this company as a roofer, and at the time of the alleged injury was engaged in shingling one of the houses. The complaint alleges

that the house in question was so negligently constructed that when the plaintiff, in the course of employment, stepped upon a certain portico or small porch roof, "the same fell away from the building and precipitated the plaintiff to the ground", resulting in the injuries complained of.

The case was tried before a jury, and at the conclusion of plaintiff's case, a nonsuit was granted as to defendant Stokes, the general contractor, and another defendant, Tony Parravano, doing business as Parr Cement Company. A motion for nonsuit as to the appellant, Eric Flodine, was denied. The jury returned a verdict for the respondent and against the appellant in the sum of $2,000. Thereafter appellant's motion for a new trial was denied, followed by the present appeal.

Appellant's points for reversal include, (A) error in refusing to grant a nonsuit; (B) error in admitting plaintiff's testimony in rebuttal as to a conversation with appellant's representative, Harry Fossedal; (C) error in refusing to give an instruction directing a verdict for defendant; and (D) error in refusing to grant appellant's motion for a new trial.

In reference to the alleged errors in refusing to grant a nonsuit and a directed verdict, appellant contends that "There is no testimony in this record from which it may fairly be inferred that he (Flodine) directly, or indirectly, either neglected some duty which he owed to this plaintiff or that he did some negligent act which proximately caused the accident". In this connection it is asserted that "All development was by independent contractors over which Flodine exercised no control"; following this assertion, however, is the statement that "Fossedal as appellant's representative, checked the work upon each as a subcontractor reported his work ready, to see that it conformed to F. H. A. requirements and reported to Flodine, who in turn issued his check." It is further claimed that "Neither appellant or his representative Fossedal had ever known or noticed whether the posts to support the small portico upon which plaintiff stepped was in place or ever had been"; and that, "For 17 years plaintiff had followed the trade of a shingler, knew the type of construction employed, yet made no inspection or took any measures to ascertain whether the portico was safe to step on".

[1-3] It is apparent, as noted in the respondent's brief, that the above contentions seek a review of the weight of the evidence. The well-known rule, as stated in Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, is that "when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court". In the instant case, while the record discloses the usual conflict as to various details, such, for example, as the number of nails used in fastening the porch roof to the main building, the transcript undoubtedly contains substantial evidence from which the jury could reasonably find in favor of the plaintiff.

Among other things, the record reveals that the plans and specifications of the houses in question were prepared under Flodine's supervision; that the sole support of the porch roof was the 16 penny nails by which it was tacked to the house, and that the finished columns which would have supported the porch roof were not then in place. It likewise appears that Flodine himself had been a general contractor for some 30 years, and was familiar with roofing methods; that Flodine personally examined all houses "from sitting in an automobile, and checked over all the work". The porch roof in question was on the front of the house, facing the street, apparently with no obstruction obscuring the view of one examining it from the street. According to Flodine's testimony, Mr. Fossedal was "My representative"; appellant's brief refers to Fossedal as "appellant's representative"; an office was maintained on the tract by Flodine, and Fossedal, designated as "Superintendant for Eric Flodine", was on the job every day, "looking after

the job in general, getting lumber for the subcontractors, seeing they carried on the work according to plans and specifications", etc. There was also evidence to the effect that the respondent Dressel had no knowledge that the porch roof was unsupported; that pursuant to instructions, Dressel went upon the roof to do the shingling as soon as it was ready; that it was customary to start shingling at the lowest point of a roof, and that in doing so, Dressel stepped onto the porch roof which immediately collapsed. Negligence and contributory negligence were clearly questions of fact which have been settled by the jury contrary to appellant's contentions, and under the rule hereinbefore mentioned, appellate interference is unwarranted.

Appellant's argument that the trial court erred in admitting plaintiff's testimony in rebuttal as to a conversation between plaintiff and Fossedal after the accident, is without merit. The appellant's brief complains that "After all testimony was in and after Fossedal, plaintiff's witness, had left the court room, plaintiff was recalled by his counsel and testified over defendant's objection", that after the accident, on the way to the hospital, Fossedal, referred to as appellant's representative and superintendant, "said that was a terrible thing to have happening, and he said that is the type of thing he had been up against on the tract since it started. I said that is the worst accident I had ever had, and, I says, 'there were no supports under there'. He (Fossedal) said, 'I know there weren't. He said, 'It is a wonder that it hadn't fallen off on somebody's head before you stepped on it.' "

Out of the presence of the jury the above testimony was offered for the purpose of proving "that Fossedal knew, admitted knowing that there had been difficulties with these fellows taking out these supports and leaving them out, he had expected something of the kind to happen, and he is giving this testimony because he was the representative of Mr. Flodine, and Mr. Flodine has attempted to testify there was no knowledge given him in reference to conditions on the tract". The testimony was not offered for impeachment but for the purpose of showing knowledge of the dangerous condition on the part of appellant's general representative in charge of operations.

[4-6] Appellant's argument that since the conversation with Fossedal was admittedly not a part of the res gestae, the statements made therein could not bind the appellant, misses the theory on which this evidence was offered and admitted. As the trial court observed in ruling on the objection, there was evidence that Fossedal "was the general superintendant". And it is a well-established rule "that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is in reference to a matter over which his authority extends". See 2 Am.Juris. 286. Or, as stated in Faires v. Title Insurance & Trust Co., 15 Cal.App.2d 350, 354, 59 P.2d 428, 430, and elsewhere, "Knowledge acquired by an agent during the agency and within its scope is imputed to the principal". The evidence in question was properly admitted for that purpose, for as stated in 20 Am. Jur. 511, "Post rem statements of an agent, however, may be introduced in evidence against the principal for the purpose of showing his knowledege of the transaction". See also Diller v. Northern California Power Co., 162 Cal. 531, 538, 123 P. 359, 362, Ann.Cas.1913D, 908, where the court said: "Thomas was its agent in general charge of its power system, and notice to him of a defective construction had a direct bearing on the issue of negligence in maintenance".

[7, 8] It is further asserted that in any event this evidence should not have been admitted on rebuttal, after having been "withheld until the last minute and when there was no way to offset it". But, as admitted in appellant's brief, "the Court has wide power in determining the order of trial", and the record discloses no abuse of this discretionary power. Moreover, there was no request by appellant for permission to offer further evidence to "offset" this testimony. Immediately after its reception,

appellant's attorney declined the right of cross-examination of the witness, and the case was closed.

[9, 10] There being substantial evidence to support the verdict, and no prejudicial error appearing in the record, the judgment is therefore affirmed, and the attempted appeal from the order denying a new trial is dismissed.

YORK, P. J., and WHITE, J., concur.



PEOPLE v. McRAE. *
Cr. 2004.

District Court of Appeal, Third District, California.

June 18, 1947.

Hearing Granted July 17, 1947.

1. Criminal law ⇐507(7)

One who willingly participated in an alleged breach of section 288a of the Penal Code was an "accomplice". Pen. Code, § 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⇐238
Indictment and Information ⇐10

Provisions of the Penal Code with respect to the necessity of corroborating the evidence of an accomplice is not limited to trial by a petit jury but also applies to legal hearings of accusations before grand juries or magistrates. Pen. Code, § 1111.

3. Courts ⇐92

Where there was corroborating evidence before the magistrate and the grand jury, what was said in an opinion regarding the necessity of evidence corroborating an accomplice was mere dictum. Pen. Code, § 1111.

4. Indictment and Information ⇐144

Where there was no corroboration of the accomplice at preliminary hearing of one charged with violation of section 288a of the Penal Code dismissal of information on ground that defendant had been committed without reasonable or probable cause was proper. Pen. Code, §§ 288a, 1111.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Proceeding by the People of the State of California against Robert V. McRae for an alleged violation of section 288a of the Penal Code. From an order dismissing the information on the ground that the defendant had been committed without reasonable or probable cause, the People appeal.

Order affirmed.

See, also, Cal.App., 179 P.2d 3.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Dep. Atty. Gen., for appellant.

C. K. Curtright and Peter Mannino, both of Sacramento, for respondent.

THOMPSON, Justice.

The defendant was charged, under Section 288a of the Penal Code. After a preliminary examination by a magistrate he was held for trial in the Superior Court upon the uncorroborated testimony of the accomplice only. An information was filed, to which he first pleaded not guilty. By leave of court that plea was withdrawn and the defendant moved, under Section 995 of the Penal Code, to dismiss the information on the ground that he had been "committed without reasonable or probable cause." The motion was granted and the information was dismissed. From that order the State of California has appealed.

The chief issue on this appeal is whether the uncorroborated testimony of an accomplice furnishes proof that the alleged offense was committed, or that the accused person is guilty thereof, warranting a magistrate in committing him for trial under the provisions of Section 872 of the Penal Code. The Attorney General contends that the provisions of Section 1111 of the Penal Code, with respect to the necessity of corroborating the evidence of an accomplice, is limited to trial by a petit jury and that it

* Subsequent opinion 187 P.2d 741.

does not apply to preliminary examinations before a magistrate. He also asserts that Laurel Quigley, who was the only witness at the preliminary examination, was not an accomplice to the crime.

[1] We are of the opinion the record of the preliminary hearing clearly shows that Quigley was an accomplice. People v. Tenner, 67 Cal.App. 2d 360, 363, 154 P.2d 9; 8 Cal.Jur. 173, § 253. He willingly participated in the offense. There is no evidence to the contrary.

[2] We conclude that the provisions of Section 1111 of the Penal Code apply not only to a trial by a petit jury, but also to legal hearings of accusations before grand juries or magistrates. That section prescribes a limitation of the sufficiency of the testimony of an accomplice as proof of a crime or misdemeanor on account of the unreliable and discredited nature of the testimony of a particeps criminis. It affects the very character and sufficiency of the evidence to establish the guilt of an accused. The uncorroborated testimony of an accomplice does not constitute credible evidence of the commission of a crime, or of the defendant's participation therein. It will not support a conviction because it is not worthy of belief. In People v. Dail, 22 Cal.2d 642, at page 655, 140 P.2d 828, at page 835, the Supreme Court said in regard to such evidence, that: "The requirement of section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that *such evidence is to be regarded as untrustworthy and not to be believed unless fortified by other evidence tending to connect a defendant with the commission of the offense charged.* The power of the Legislature so to provide is not questioned and if *it may thus stigmatize accomplice testimony and completely deny it credence unless corroborated,* no valid reason exists why the Legislature may not declare, as it has done in subdivision 4 of section 2061 [C.C.P.], that the jury is to be instructed to view such accomplice testimony with distrust. * * * It merely serves to state the legislative condition upon which the jury is permitted to hear that class of evidence." (Italics added.)

If the uncorroborated testimony of an accomplice is not adequate evidence to support a conviction, it is not sufficient evidence, standing alone, upon which a magistrate or a grand jury may commit or indict an accused person. If it is not sufficient evidence because it is discredited, it certainly furnishes no adequate proof that a crime has been committed, or probable cause to believe that the defendant is guilty of the alleged offense. Both a grand jury and a magistrate are required to receive only legal evidence upon hearings of accusations of crime. To indict or commit an accused person without legal evidence would result in depriving the defendant of his liberty without due process of law contrary to the inhibition of the Fourteenth Amendment to the United States Constitution. Section 919 of the Penal Code provides that a grand jury shall "receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." The same rule applies to a preliminary hearing. An indictment which is based upon no legal evidence deprives the defendant of his liberty without due process, and is void. Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713. The commitment of an accused person by a magistrate, based upon mere hearsay or incompetent evidence, is likewise unauthorized and void. In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528; In re Kawaguchi, 12 Cal.App. 498, 107 P. 727, 728; 7 Cal.Jur. 982, § 120. In the Kawaguchi case, supra, the court said: "* * * The law does not contemplate that a party shall be put upon his trial for a felony under an information having for its sole support a commitment based entirely upon hearsay or incompetent evidence."

It is true that when hearsay evidence is received at a preliminary hearing *without objection,* its incompetency is thereby waived, and it may then be considered by the magistrate in determining the existence of probable cause. In re Plummer, 79 Cal. App.2d 651, 180 P.2d 771; In re Sielcken, 51 Cal.App. 538, 197 P. 668; 10 Cal.Jur. 1054, § 305; 20 Am.Jur. 401, § 452; 104

A.L.R. 1130, note. But the last mentioned exception to the general rule with respect to hearsay evidence has no application to this case. While a committing magistrate is not bound by the rule which is applicable to a trial jury, with respect to proof of guilt beyond a reasonable doubt (In re Souza, 65 Cal.App. 9, 222 P. 869), there must be substantial legal evidence of the crime and of the defendant's participation therein, to warrant the magistrate in committing the accused persons for trial under Section 872 of the Penal Code. 42 C.J.S., Indictments and Informations, § 24 c(3), p. 871.

In New York, under statutes authorizing indictments by grand juries, containing language similar to the California statutes in that regard, including our Section 1111 of the Penal Code, it has been repeatedly held that the indictments founded upon uncorroborated testimony only of accomplices are invalid and should be set aside. People v. Dally, 174 Misc. 830, 21 N.Y.S.2d 774; People v. Nicosia, 164 Misc. 152, 298 N.Y.S. 591; People v. Markan, 123 Misc. 689, 206 N.Y.S. 197. In the Nicosia case, supra, defendant's motion to dismiss the indictment was granted, on the ground that the testimony of two accomplices, upon which the indictment was founded, was not corroborated as required by Section 399 of the New York Code of Criminal Procedure. That section, similar to Section 1111 of the California code, reads as follows: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

The court said in the Nicosia case, 298 N.Y.S. at page 599:

"If the defendant Nicosia suborned Loffredo and Autuori as alleged in the indictment, they are all particeps criminis * * * and the testimony of the latter must therefore be corroborated by evidence which tends to connect Nicosia with the commission of the crime. * * *

"In conclusion, as I have already indicated, sections 256 and 258, Code Cr.Proc. are protective measures intended to safeguard the right which every individual accused of crime has to the presumption of innocence guaranteed by our Constitution. It is as imperative therefore not to indict on evidence which at best can create but suspicion of guilt as it is to indict when competent legal evidence is adduced to warrant an indictment. The obligation is no more cogent in the latter case than it is in the former. * * *

"An indictment found in violation of these standards should be dismissed. Motion granted."

In the Markan case, supra, the indictment was also set aside for lack of corroboration of the accomplice. Commenting upon the application of Section 399 of the New York code to testimony before the grand jury, which section is similar to Section 1111 of the California Penal Code, the court said, 206 N.Y.S. at page 203 of its opinion: "* * * The necessity for corroboration as provided by statute *applies to an indictment as well as to a trial* and the indictment can be set aside at any time when it appears that the evidence before the grand jury was insufficient on which to sustain it." (Italics added.)

In the Dally case, supra [174 Misc. 830, 21 N.Y.S.2d 775], the court said: "* * * We hold that corroboration of an accomplice or accomplices is necessary to the finding of a valid indictment by a grand jury, and that in the absence of corroboration the indictment may be set aside."

In the last mentioned case the New York court specifically disapproved of a contrary holding in the previous decision of that court in People v. Munro, 150 Misc. 41, 268 N.Y.S. 404, cited and chiefly relied upon by the appellant in this case. The Munro case was overruled in that regard, and furnishes no authority in support of appellant's contention that Section 1111 of the California code has no application to preliminary hearings before a magistrate.

The cases of In re Schwitalla, 36 Cal. App. 511, 172 P. 617 and Stern v. Superior Court, 78 Cal.App.2d 9, 177 P.2d 308, upon which the appellant relies, are not in conflict with what we have previously said regarding the necessity of corroborating the testimony of an accomplice, to render it available for consideration of a magistrate

or a grand jury, to warrant a commitment or an indictment of the alleged crimes. Each of the last mentioned cases specifically holds that the record contains adequate evidence corroborating the accomplice. In the Schwitalla case [36 Cal.App. 511, 172 P. 618], the court said: "* * * And we may add that, to our minds, the testimony of the independent witness who gave evidence * * * furnished some corroboration, slight though it was, of the testimony of the accomplice."

And in the Stern case the court said, 177 P.2d at page 313 of the opinion, that: "* * * The transcript contains the evidence of witnesses who appeared before the grand jury which sufficiently corroborates the testimony of the accomplices."

[3] Since there was corroborating evidence adduced before the magistrate and the grand jury in the last mentioned cases, whatever may have been said regarding the necessity therefor is mere dictum.

[4] In the present case there was absolutely no corroboration of the accomplice, who was the only witness called or examined at the preliminary hearing. No other evidence was adduced.

We conclude that the respondent was erroneously committed for trial by the magistrate upon the uncorroborated testimony of the accomplice, and that the information was therefore properly dismissed.

The order is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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SECOND SERIES

30 Cal.2d 388

ÆTNA CASUALTY & SURETY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. and 12 other cases.

S. F. 17417–17429.

Supreme Court of California.

June 26, 1947.

Rehearing Denied July 22, 1947.

1. Statutes ⇐263

A "retrospective law" is one affecting rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Retrospective Law".

2. Statutes ⇐263

Statutes are not to be given a retrospective operation unless it clearly appears that such was the legislative intent.

3. Workmen's compensation ⇐60

A legislative intent in favor of the retrospective operation of provision of the Labor Code that where temporary disability payment exceeds 25 per cent. of permanent disability payment, injured employee shall be paid 75 per cent. of permanent disability payment in addition to temporary disability payment, could not be implied from the mere fact that the act is remedial and subject to the rule of liberal construction. Labor Code, § 4661.

4. Workmen's compensation ⇐60

Provision of the Labor Code that where temporary disability payments exceed 25 per cent. of permanent disability payments, injured employee shall be paid 75 per cent. of permanent disability payment in addition to temporary disability payment, was not intended by the Legislature to be retroactive, and does not apply to injuries occurring before the effective date of the statute. Labor Code, § 4661.

CARTER, J., dissenting.

Consolidated proceedings under the Labor Code by the Aetna Casualty & Surety Company, a corporation, insurance carrier, and another, by the Firemen's Fund Indemnity Company, a corporation, insurance carrier, and another, by the Pacific Employers Insurance Company, a corporation, insurance carrier, and another, by the Industrial Indemnity Exchange, insurance carrier, and another, by the California Compensation Insurance Company, a corporation, insurance carrier, and another, by the Industrial Indemnity Exchange, an inter-insurance exchange, insurance carrier, and another, by the State Compensation Insurance Fund, insurance carrier, and Adhor Milk Farms, a corporation, by the State Compensation Insurance Fund, insurance carrier, and Flood Bros., Inc., a corporation by the State Compensation Insurance Fund, insurance carrier, and Stauffer Chemical Company, by the Hartford Accident & Indemnity Company, a corporation, insurance carrier, and another, by the Western National Indemnity Company, a corporation, insurance carrier, and another, by the Liberty Mutual Insurance Company, a corporation, insurance carrier, and another, and by the Industrial Indemnity Exchange, an inter-insurance exchange, insurance carrier, and another, for writs of review to annul awards of compensation by the Industrial Accident Commission of the State of California to William Charlesworth, Simon O. MacDonald, Clara Wynkoop, R. C. Killen, Frank Kidd, Harvey Allison, Robert Denton Fleming, Elwyn Roberts, Robert L. Richardson, Burns D. Lamb, John W. Janson, Gerald Reed, and Joe Martinez, for temporary and permanent disability.

Awards annulled and causes remanded for further proceedings.

Prior opinion, 174 P.2d 41.

Brobeck, Phleger & Harrison, Moses Lasky, Leonard, Hanna & Brophy, Maurice E. Harrison, Keith, Creede & Sedgwick, Donald Gallagher, John H. Black and Edward R. Kay, all of San Francisco, Claude F. Weingand, George R. Haswell, Thomas F. McGrath and Herlihy & Herlihy, all of Los Angeles, S. Norman Hays, of San Francisco, and F. Carlton Myers, of Los Angeles, for petitioners.

R. C. McKellips, John A. Rowe, Jr., Joseph Sheehan and T. Groezinger, all of San Francisco, for respondents.

Charles J. Janigian, Charles P. Scully, George Olshausen and John K. Hagopian,

all of San Francisco, Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., and Charles A. Son, of Los Angeles, amici curiae on behalf of respondents.

GIBSON, Chief Justice.

This is a proceeding to review an award of compensation made by the Industrial Accident Commission in favor of an injured employee. At the time the employee sustained his admittedly compensable injury, section 4661 of the Labor Code provided that "Where an injury causes both temporary and permanent disability, the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." By an amendment effective as of September 15, 1945, the following proviso was added to section 4661: "except that where the temporary disability payment exceeds 25 per cent of the permanent disability payment the injured employee shall be paid 75 per cent of such permanent disability payment in addition to the temporary disability payment." Thereafter the commission made its award allowing compensation pursuant to the terms of the amended statute, with the result that the award was greater than it would have been had the commission applied section 4661 as it read at the date of injury. Twelve additional cases arising from similar factual situations have been consolidated with this proceeding.

The twofold question to be determined in this proceeding is whether the commission gave retrospective operation to the amended statute by applying it in a case where the injury occurred prior to the amendment and, if so, whether such retrospective application was proper.

[1] "A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." American States Water Service Co. v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770, 774; Ware v. Heller, 63 Cal.App.2d 817, 821, 148 P.2d 410; 23 Cal.Jur. 628. Respondent commission contends, however, that in making its award in accordance with section 4661 as amended, it gave only prospective operation to the amendment. It is argued that the statute deals with the subject of disability to which the injury is a mere antecedent fact, that there was no right to or correlative obligation for permanent disability compensation at the time of injury but that such right or obligation arose only after the disability was manifest and its existence determined by the commission, and that consequently no existing rights or obligations were affected by application of the amendment even though the injury occurred before its adoption. With this reasoning we cannot agree.

The prior industrial injury was not a mere antecedent fact relating to the permanent disability ensuing therefrom; on the contrary, it was the basis of the right to be compensated for such disability. This is recognized by the amendment itself which begins with the recital "Where an injury causes both temporary and permanent disability." Moreover, it is elementary that an industrial injury is the foundation of rights and liabilities under workmen's compensation laws. See Labor Code, § 3600. It may be true that, with respect to certain procedural matters, proceedings for permanent disability compensation are viewed as separate and distinct from proceedings for temporary disability compensation. See Gobel v. Industrial Acc. Com., 1 Cal.2d 100, 33 P.2d 413; Cowell Lime & Cement Co. v. Industrial Acc. Comm., 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118. It does not follow, however, that the "cause of action" for permanent disability is separate and distinct from the original industrial injury. Labor Code, § 5303. The employee was entitled to compensation not merely because he became permanently disabled, but because that disability resulted from an injury in the course of and arising out of his employment.

Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery. The 1945 amendment of section 4661 increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations.

The amendment is therefore clearly substantive in character, and the commission, by applying it in the present proceedings, gave it a retrospective operation.

The authorities support the conclusion that a statute changing the measure or method of computing compensation for disability or death is given retrospective effect when applied to disability or death resulting from an injury sustained before the effective date of the statute. Holmberg v. City of Oakland, 55 Cal.App. 270, 272, 203 P. 167; United Iron Works et al. v. Smethers, 159 Okl. 105, 14 P.2d 380; Lynch v. State et al., 19 Wash.2d 802, 145 P.2d 265; Virden v. Smith et al., 46 Nev. 208, 210 P. 129; Polk v. Western Bedding Co., 145 Pa.Super. 142, 20 A.2d 845; Quilty v. Connecticut Co., 96 Conn. 124, 113 A. 149; Stanswsky v. Industrial Commission et al., 344 Ill. 436, 176 N.E. 898; see Hendrickson v. Industrial Acc. Comm., 215 Cal. 82, 84, 8 P.2d 833; Hyman Bros. Box & Label Co. v. Industrial Acc. Comm., 180 Cal. 423, 424, 181 P. 784; Chaney v. Los Angeles County Retirement Bd., 59 Cal.App. 2d 413, 138 P.2d 735. The only case cited in support of the contrary view is Talbot v. Industrial Ins. Comm., 108 Wash. 231, 183 P. 84. It is sufficient to note that in a subsequent case the same court which decided it stated that the Talbot case "did not say that the allowance of the increased payment was in 'no sense' a retroactive application of the amendatory act, but simply said that so to apply the amendment did not amount to giving it a retroactive effect contrary to the intention of the Legislature." Lynch v. State et al., 19 Wash.2d 802, 145 P.2d 265, 268.

[2] It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent. Jones v. Union Oil Co., 218 Cal. 775, 25 P.2d 5; In re Cate, 207 Cal. 443, 279 P. 131; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48. It is contended upon behalf of respondents that this rule of statutory construction has no application to procedural statutes, and that section 4661 relates solely to matters of procedure or remedy. Feckenscher v. Gambel, 12 Cal.2d 482, 85 P.2d 885; City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298; San Bernardino County v. Industrial Acc. Comm., 217 Cal. 618, 20 P.2d 673, and Davis & McMillan v. Industrial Acc. Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095, are relied upon in support of the contention. In those cases, with one exception, it was held that the language of the statutes showed that the Legislature intended them to be applied retroactively, and the court was concerned mainly with the question of whether the Legislature has power to give those laws such retroactive effect. Since the question of the constitutionality of retroactive legislation and the question of the applicability of a rule of statutory construction are distinct (Ware v. Heller, 63 Cal.App.2d 817, 821, 148 P.2d 410), these cases are not in point.

Davis & McMillan v. Industrial Acc. Comm., supra, 198 Cal. at page 638, 246 P. at page 1046, 46 A.L.R. 1095, contains language, quoted from 36 Cyclopedia of Law, page 1201, to the effect that the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure. See, also, Crawford, The Construction of Statutes, p. 581. A different theory is offered to reach the same result in Morris v. Pacific Electric Ry. Co., 2 Cal.2d 764, 768, 43 P.2d 276, 277, wherein this court stated that procedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." See also Estate of Patterson, 155 Cal. 626, 638, 102 P. 941, 26 L.R.A., N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625; Ware v. Heller, 63 Cal.App. 2d 817, 825, 148 P.2d 410. In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. Blyer v. Hershman, 156 Misc. 349, 281 N.Y.S. 942, 944. In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective.

There is then no problem as to whether the Legislature intended the changes to operate retroactively.

This reasoning, however, assumes a clear-cut distinction between purely "procedural" and purely "substantive" legislation. In truth the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. Jones v. Union Oil Co., supra, 218 Cal. 775, 777, 25 P.2d 5 (change in procedure to obtain judgment liens); In re Cate, supra, 207 Cal. 443, 448, 279 P. 131 (change in reinstatement procedure by enactment of State Bar Act, St.1927, p. 38); Pignaz v. Burnett, supra, 119 Cal. 157, 160, 51 P. 48 (change in time to appeal). The argument that the statute in this case is a procedural law to which the general rule of statutory construction does not apply is but a different statement of the respondent commission's original contention that it did not give a retrospective application to the amendment. As we have heretofore concluded, the amendment of section 4661 is substantive in its effect, and its operation would be retroactive, since it imposes a new or additional liability and substantially affects existing rights and obligations.

We turn now to the contention that the Legislature intended to give retrospective operation to the 1945 amendment of section 4661. That intention does not appear on the face of the amendment since no express provision was made for its application to cases involving prior injuries. Respondents urge, however, that such intention appears by necessary implication.

[3] It is argued that since the provisions of the Workmen's Compensation Act are to be liberally construed to extend their benefits to injured persons (Labor Code, § 3203), the legislative intention that the amendment should operate retrospectively must be implied. No authority is cited for this novel doctrine which would require the court to ignore the rule against retroactive operation with respect to statutes increasing benefits to persons favored by remedial legislation. The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive. They relate to different aspects of the interpretation of statutes, and are found in most of the codes, including the Labor Code. Civil Code, §§ 3, 4; Code of Civ.Proc. §§ 3, 4; Penal Code, §§ 3, 4; Labor Code, §§ 4, 3202. It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purposes of destroying the other. It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction. See Virden v. Smith, supra, 46 Nev. 208, 210 P. 129, 130.

It is also argued that the legislative intent to extend the benefits of the amendment to previously injured workmen must be implied from the fact that the Legislature could not have intended to differentiate between workmen injured before and after the effective date of the amendment. The argument is not persuasive. Every change in the law brings about some difference in treatment as a result of the prospective operation of the amendment. Moreover, the injustice that might be suffered by an employer if the amendment were applied retrospectively would afford ample basis for an intentional difference in treatment of workmen injured before and after adoption of the amendment.

Finally, it is argued that the amendment was motivated by the need for an increase in disability benefits due to war conditions and economic crises, that such necessity applies to disabled workmen without regard to the date of their injury, and that therefore a retrospective operation must have been intended. There is nothing on the face of the statute which indicates that the economic effect of the war motivated its enactment, and the amendment was not made a part of a general increase in compensation for all compensable injuries, which might indicate an intent to provide

for such unusual conditions. In Schmidt v. Wolf Contracting Co., 269 App.Div. 201, 55 N.Y.S.2d 162, affirmed, 295 N.Y. 748, 65 N.E.2d 568, relied upon by respondents, it was held that a statute increasing both temporary and permanent disability payments for a limited period was intended to operate retrospectively. The court reached its conclusion on the ground that the statute contained an introductory recital "Because of existing conditions due to the war" which would have been surplusage had the Legislature intended to restrict the increase to employees injured after the effective date of the amendment. Workmen's Compensation Law, Consol.Laws c. 67, § 15, subd. 6. The implication from that decision is clear that if, as in the present case, the statute did not contain the quoted language it would have been construed to apply prospectively only.

[4] Our conclusion is that it does not clearly appear from the language of the amended statute, or by necessary implication, that the Legislature intended it to apply in cases where the injury occurred before the effective date of the enactment. On the contrary, it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended. Accordingly the commission improperly gave a retrospective effect to the amendment by applying it to claims arising out of injuries occurring prior to the date of its enactment.

The awards are annulled and the causes are remanded for further proceedings in accordance with this opinion.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion is a product of the reactionary legalistic philosophy of an era preceding the advent of the Workmen's Compensation Laws and is out of harmony with the philosophy underlying the social policy upon which these laws are based. It was because of the prevalence in the courts of this reactionary legalistic philosophy and its devastating effect upon the social and economic welfare of wage earners that Workmen's Compensation Laws were enacted, and their administration was taken away from the courts except for the very limited function of review on legal issues only. This philosophy inheres in the concept that property rights are above personal rights and that laws granting benefits to employees must not be so construed as to affect the status quo adverse to the employer. While this philosophy still has its advocates on our courts and in other branches of our government, it has lost most of its vigor in recent years due to the effort of leaders in liberal thought to improve the condition of those who are required to work for a livelihood in the great industries of our country. It was this liberal thought which placed in our Constitution and on our statute books the Workmen's Compensation Laws.

Mr. Horovitz in his able and enlightening work on Workmen's Compensation Laws makes the following comment relative to the history, theory and growth of compensation acts:

"Before the advent of the factory system, with its gigantic machinery and high speeds, huge mines, mills and other industries, bringing large number of workers into close proximity with danger,—back in the days of rural and agricultural life of one hundred or more years ago,—serious injuries were relatively few. Men were closer to their employers.

"If the home servant lost an arm the master, out of human sympathy, often provided doctors, financial help and a readjusted job. If he did not, the servant's only recourse was to sue in the regular common-law courts. Here he would often wait two or more years for a jury trial. Meantime his limited savings or public charity bore the burden. Then his lawyer would attempt to show negligence on the part of the employer—only to be defeated in the great majority of cases by the employer's (or his insurer's) defences of contributory negligence, assumption of risk, or the fellow-servant rule. In short, if the worker himself was partly to be blamed, or if a fellow worker and not the employer himself caused the injury, or if the con-

tract of employment apparently subjected him to the risk of injury—in any of these three situations the worker lost his case.

"The fellow-servant defense was particularly harmful to workers. In huge factories and work places it was usually the fellow worker, not the boss himself, who caused the accident. By staying out of the factory the employer usually could avoid liability for all injuries to his men.

"The creation by the courts, therefore, of the fellow-servant defense was hailed by employers with wide acclaim. As stated by one writer: 'Very appropriately, this exception was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other state without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists.'

"No wonder, then, that 80 per cent of the cases were lost or uncompensated; and in the 20 per cent of successful cases the lawyer's fees, doctor's bills and other expenses often ate up a substantial portion of the award.

"As workers and their union representatives clamored for amelioration of these outmoded court-made rules, some of the liberal courts invented the doctrine of vice-principal (i. e., a person in superintendence was not a fellow employee, and his negligence was that of the employer); and the legislatures passed Employers' Liability Acts, cutting down the value of some of these three defences. *Nevertheless, most of the courts, bound by precedent, continued to grind out pro-employer decisions, and the workers were up in arms.* Workers and their families had the right to vote. Legislators felt the pressure of their constituents.

" 'The workers wanted a system entirely new. It is but fair to admit that they had become impatient with courts of law. They knew and both economists and jurists were pointing out what is now generally conceded—that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw.' What could be done?

"In 1884, Germany, led by Bismarck, had evolved the idea of workmen's compensation legislation. Work injuries for the first time were compensated, not on the basis of negligence but on their relation to the job. In 1897 England had enlarged the German idea, and had abolished the common law and its amendments and established an entirely new theory—that of workmen's compensation. Liability depended not on who was at fault for the accident, but on whether it arose out of the employment, while the worker was engaged therein. English legal minds evolved the phrase 'personal injury by accident arising out of and in the course of the employment' as the basis of awards. To laymen this simply meant that if the worker was injured at work because of his work he would obtain a certain percentage of his wages during periods of injury-enforced idleness, plus medical care at the employer's (or his insurer's) expense.

"From 1902 onward many legislators clamored for a similar change of law in this country. They argued that the mechanization of the country had made injuries inevitable; that industry and not charity or savings should pay for industrial injuries; that simple justice required the abolition of the old common-law defences for industrial injuries.

" 'Legislate as we may * * * for safety devices the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food.'

"A new system was needed, and one that would also help in accident prevention and rehabilitation. Commissions sprang up in many states to study the idea. *Massachusetts debated the question for nine years, and when it finally passed its compensation law in 1911, ten other states had already completed the change to compensation.*

"Halted temporarily by three state courts which declared their acts unconstitutional, and then spurred on in 1917 when the Supreme Court of the United States upheld three different types of acts, the compensation idea spread rapidly. Today 47 out of 48 states (Mississippi standing alone) have compensation acts. In addition, such legislation exists in Alaska, Hawaii and Puerto Rico. Federal workmen's compensation laws now also cover government employees, longshoremen and harbor workers, and private employees in the District of Columbia.

"The change was not easily made. Opposition developed from many quarters. Insurance companies or carriers who made large profits from common-law coverage of employers at first bitterly opposed the adoption of the English system. For a short while even the labor unions joined the opposition, then turned about and became its most insistent proponents. Employers, fearing large increased costs, added their powerful opposition voices.

"Unquestionably, compensation laws were enacted as a humanitarian measure, to create a new type of liability,—liability without fault,—to make the industry that was responsible for the injury bear a major part of the burdens resulting therefrom. *It was a revolt from the old common law and the creation of a complete substitute therefor, and not a mere improvement therein. It meant to make liability dependent on a relationship to the job, in a liberal humane fashion, with litigation reduced to a minimum. It meant to cut out narrow common-law methods of denying awards.* It made substitute schemes, or substitute-employer plans, except where expressly permitted in the compensation statute under safeguards, illegal and against public policy; or void because of an element of coercion, or as violating the state's insurance provisions; or as additional to, and not a substitute for workmen's compensation benefits; or construed the policy issued as one under which full workmen's compensation benefits were due." Injury and Death under Workmen's Compensation Laws by Samuel B. Horovitz, pp. 2–10. [Emphasis added.]

In the light of the foregoing let us analyze the majority opinion in this case. (1) It is there stated: "The 1945 amendment of section 4661 increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations." That is not a correct statement as it clearly appears that the amount of compensation is not increased in all cases. It is *only* where the temporary disability payment exceeds 25% of the permanent disability payment that the latter is increased. (2) It is also stated that the provision in the Workmen's Compensation Act that its provisions be liberally construed cannot indicate a legislative intent to have the amendment applied retroactively for "It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purposes of destroying the other." There is nothing "peculiar" about the matter. Many situations arise where conflicting legal principles must be rationalized, such as conflicting presumptions and conflicting rules of statutory construction. To illustrate, we have the rule that statutes in derogation of the common law must be strictly construed yet the four original codes require them to be liberally construed. Code of Civ.Proc. sec. 4; Civil Code, sec. 4; Penal Code, sec. 4; Political Code, sec. 4. In the instant case we have a mere court made rule of statutory construction which conflicts with a provision that, contrary to the statement in the majority opinion that it is similar to provisions in nearly all the statutes, specifically requires that "this code shall be liberally construed by the court *with the purpose of extending their benefits for the protection of persons injured in the course of their employment*". Labor Code, sec. 3202. [Emphasis added.] And all *reasonable doubt* must be resolved in favor of the employees. Lumbermen's Mut. Cas. Co. v. Ind. Acc. Com., 29 Cal.2d 492, 175 P.2d 823; Truck Ins. Exchange v. Industrial Acc. Comm., 27 Cal.2d 813, 167 P.2d 705. How can the employee be given protection or doubts resolved in his favor if the amendment is not applied to injuries oc-

curring prior to the effective date thereof? While there may be a difference of opinion as to what constitutes a liberal construction, it is nothing short of counterfeit logic to say that the construction contained in the majority opinion falls within that category. The construction there given requires the maintenance of the status quo with respect to all employees who suffered an injury prior to the effective date of the amendment. Such a construction is conservative or reactionary and is the antithesis of a liberal construction. The majority insist upon this construction because it might injuriously affect employers and insurance carriers. It can hardly be imagined that any provision of the Workmen's Compensation Act could be given a *liberal construction* without adversely affecting an employer who is self-insured or an insurance carrier. The obvious reason for the enactment of Labor Code, section 3202, was to benefit injured employees by extending the benefits of the act as far as possible in their favor in order to relieve their financial distress during the period of disability resulting from an industrial injury. It must be conceded that to so extend such benefits would injuriously affect the self-insured employer and insurance carriers for employers not self-insured. While this mandate of the Legislature has been disregarded by conservative minded judges in many cases, it is nevertheless a declaration of legislative policy toward the interpretation of the act and should be given consideration by the courts, and if it had been given consideration in these cases, the awards in favor of the injured employees here involved would be affirmed.

Since the administration of the Workmen's Compensation Act affects the social and economic welfare of injured employees, it is obvious that changing economic conditions, such as wages and living costs, play an important part in accomplishing the objectives contemplated by the Legislature which enacted the law. It must be assumed that the Legislature had in mind these conditions at the time the law was enacted and at the time each amendment thereto was adopted. The sole problem that the Legislature was considering on each of these occasions was the welfare of the injured workman who had suffered disability arising out of an industrial injury. Certainly when it adopted the amendment here involved it had in mind and intended that its provisions should operate to the benefit of those who had suffered disability and whose welfare required the economic advantage afforded thereby. Any other assumption would impute to the Legislature a motive and desire to discriminate against those who had suffered injuries prior to the effective date of the amendment, but whose permanent disability status had not yet been determined. There is no justification whatsoever for such imputation. Obviously the economic welfare of such injured employees would be as greatly affected as one whose injury occurred thereafter. To my mind it is more reasonable to assume that the motivating force behind the enactment of the amendment was the necessity for improving the economic welfare of those presently disabled than those who might suffer disability from injuries occurring in the future. It must be conceded that the amendment here involved was adopted in the light of economic conditions as they existed at that time and that its objective was to grant immediate relief to those who were found entitled to the benefits provided for therein.

(3) In endeavoring to distinguish Schmidt v. Wolf Contracting Company, 269 App. Div. 201, 55 N.Y.S.2d 162 (hereafter more fully discussed), the majority opinion states that the legislation there expressly declared that it was necessary to increase the compensation because of the great advance in the cost of living, while here the Legislature made no such declaration. Justice may be blind but it should not be also dumb. Why should the Legislature declare that which every one knows to exist? Certainly a legislative declaration of the purpose of legislation is not necessary where the conditions giving rise to it are patent to all. Furthermore, this court may take judicial notice of the greatly decreased purchasing power of the dollar since 1941.

(4) It is said that "an industrial injury is the foundation of rights and liabilities under workmen's compensation laws." On the contrary the industrial *disability* is the foundation for liability. Merely receiving

an injury does not authorize compensation. There must be a disability.

(5) It is asserted that the employer's substantive rights will be adversely affected by the amendment if it is retroactively applied. However, where the disability occurs *after* the amendment became effective, there is no retroactive application regardless of the date of the injury. There is nothing upon which the amendment can operate until there is a disability. This may occur many months, even years, after the injury. See Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 172 P.2d 884; Lumbermen's Mut. Cas. Co. v. Ind. Acc. Comm., 29 Cal.2d 492, 175 P.2d 823; Pacific Employers Ins. Co. v. Ind. Acc. Comm., 19 Cal. 2d 622, 122 P.2d 570, 141 A.L.R. 798. Furthermore, in the interpretation of the amendment here involved, the majority opinion overlooks at least one controlling factor. It overlooks, and completely disregards, the proposition that the amendment does not add or create an entirely new liability or obligation but simply changes the method of computing permanent disability awards. In other words, there will be many cases, in fact a great majority of cases in which there is both a temporary and permanent disability award, which will not be affected by the amendment, as the amount of temporary disability must exceed 25% of the permanent disability award before the amendment comes into operation. Suppose that instead of this amendment, the Legislature had provided that where permanent disability awards are payable in installments, future installments should bear interest from the date of the award; or suppose the Legislature should provide that where a compensation claim is contested by an employer or insurance carrier and an award is made in favor of the applicant, he is entitled to an allowance for attorney's fees to be paid by the employer or insurance carrier. Certainly such an amendment would be held to apply to pending cases in which awards had not yet been made at the time of the effective date of the amendment. This proposition is sustained by the case of Funkhouser v. J. B. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243, which holds that a statute passed allowing interest on unliquidated damages for breach of a contract where none had existed before could be validily applied to causes of action which had previously accrued. Let us assume further that some new discovery is made in the field of medical science which, although expensive, could restore those afflicted with certain injuries to normalcy, and the Legislature should make provision in the Workmen's Compensation Act that employees so afflicted would be entitled to such treatment at the expense of the employer or insurance carrier. Could it be said that such an amendment would not be applicable to pending cases where the employee was still receiving medical treatment at the expense of the employer or insurance carrier and was still under the jurisdiction of the Industrial Accident Commission? I do not believe that the most reactionary mind could say that such a provision would not be applicable to pending cases. In other words, such amendments operate upon existing liability, and so long as such liability exists, amendments increasing or reducing liability should operate in presenti regardless of when the injury occurred which created the liability.

Turning to the cases and looking at the matter affirmatively, I believe only one result is reasonable. The amendment is set forth in the majority decision. In these cases the Industrial Accident Commission made awards after the effective date of the amendment computing and allowing compensation for the permanent disability suffered by said employees in accordance with the amendment rather than the preexisting law although the industrial injuries which ultimately resulted in the permanent disability occurred before the effective date of the amendment. Typical of the cases here involved is the one in which the applicant-employee Charlesworth suffered a compensable injury in 1942. Compensation was paid until January 3, 1945. After hearing in August 1945 on application for adjustment of compensation, the commission, in March 1946, found that $3,825 in compensation had been paid; that the employee had 64% permanent disability and was entitled therefore to $6,400; that the compensation insurance carrier was entitled to a credit of only 25% of the $6,400,

or $1,600, requiring it to pay $4,800 for the permanent disability in addition to that already paid for the temporary disability, or a total of $8,625. Under the law prior to the amendment it would pay a total of $6,400 inasmuch as the permanent disability award was greater than the temporary disability award of $3,825, or, stated another way, it could deduct the sum of $3,825 from the sum of $6,400, leaving a balance of $2,575.

The major contentions of petitioners (corporate insurance carriers and self-insured employers) are: (1) that the commission has given retroactive effect to the amendment which is contrary to the rule of statutory construction that a statute will not be construed to operate retrospectively unless it is expressly made so to do, and (2) that giving such effect to the amendment it is unconstitutional, or at least, its validity is doubtful and for that reason it should be construed as prospective in operation.

It is no doubt true that there exists the firmly established rule of statutory construction that a statute will not be given a retroactive effect unless the legislation requires it, and that in cases where, to apply an act retroactively would impair the obligation of a contract, destroy a vested right or violate the due process clause, such rule may be said to have a constitutional law aspect. The latter aspect really involves a question of whether there has been an impairment of a constitutional right, the same as in any other case, and the retroactive feature as a factor is of small consequence. Considering only, however, for the present, its pertinency as a rule of interpretation of legislation, and assuming that if the amendment here involved is applied to a permanent disability where the injury occurred prior to the effective date of the amendment, it is being given retroactive effect, such rule is nothing more than one element in ascertaining the correct effect and scope of the operation of the legislation. There are several other factors which are of controlling significance.

First, the wording of the amendment, together with the portion which is not amended, may reasonably be said to apply even though the injuries occurred prior to its effective date. The old provision with reference to deducting temporary disability payments from permanent disability payments remains the same. An exception is established by the amendment, that is, that where the temporary disability payment is 25% or more of the permanent disability award, then 75% of the latter is payable in addition to the temporary disability payment. In other words, the right of deduction is not wholly abrogated. It is still effective where the required percentage is not reached. In the instant cases the awards of the commission were not made until *after* the amendment, and it was not until then that there existed an occasion for applying the computation authorized by the amendment. In San Bernardino County v. Industrial Accident Commission, 217 Cal. 618, 627, 20 P.2d 673, 677, this court considered the effect of an amendment to the workmen's compensation law which authorized the commission to apply against the employer's liability for compensation, the amount of any recovery by the employee from a third party tort-feasor where the recovery was by settlement instead of legal action. Prior thereto the law provided for the assertion of a lien by the employer where there was an action to recover by the employee but no provision was made as to settlement out of court. In deciding that the amendment did apply to a case *where the injury occurred prior to the effective date of the amendment, the court said:* "In 1931, following the decision in the Jacobsen case [Jacobsen v. Industrial Acc. Comm., 212 Cal. 440, 299 P. 66], the Legislature amended section 26 of the Workmen's Compensation Act * * * to provide expressly for the power denied in that case. The relevant provision now reads: 'The commission is empowered to and shall allow a credit to the employer to be applied against his liability for compensation the amount of any recovery by the employee for his injury, either by settlement or after judgment, that has not theretofore been applied to reimburse the employer.' While *the injury to* Mrs. Allen was *sustained prior to the enactment of this amendment, the decision and award of the commission,*

which are here attacked, were made after the amendment went into effect. How, then, could the commission disregard it in arriving at its determination? *As a matter of interpretation, the amendment in its language plainly applies to any case before the commission at the time of its effective operation.* There is nothing in its wording to suggest that it was not intended to apply to cases where the injury occurred prior thereto. Nor is there any policy opposed to such application. The amendment was designed to permit the Commission to do what the court theretofore alone could do—prevent double recovery by crediting the employer with the employee's recovery against the third party. Its application in the instant case would avoid a multiplicity of actions and the unfair result already discussed." [Emphasis added.] Likewise in the instant case the language of the amendment (being nothing more than a method of computing the disability payments, temporary and permanent, with respect to their relation to each other) should apply to awards made after the amendment even though the injuries for which the awards were made, were previous thereto. The time to make that computation is the time of the award not the time of the injury.

Second, the workmen's compensation law being social legislation, especial attention must be given to the purposes and objects sought to be achieved thereby. It is fundamental that the object sought to be achieved and evil to be remedied are compelling considerations in statutory interpretation. Rock Creek, etc., Dist. v. County of Calaveras, 29 Cal.2d 7, 10, 172 P. 2d 863, and cases there cited. The policy underlying the workmen's compensation law is set forth in the Constitution. "The Legislature is hereby * * * vested with *plenary* power, unlimited by any provision of this constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons *to compensate* any or all of their workmen for injury *or disability,* * * *. A complete system of workmen's compensation includes *adequate* provisions for the *comfort, health and safety and general welfare* of any and all workmen and those dependent upon them for support to the extent of *relieving from the consequences of any injury* * * * sustained by workmen in the course of their employment, irrespective of the fault of any party; * * * full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; * * * all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government." Cal. Const. Art. XX, sec. 21. [Emphasis added.] The essence of workmen's compensation law is to alleviate the effects of the disability. This Court said: "The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work, and *also to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor.* By this means society as a whole is relieved of the burden of caring for the injured workman and his family, and the burden is placed upon the industry. That the injured workman and his dependents may be cared for, compensation in the form of disability benefits is provided for by the act approximating the wages earned by the employee, and varying with the degree of disability and dependency." [Emphasis added.] Union Iron Wks. v. Industrial Acc. Comm., 190 Cal. 33, 39, 210 P. 410, 413. It must be assumed that the Legislature had the foregoing principles in mind when it amended section 4661, and having that knowledge, it is not to be supposed that it intended to unnecessarily discriminate between groups of workmen suffering permanent disabilities whose injury happened to occur before the effective date of the amendment and those subsequent in time. Such intention is not to be imputed to the Legislature unless absolutely necessary. The Legislature is not presumed to enact harsh, discriminatory or injurious legislation. See Schmidt v. Wolf Con-

tracting Co., 269 App.Div. 201, 55 N.Y.S. 2d 162, affirmed 295 N.Y. 748, 65 N.E.2d 568. There is no magic in making the date of the injury the time for the commencement of the operation of the amendment. It would be equally as plausible to argue that the date of employment is the pivotal factor. The essence of the matter is that industry rather than society as a whole must bear the burden of assisting in the economic and vocational restoration or rehabilitation of workmen suffering from industrial disability. It is the disability that is of first importance. Undoubtedly the Legislature recognized the need for a more adequate provision to enable the permanently disabled employee to rehabilitate himself, reshape his vocational approach to accommodate his disability, and realized that the present high prices of commodities (a fact of which judicial notice may be taken) made it imperative that a greater allowance should be made for permanent disability. While it may have been that in normal times the temporary disability payments would in some measure supply the means necessary to meet the problem of permanent disability, and hence justify the full deduction of the temporary payment from the permanent award, the present decreased purchasing power of the dollar makes pressing and urgent the immediate necessity of increasing the compensation payable to the permanently disabled workmen. If the amendment is to be confined to injuries occurring after its operative date, little is accomplished toward the end to be achieved. Running through the whole policy of workmen's compensation is the concept of the social advantages of caring for those disabled in industry. Such policy is pregnant with the thought that the Legislature may adjust the benefits conferred to meet changing circumstances and conditions, a principle with which employers and compensation insurance carriers are or should be cognizant and which they should contemplate. Indeed, broadly speaking, the Legislature has foreshadowed its intent in respect to the foregoing principle. The law has consistently provided: "The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor. * * * Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated." (Labor Code, sec. 5803.) While I do not intimate that under that section the commission could change the law for computing compensation, it is evident by the amendment presently discussed that the Legislature was merely expending the power of the commission under section 5803 to enable it more adequately to meet conditions as they arise and circumstances as they change, all to attain the fulfillment of the basic social policy implicit in the workmen's compensation law. It must be remembered that we are not confronted here with a radical change in the law. The workmen's compensation law has always provided for compensation for permanent disability. The amendment is not imposing an obligation that did not previously exist. The only change is the method of computing the amount—the effect of and relation between payments for temporary and permanent disability.

Third, it is basic that the workmen's compensation laws should be liberally construed to the end that benefits shall be secured to the workmen. "The provisions of [workmen's compensation laws] * * * shall be liberally construed by the courts with the purpose of *extending their benefits for the protection of persons* injured in the course of their employment." [Emphasis added.] Labor Code, sec. 3202. See cases collected 27 Cal.Jur. 260, and supplements. This is an express mandate by the Legislature that the benefits of the statute shall be extended, that is, construed to secure to all workmen the benefits provided for therein. Certainly when we have an amendment such as is here involved, which may be interpreted to in-

clude or to exclude, arbitrarily, benefits to workmen suffering permanent disability, and the Legislature has by section 3202 instructed this court that the rule of inclusion rather than exclusion should apply, the determination by the majority that the method (fixed by the amendment) for computing the payments for permanent disability does not apply to persons who are found so disabled merely because the injury chanced to occur before the operative date of the amendment, gives the amendment a restrictive effect—gives it a strict interpretation rather than extending the benefits thereof and giving it a liberal interpretation. Thus when we consider all the factors heretofore discussed, together with the principles presently considered, there is no sound basis for the application of the rule that it is presumed the Legislature intends a statute to operate prospectively only. The clear import is to the contrary.

A significant recent case bearing upon the problem is Schmidt v. Wolf Contracting Company, supra, 269 App.Div. 201, 55 N.Y.S.2d 162, affirmed 295 N.Y. 748, 65 N.E.2d 568. There the New York Legislature on April 1, 1944, amended the law dealing with maximum and minimum compensation payments for permanent and temporary disability to provide that: "Because of existing conditions due to the war compensation for permanent or temporary total disability may be in excess of twenty-five dollars but shall not exceed twenty-eight dollars per week for any period of disability arising out of claims accruing during the year commencing June first, nineteen hundred forty-four." (55 N.Y.S.2d at page 165.) It was contended that a claimant who became totally disabled before June 1, 1944, was not entitled to the increase in compensation authorized by the amendment commencing on June 1, 1944. In denying that contention the court said, in line with the foregoing discussion herein:

"We have repeatedly said, and so has the Court of Appeals, that the Workmen's Compensation Law is classed as remedial legislation and hence a spirit of liberality should characterize its interpretations in order to effectuate its intent and purpose.

"We are not concerned with the wisdom or the justice of the amendment in question. Our only duty is to ascertain the meaning and intent of the lawmakers. *The intention of the lawmakers is the law. That intention is to be gathered from the necessity or the reason of the enactment.* In the construction of a statute we are not confined to the literal meaning of the words. When the intention can be disclosed from the statute, words may be modified or altered so as to obviate all inconsistency with such intention. To give this amendment the construction which appellants urge would produce an absurd and illogical result. 'Every interpretation that leads to an absurdity should be rejected.' Flynn v. Prudential Insurance Co. of America, 207 N.Y. 315, 318, 100 N.E. 794, 795.

"In People v. Ryan, 274 N.Y. 149, 152, 8 N.E.2d 313, 315, the Court said:

"'In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to "defeat the general purpose and manifest policy intended to be promoted," all parts of the act must be read and construed together for the purpose of determining the legislative intent, and, if the statute is ambiguous and two constructions can be given, the one must be adopted which will not cause objectionable results or cause inconvenience, hardship, injustice, or mischief, or lead to absurdity.' * * *

"A reading of the amendment clearly indicates to us that the Legislature intended that *it should apply to injuries sustained prior to June 1, 1944,* if disability is present and payments are due during the year commencing on that date.

"It is unreasonable to assume that the Legislature intended that a workman who suffers injury on May 31, 1944, is any less affected by the phrase 'because of existing conditions due to the war' than one injured on June 1st of the same year. The disability, if any, in both cases would be present during the year commencing

June 1st. Both workmen would be subject to the same existing conditions due to the war and during the same period of time. We cannot attribute to the Legislature an intent to make such an unfair discrimination.

"It is not the injury which must be sustained during the year commencing June 1st but the disability or incapacitation which must occur in order to bring the workman within the provisions of the amendment.

"In enacting the amendment the Legislature recognized the existence of an emergency, 'because of existing conditions due to the war' and provided a remedy. If the Legislature had intended to restrict the increase in awards to workmen injured after June 1st, it could have accomplished that result without the use of the words 'because of existing conditions due to the war.' As to those employees the words are superfluous. We should not assume that the lawmakers inserted those words in the amendment for no useful purpose. * * *

"When the amendment is read in the light of its spirit and purpose and consideration is given to the condition sought to be remedied as well as the history of the times, it is clear that the legislative intention was to make it applicable to claims for disability accruing during the year commencing June 1st.

"It is not the original claim but the disability which is subject to the time limitation. When the injuries are suffered the period of disability is uncertain. A workman may sustain injuries with no resultant disability in which case no compensation is due. A disability does not arise out of a claim. It is the claim which arises out of the disability.

"If the Legislature intended to limit the force of the amendment, as suggested by appellants, unquestionably it would have used language indicating unequivocally that the increased benefits would be applicable only to those sustaining injuries during the specified year. We think it is unreasonable to assume that the Legislature intended to confer benefits on a small group of workmen sustaining injuries during the year beginning June 1st. * * *

"The Workmen's Compensation Law creates the liability under which compensation is required to be paid by the employer to an injured employee or, in the event of his death, to his dependents. The obligation is purely statutory and does not arise out of an employer-employee relationship. Liability imposed by the Act is neither ex contractu (Matter of Smith v. Heine [Safety] Boiler Co., 224 N.Y. 9, 119 N.E. 878, Ann.Cas.1918D, 316) nor ex delicto (Matter of Doey v. Clarence P. Howland Co., 224 N.Y. 30, 120 N.E. 53).

"The spirit and purpose of the amendment are of material assistance in its interpretation. * * *

"The history of the times and conditions of the country are helpful in construing the amendment. * * *

"In the consideration of the mischief to be remedied by the amendment the intention of the Legislature becomes apparent." [Emphasis added.]

In this state several cases have given consideration to the question as to what events are controlling in determining the effective date of changes in the workmen's compensation law. In Hendrickson v. Industrial Accident Commission, 215 Cal. 82, 8 P.2d 833, it was conceded by the commission that an amendment increasing the compensation by 10% when the employer was wilfully uninsured did not apply to an injury occurring prior to the effective date of the amendment. The case does not represent a holding, and moreover does not constitute a practice on the part of the commission to interpret amendments as prospective only inasmuch as the amendment provided for what was in the nature of a *penalty* against the employer for failure to insure—a punishment to induce him to obey the law rather than, as in the instant case, a furtherance of the policy of the law to extend and make more adequate payments for disability, thus relieving society as a whole of the burden. While it is true that liability for increased compensation imposed in such cases as the wilful misconduct of the employer is compensation to the employee in a broad sense

rather than a penalty (E. Clemens Horst Co. v. Ind. Acc. Comm., 184 Cal. 180, 193 P. 105, 16 A.L.R. 611), such liability does not have to do with giving adequate compensation to the employee measured by the cost of attaining rehabilitation, as exists in the case at bar, and thus there is not the same reason for applying it to past injuries. Pacific Gas & Electric Company v. Industrial Accident Commission, 180 Cal. 497, 181 P. 788, and Worswick Street Paving Co. v. Industrial Accident Commission, 181 Cal. 550, 185 P. 953, hold merely that an amendment to the constitution did not purport to ratify or correct an invalid portion of the statute. The general proposition was stated in Hyman Bros. Box & Label Co. v. Industrial Accident Commission, 180 Cal. 423, 181 P. 784, without any discussion of the controversy involved, that is, it does not appear what contention was made on the subject or what changes if any had been made in the law. In Great Western Power Company v. Pillsbury, 170 Cal. 180, 149 P. 35, the statute (Stats.1911, p. 796) in force when the injury occurred was applied but the new act (Stats.1913, p. 279) specifically provided that its compensation provision should not apply to any injury sustained prior to its effective date. If anything, this indicates that when the Legislature desires to have the act or amendments limited to future injuries it makes express provision therefor. Carlsen v. Diehl, 57 Cal.App. 731, 208 P. 150, is not in point as it dealt with a procedural matter. In any event it did not involve the extension of the benefits of the act. Holmberg v. City of Oakland, 55 Cal.App. 270, 203 P. 167, involving prior rights, did not consider the rule of liberal construction, dealt with an entirely new liability for benefits for injuries, and spoke as of the future. There was no dispute concerning the matter in Bay Shore Laundry Company v. Industrial Accident Commission, 36 Cal. App. 547, 172 P. 1128. In Reynolds v. E. Clemens Horst Company, 35 Cal.App. 711, 170 P. 1082, the old law was applied on the theory that the new law by a savings clause continued in effect for the prior injuries. In its holding that the employee has a vested right after the injury by reason of the old law which was repealed, the court ignored the well-established rule that there is no vested right in a right created by statute. See Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885.

There are cases from other jurisdictions holding that amendments to workmen's compensation laws dealing with the amount of or liability for compensation apply only to injuries occurring subsequent to their effective date. See 71 C.J. 334, 84 A.L.R. 1244, and supplemental decisions; Arnold & Murdock Co. v. Industrial Commission, 314 Ill. 251, 145 N.E. 342, 40 A.L.R. 1473, and supplemental decisions. I believe, however, that the social necessity of flexibility in the functioning of workmen's compensation laws, heretofore discussed, was not given sufficient consideration by the courts in deciding those cases.

It is contended that the savings clause in the Labor Code (which contains the workmen's compensation laws) indicates a legislative intent that the amendment is to operate only on injuries occurring subsequent to its effective date. "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." Labor Code, sec. 4. Manifestly that provision was designed to cover nothing more than the original code, inasmuch as many repeals of statutes were effected by it, most of which were restated in the code. It was to prevent the adoption of the code from disturbing existing conditions inasmuch as merely a revision and codification was intended rather than a change in the law. Nor does the provision: "Whenever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made," (Labor Code, sec. 9) give a different meaning to section 4. Section 9 was aimed at situations where reference is made in one law to another as affecting or governing the procedure or rights provided for in the former. Thus it eliminates the uncertainty of whether the law to

which reference was made would be considered as it existed at the time of the reference or as subsequently amended. Moreover, as heretofore seen, because of the nature and basis of the law here involved the rights do not become static.

It is further asserted that the commission having interpreted the amendment as not applying to previous injuries from September, 1945, to January, 1946, is a pertinent factor in interpretation. But the time was short and the rule is established that: "But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute." California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 661, 147 A.L.R. 1028.

It is contended that to apply the amendment to previous injuries is unconstitutional as an impairment of the obligation of contracts, deprivation of vested rights, and a taking of property without due process of law contrary to both the state and federal constitutions. There is no sound basis for this contention. From the standpoint of the self-insured employer there is no contract. The existing law with relation to the compensation payable to his employees is not a part of the employment contract. If it were, the date of the employment rather than of the date of the injury would be the pivotal time with respect to the law applicable thereto. The obligations and benefits under the workmen's compensation law in California are purely statutory, regulating the status of employer and employee and have no contractual basis. Alaska Packers' Ass'n v. Industrial Acc. Comm., 1 Cal.2d 250, 34 P.2d 716; Alaska Packers Ass'n v. Ind. Acc. Comm., 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044; Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190; North Alaska Salmon v. Pillsbury, 174 Cal. 1, 162 P. 93, L.R.A.1917E, 642; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P.2d 1071. Insofar as the corporation insurance carriers are concerned their policies, by force of regulation under the Insurance Code, are uniform in providing (or an equivalent thereof):

"The Contract. The obligations of Paragraph One (a) of the policy to which this endorsement is attached, include such Workmen's Compensation Laws as are herein cited and described and none others.

"Divisions IV and V, Labor Code of the State of California (except the increase in any award under the provisions of Section 4553 thereof, * * *) *and all laws amendatory thereof, or supplementary thereto* which may be or become effective *while this policy is in force.* All the foregoing, subject to such exceptions, is, for the purpose of this insurance, called the Workmen's Compensation Law. [Emphasis added.]

"It is further understood and agreed that (subject to the approval of the Insurance Commissioner), the rates of premium are subject to change, if, during the term of this Policy, any amendments affecting the benefits provided by the Workmen's Compensation Laws become effective; such change, if any, to be expressed by an endorsement naming the effective date thereof."

Thus the insurance carriers are in no position to complain. Their policies contemplate changes in the law. True, such policies refer to amendments to the workmen's compensation law which become effective while the policies are in force. It may be that the term of such a policy (the term which the premium payment covered) would have expired before the amendment but the policy would still be in force in the sense that the obligation to pay compensation for any disability would continue to exist as long as it was related to an injury occurring during the term of the policy. It cannot be seriously doubted that liability under the policy continues after its specified term or premium period as to disabilities having their inception during the term. The only right which could be claimed to be vested is one to have all payments for temporary disability deducted from the permanent disability award in every case, instead of in only some of the cases, and to a partial extent as is permitted

by the amendment. Limiting the extent of the amount of temporary disability payments that may be deducted from permanent disability awards was merely a means to assure that the employee would obtain compensation more nearly consonant with the aims and objects of the workmen's compensation law in the light of changing conditions. It is analogous to enactments increasing or diminishing the damages recoverable in ordinary actions. Retroactive application of such enactments is not unconstitutional. In Funkhouser v. J. B. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 135, 78 L.Ed. 243, a statute was passed allowing interest on unliquidated damages for breach of contract where none had existed before. The court held that it could be validly applied to causes of action which had previously occurred, stating: "The statute in question concerns the remedy and does not disturb the obligations of the contract. * * * The contractual obligation of appellants was to take and pay for the described articles, and the law, in force when the contract was made, required that in case of breach appellants should make good the loss sustained by the appellee. *The ascertainment of that loss, and of what would constitute full compensation, was a matter of procedure within the range of due process in the enforcement of the contract.* 'To enact laws providing remedies for a violation of contracts' and 'to alter or enlarge those remedies from time to time,' was within the competency of the Legislature. Waggoner v. Flack, supra. [188 U.S. 595, 23 S.Ct. 345, 47 L.Ed. 609] The mere fact that such legislation is retroactive does not bring it into conflict with the guarantees of the Federal Constitution (League v. [State of] Texas, supra, page 161 of 184 U. S., 22 S.Ct. 475 [46 L.Ed. 478]), and when the action of the Legislature is directed to the enforcement of the obligation assumed by the parties and to the giving of suitable relief for nonperformance, it cannot be said that the obligations of the contract have been impaired. The parties make their contract with reference to the existence of the power of the state to provide remedies for enforcement and to secure adequate redress in case of breach. Henley v. Myers, supra [215 U.S. 373, 30 S.Ct. 148, 54 L.Ed. 240]" (290 U.S. at page 167, 54 S.Ct. at page 135, 78 L.Ed. 243.) Likewise in the instant cases, the object of the workmen's compensation laws is and always has been to afford full and adequate compensation to injured workmen, and knowledge of such object should be imputed to employers and insurance carriers. The ascertainment of the loss sustained—the measure of compensation—may well be a matter of procedure. See, also, to the same effect, United States v. Standard Oil Co. of California, D. C., 21 F.Supp. 645; Fechenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885.

My conclusion in these cases need not rest alone upon the foregoing discussion. There is a larger and more significant principle involved. Even assuming that there are contract and vested rights involved, yet the amendment is a valid exercise of the police power. The validity of workmen's compensation laws is unquestioned. The social purposes and aims fall within the general welfare scope of the police power. As we have seen above, the present and urgent need for more adequate and nondiscriminatory compensation for permanent disability to assist in the vocational and economic rehabilitation of the disabled workmen is clear. The nature of workmen's compensation laws is such that a reserved power on the part of the Legislature to meet current and future exigencies arising from changing conditions should be contemplated. In an overall sense nothing really new has been added by the amendment. Rather the benefits have been extended to more fully accomplish that which has already been done in part. The language in Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 434, 54 S.Ct. 231, 238, 78 L.Ed. 413, 88 A.L.R. 1481, is apt: "Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.

Ed. 288, [87 A.L.R. 721]. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. * * * The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. * * * The question is not whether the legislative action effects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. * * * What has been said on that point is also applicable to the contention presented under the due process clause." In Schmidt v. Wolf Contracting Co., supra, 269 App.Div. 201, 55 N.Y.S.2d 162, heretofore discussed on the question of the interpretation of the amendment, the contention of unconstitutionality was also made. The court answered that contention as follows, 55 N.Y.S.2d at page 169:

"Liability under the Workmen's Compensation Law does not arise out of contract. That liability has its origin not in contract but in legislative fiat decreed in accordance with constitutional mandate and hence does not violate the contract clause of the United States Constitution.

"Even if it be assumed that liability under the Workmen's Compensation Laws is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the state may be exercised to effect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.

"The subject matter of workmen's compensation reposes within the control of the Legislature.

"A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority. Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117, 63 L. Ed. 309, 9 A.L.R. 1420; Louisville & N. R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297, 34 L.R.A.,N.S., 671.

"The constitutional prohibition that no state shall pass any law which shall deprive a person of life, liberty or property without due process is not absolute. Matter of People v. Title & Mortgage Guarantee Co. of Buffalo, 264 N.Y. 69, 190 N.E. 153, 96 A.L.R. 297; Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

"In the case of Sliosberg v. New York Life Insurance Company, 244 N.Y. 482, at page 497, 155 N.E. 749, at page 755, in discussing the question of impairment of the obligation of contract the court said:

"'All contracts are made subject to the exercise by government of a sovereign right to legislate for the protection of "the lives, health, morals, comfort and general welfare of the people." Manigault v. Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L. Ed. 274. That the government may be required, in times of public stress, so to legislate as to nullify private contracts, is an implied term of the law of every contract, so that such legislation, if enacted, does not impair the obligation of the contract within the meaning of the limitation. Marcus Brown [Holding] Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877.'

"The amendment in question was enacted in the exercise of the police power of the state and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good. Matter of Petrie, supra [215 N.Y. 335, 109 N.E. 549]; Matter of Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351, Ann.Cas.1916B,

158; New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629.

"In the case of Guttag v. Shatzkin, 230 N.Y. 647, at page 650, 130 N.E. 929, at page 930, the court said:

" 'While the states are subject to the contract clause of section 10, article 1 and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.C. 117, 63 L. Ed. 309, 9 A.L.R. 1420. These sections of our federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; the one to preserve the health and morals of a community; the other to preserve sovereignty.' "

In view of the foregoing discussion and the authorities cited, and considering the declared public policy of this state toward the Workmen's Compensation Law, and applying the rule of liberal construction enjoined upon us by statute, it cannot be fairly said that the Legislature intended that the amendment here involved should apply to future injuries only. On the contrary every consideration of public policy vouchsafed by the constitutional provision which is the postulate of the workmen's compensation statute, and the statute itself, compels a construction which renders said amendment applicable to existing liability regardless of the date of the injuries out of which such liability arose, which construction, I believe, is obviously in harmony with the intention of the Legislature in the enactment of said amendment.

The awards should be affirmed.

Rehearing denied; CARTER, J., dissenting.

30 Cal.2d 920

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 17431.

Supreme Court of California, in Bank.

June 26, 1947.

Rehearing Denied July 22, 1947.

Workmen's compensation ⇐60

Provision of the Labor Code that where temporary disability payments exceed 25 per cent. of permanent disability payments, injured employee shall be paid 75 per cent. of permanent disability payment in addition to temporary disability payment, did not apply to injuries occurring before the effective date of the statute, though no claim was filed with the commission until after the effective date of the statute. Labor Code, § 4661.

CARTER, J., dissenting.

Proceedings under the Labor Code by the Bethlehem Steel Company, a corporation, for writ of review to annul an award of compensation by the Industrial Accident Commission to Carl Zdechlik, employee.

Award annulled, and cause remanded for further proceedings.

Prior opinion, 174 P.2d 50.

R. P. Wisecarver, of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondents.

PER CURIAM.

Petitioner, a self-insurer, seeks to annul an order of the Industrial Accident Commission awarding compensation to an injured employee. The industrial injury occurred prior to the effective date of the 1945 amendment of Labor Code, section 4661, but no claim was filed with the commission until after that date, and the award was made pursuant to the section as amended. Otherwise the facts are substantially the same as those in Aetna Casualty & Surety Co. v. Industrial Accident Commission, Cal.Sup., 182 P.2d 159, and for the reasons stated in that case it must be held that the commission improperly gave a retroactive effect to the amendment.

The award is annulled and the cause is remanded for further proceedings.

CARTER, Justice.

I dissent.

I dissent upon the same grounds stated in my dissenting opinion in Aetna Casualty & Surety Co. v. Industrial Accident Commission, Cal.Sup., 182 P.2d 159.

Rehearing denied; CARTER, J., dissenting.



30 Cal.2d 919

COLUMBIA STEEL COMPANY, a corporation, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California and Paul B. Barker, Respondents.

S. F. 17430.

Supreme Court of California, in Bank.

June 26, 1947.

Rehearing Denied July 22, 1947.

Prior opinion, 174 P.2d 50.

Walter Shelton and A. Terkel, both of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondents.

PER CURIAM.

Petitioner, a self-insurer, seeks to annul an order of the Industrial Accident Commission awarding compensation to an injured employee. The industrial injury occurred prior to the effective date of the 1945 amendment of Labor Code, section 4661, but the award was made pursuant to the provisions of the section as amended. The facts are substantially the same as those in Aetna Casualty and Surety Company v. Industrial Accident Commission, Cal.Sup., 182 P.2d 159, and for the reasons stated in that case it must be held that the commission improperly gave a retroactive effect to the amendment.

The award is annulled and the cause is remanded for further proceedings.

CARTER, Justice.

I dissent.

I dissent upon the same grounds stated in my dissenting opinion in Aetna Casualty and Surety Company v. Industrial Accident Commission, Cal.Sup., 182 P.2d 159.

Rehearing denied; CARTER, J., dissenting.



30 Cal.2d 426

WATCHTOWER BIBLE & TRACT SOC., Inc., v. LOS ANGELES COUNTY et al.

L. A. 20017.

Supreme Court of California.

July 1, 1947.

1. Taxation ⇐244

Literature used by religious sect in exercise of religion and proselyting purposes was not a "building" within Constitution exempting from taxation building used exclusively for religious worship. Const. art. 13, § 1½.

See Words and Phrases, Permanent Edition, for all other definitions of "Building".

2. Taxation ⇐65

Where personal property has become a fixture, it is part of building and then is assessed as real property as distinguished from personal property.

3. Taxation ⇐244

The term "building" in constitutional provision granting tax exemption to building used exclusively for religious worship must be given a strict construction, since tax exemption statutes are to be strictly construed against taxpayer. Const. art. 13, § 1½.

4. Evidence ⇐23(1)

It is not a matter of common knowledge that items of property such as pews, altars and other paraphernalia used in exercise of religion are not taxed and court would not be justified in indulging in such an assumption. Const. art. 13, § 1½.

5. Taxation ⇐49

The purpose of constitutional provision that all property in state except as otherwise in Constitution provided, not exempt

under laws of United States, shall be taxed in proportion to its value is to secure equality of taxation which results from subjecting all property to the same burden. Const. art. 13, § 1.

6. Constitutional law ⇐84, 90, 274
Taxation ⇐37

General uniform nondiscriminatory ad valorem property tax for revenue purposes imposed on all property alike, real and personal, regardless of its use was not invalid, as applied to literature of religious organization as restricting exercise of religion or freedom of press or speech. Const.Cal. art. 1, §§ 4, 9; art. 13, § 1; U.S.C.A.Const. Amends. 1, 14.

7. Taxation ⇐61

Property used in exercise of rights of freedom of press or religion is subject to uniform tax for revenue imposed on all alike. Const.Cal. art. 1, §§ 4, 9; art. 13, § 1; U.S.C.A.Const. Amends. 1, 14.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Watchtower Bible & Tract Society, Inc., against County of Los Angeles, California, and others to recover taxes paid under protest. From a judgment of dismissal, plaintiff appeals.

Affirmed.

A. L. Wirin and Fred Okrand, both of Los Angeles, and Hayden C. Covington, of Brooklyn, N.Y., for appellant.

Harold W. Kennedy, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, for respondents.

CARTER, Justice.

A judgment of dismissal was entered following plaintiff's failure to amend after a demurrer was sustained with leave to amend. Plaintiff's action is one to recover taxes (paid under protest) levied and assessed by defendants county and city.

Plaintiff is a corporation organized by Jehovah's Witnesses, a religious sect, to assist in fostering their creed. Plaintiff owns real property in defendant county upon which buildings are situated. This property is used for religious purposes. (An exemption was claimed and allowed for that real property pursuant to the Constitution [Cal.Const. Art. XIII, sec. 1½] and no dispute exists with reference to it.) Plaintiff owns and stores in one of said buildings pamphlets, books and other literature which are used by it and the Jehovah's Witnesses in the exercise of their religion and for proselyting purposes. The buildings being the distribution point for said literature. The literature so stored was assessed as personal property subject to taxation and was levied upon for the payment of such tax. It is claimed by plaintiff that said property is exempt from taxation under the Constitution (Cal.Const. Art. XIII, sec. 1½), and if not, that the tax so levied is invalid as a violation of the right of religious liberty and freedom of speech and the press as guaranteed by fundamental law. U.S.Const. 1st and 14th Amendments; Cal.Const. Art. I, secs. 4, 9.

[1-3] Turning first to the claim that the property taxed is exempt under the laws of this state, the provision relied upon reads: "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship, shall be free from taxation." Cal.Const. Art. XIII, sec. 1½. That section was added to the Constitution in 1900. In this connection it should be noted in passing that the *Legislature is authorized* to exempt from taxation "property used exclusively for religious * * * purposes and owned by * * * corporations organized and operated for religious * * * purposes" not conducted for profit. Cal.Const. Art. XIII, sec. 1c. At the time of the assessment of the property here involved the Legislature had not acted pursuant to that authority. It had merely provided that "The church exemption is as specified in section 1½ of Article XIII of the Constitution." Revenue & Taxation Code, sec. 206. Subsequently, in 1945, the Legislature added the so-called "welfare exemption" which embraces property used exclusively for religious purposes with specified qualifications. Revenue & Taxation Code, sec. 214, as added Stats.1945, ch. 241, sec. 1. It may be that the term "property"

as used therein includes personal property. See Revenue & Taxation Code, sec. 103. Be that as it may, by no stretch of the imagination may the term "building" as used in Article XIII, section 1½, include the personal property here taxed although it is assumed that it is used for the exercise of religion as well as the building in which it is stored. It is unquestionably personal property, not being in any sense a fixture or attached to the building. Where personal property has become a fixture it is a part of the building and then is assessed as real property as distinguished from personal property, thus indicating the distinction between the two. See Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 175 P.2d 512. "In 1 Bouvier's Law Dictionary Rawle's Ed. [vol. 1, p. 269] 'building' is defined as follows: 'An edifice erected by art, and fixed upon or over the soil, composed of stone, brick, marble, wood, or other proper substance connected together, and designed for use in the position in which it is so fixed.'" Swasey v. County of Shasta, 141 Cal. 392, 394, 74 P. 1031, 1032. Moreover the term must be given a strict construction inasmuch as the tax exemption statutes are to be strictly construed against the taxpayer. Lockhart v. Wolden, 17 Cal.2d 628, 111 P.2d 319; City and County of San Francisco v. San Mateo, 17 Cal.2d 814, 112 P.2d 595; Helping Hand Home v. San Diego, 26 Cal.App. 2d 452, 79 P.2d 778; 24 Cal.Jur. 89, 90.

[4] Plaintiff asserts that it is a matter of common knowledge that the items of property such as pews, altars and other paraphernalia used in the exercise of religion are not taxed. We have no such knowledge and we are not justified in indulging in such an assumption.

The argument advanced by plaintiff in support of its contention that the tax here involved is invalid, is to the effect that a general, uniform, nondiscriminatory ad valorem property tax for revenue purposes may not be imposed upon the property of a religious organization used by it in the exercise of its religion or worship by reason of the religious liberty guarantee, and, in the instant case, the property consisting of literature, by reason of the guarantee of freedom of speech and press. There are two important factors bearing upon this problem that should first be considered.

[5, 6] First, the tax levied here was one solely for the purpose of revenue to defray the general expenses of government, no element of regulation being involved. It is not a license tax—a tax on the exercise of a right, privilege, occupation, calling, or activity, and is payable whether or not the property is used in a commercial profit motive enterprize. Nor does it impose any conditions or restrictions upon the use of the property taxed. It is solely a general ad valorem property tax which is the chief source of revenue for the local government. See Brunton v. Superior Court, 20 Cal.2d 202, 124 P.2d 831; Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A. L.R. 1. It is a uniform, nondiscriminatory tax levied upon all property alike, personal and real, regardless of the use to which it is put, pursuant to the constitutional provision reading: "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." Cal. Const. Art. XIII, sec. 1. The purpose of that provision is to secure equality of taxation which results from subjecting all property to the same burden. See Feather River Power Co. v. State Board of Equalization, 206 Cal. 486, 274 P. 962; People v. Nat. Bank of D. O. Mills & Co., 123 Cal. 53, 55 P. 685, 45 L.R.A. 747, 69 Am.St.Rep. 32; 24 Cal.Jur. 71. There is, therefore, no discrimination in the instant tax and it is not even remotely aimed at any possible restriction on the exercise of religion, or freedom of speech or press.

Second, the power of taxation for revenue purposes is probably the most vital and essential attribute of the government. Without such power it cannot function. Cooley Const. Limitation, Vol. 2, pp. 986, 987; 24 Cal.Jur. 34, 35.

[7] It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike. It is the general rule that property used in connection with the publi-

cation of a newspaper has no special immunity from the general laws. Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S. Ct. 511, 90 L.Ed. 607; Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614, 166 A.L.R. 531; Associated Press v. National Labor Relations Board, 301 U.S. 103, 132, 57 S.Ct. 650, 81 L.Ed. 953. And instrumentalities used in connection with the press and the publication business are subject to normal uniform general taxation. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Giragi v. Moore, 48 Ariz. 33, 58 P.2d 1249; Id., 49 Ariz. 74, 64 P.2d 819, 110 A.L.R. 320, appeal dismissed 301 U.S. 670, 57 S.Ct. 946, 81 L.Ed. 1334, on authority of Grosjean v. American Press Co., supra; Arizona Pub. Co. v. O'Neil, D.C., 22 F.Supp. 117, affirmed 304 U.S. 543, 58 S.Ct. 950, 82 L. Ed. 1518, on authority of Grosjean v. American Press Co., supra; 110 A.L.R. 327; 35 A.L.R. 7; Thayer, Legal Control of the Press, p. 64. In the Grosjean case the court declared invalid a statute which imposed a license tax, based on gross receipts, for the privilege of engaging in the business of publishing advertisements in any newspaper or publication whatever. There, however, the application of the tax was measured, not by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements were carried, *showing an express purpose to* penalize certain publishers and curtail circulations. Mabee v. White Plains Pub. Co., supra; Oklahoma Press Pub. Co. v. Walling, supra. The court was careful to point out that:

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." Grosjean v. American Press Co., supra, 297 U.S. at page 250, 56 S.Ct. at page 449, 80 L.Ed. 660. The recent cases in the United States Supreme Court have stated a similar rule. In Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81, the court denounced an ordinance requiring the payment of a license tax as a condition to soliciting as applied to the pursuit of the activities of religious colporteurs, Jehovah's Witnesses, as in the case at bar, in distributing their literature and receiving (at the will of the distributee) a price therefor. The sole issue as stated by the court was "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax *as a condition to the pursuit of their activities.*" 319 N.S. at page 110, 63 S.Ct. at page 873, 87 L.Ed. 1292, 146 A.L.R. 81. [Emphasis added.] (The tax in the instant case is not a license tax and the payment of it is not a condition to the pursuit of plaintiff's activities.) And the court went on to say: "We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 [the portion of the Grosjean decision heretofore quoted]. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or *a tax on property used or employed in connection with those activities.* It is one thing to impose a tax on the income or property of a

preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. * * * It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U.S. 33, 56-58, 60 S.Ct. 388, 397, 398, 84 L.Ed. 565, 128 A.L.R. 876) although *it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not* discriminatory. Id., 309 U.S. at page 47, 60 S.Ct. at page 392, 84 L.Ed. 565, 128 A.L.R. 876, and cases cited." 319 U.S. at page 112, 63 S.Ct. at page 874, 87 L.Ed. 1292, 146 A.L.R. 81. [Emphasis added.] The foregoing limitation on the holding of the majority opinion in the Murdock case and the rule applicable here is elucidated in the dissent of Justice Reed: " Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, ad valorem taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books." 319 U.S. at page 129, 63 S.Ct. at page 897, 87 L.Ed. 1292, 146 A.L.R. 81. In Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, 152 A.L.R. 317, the same type of ordinance considered in the Murdock case was involved and the court again stated the exception applicable in the case at bar as follows: "This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishoner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the Murdock case, 319 U.S. page 112, 63 S.Ct. page 874, 87 L.Ed. 1292, 146 A.L.R. 81. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." 321 U.S. at page 577, 64 S.Ct. at page 719, 88 L.Ed. 938, 152 A.L.R. 317.

As we have seen the tax here involved is not such a burden on the exercise of religion as to render it invalid. It is not of the character heretofore denounced by the Supreme Court of the United States. While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally with other property in Los Angeles County. The very liberty invoked is made realistic by the protection afforded by that government.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE JJ., concur.



30 Cal.2d 335

TRUBOWITCH et al. v. RIVERBANK CANNING CO.

Sac. 5725.

Supreme Court of California.

June 24, 1947.

Rehearing Denied July 17, 1947.

1. Appeal and error ⇐1008(3)

An appellate court is not bound by trial court's construction of a written instrument based solely upon the terms of the instrument.

2. Contracts ⇐290

A party waives his right to arbitrate an issue by failing to plead such right.

3. Contracts ⇐290

Assignees who did not contend that validity of assignment should be determined by arbitration board but submitted that issue to court without reservation waived whatever right they may have had to withhold issue of validity of assignment from the court.

4. Assignments ⇐18, 23, 82

A contract provision or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract or of money damages for breach of the contract.

5. Sales ⇐81(2)

A seller who, in absence of contract provision specifying date of delivery, is entitled to determine that date, must deliver the goods within a reasonable time. Civ.Code, § 1763(2).

6. Sales ⇐405

Seller's refusal to deliver entitled buyer immediately to bring an action for damages, even if delivery date had not arrived.

7. Sales ⇐86

Where seller had refused to deliver on date set by itself on ground that governmental requirements and other circumstances beyond its control prevented delivery, subsequent assignment by corporate buyer of all its assets to sole stockholders who formed a copartnership to carry on the business did not constitute an assignment of the sales contract within provision thereof against assignment but constituted rather a valid assignment of claim for money damages for nonperformance. Civ.Code, §§ 1763(2), 1787(1).

8. Assignments ⇐82
Landlord and tenant ⇐76(3)

A party benefited by a nonassignment clause in a contract or lease may waive his right thereunder by dealing with an assignee with regard to the contract or lease, with knowledge of the assignment.

9. Assignments ⇐82

The meaning of a bilateral contract which in terms forbids assignment is a matter of interpretation.

10. Assignments ⇐82

A contract provision against assignment does not preclude a transfer of rights thereunder by operation of law.

11. Assignments ⇐82

The validity of an assignment which results merely from a change in legal form of ownership of a business depends upon whether it affects the interests of parties protected by nonassignability provision of contract.

12. Contracts ⇐292½

Where corporate buyer named in sales contract containing provisions for arbitration and against assignment, upon its dissolution assigned all its assets to sole stockholders who formed a copartnership to carry on the business, copartnership could enforce arbitration provision with respect to alleged breach of contract by seller. Civ.Code, §§ 399, 402, 1643, 1644, 1647, 1648; Code Civ.Proc. §§ 1282, 1860, 1865.

13. Judgment ⇐217

Final judgment is not rendered until findings are signed and filed, if findings are essential.

14. Contracts ⇐292½

A statutory proceeding to enforce an agreement to arbitrate, although in form a special proceeding, is in substance a suit in equity for specific performance of a contract to arbitrate. Code Civ.Proc. § 1282.

15. Contracts ⇐292½

In proceeding to enforce an agreement to arbitrate, findings must be made. Code Civ.Proc. § 1282.

16. Appeal and error ⇐344

In proceedings to enforce agreement to arbitrate, notice of appeal, filed within 60 days after findings were signed and filed, though not within 60 days from entry of court's announcement that petition was dismissed, was timely. Code Civ.Proc. § 1282; Rules on Appeal, rule 2(a).

EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Proceeding by Victor Trubowitch and T. Kedros, copartners doing business under the name and style of Pan American Food Company, against the Riverbank Canning Company to enforce an agreement to arbitrate controversies arising un

der a written contract between defendant and the Pan American Food Corporation. From a judgment dismissing the petition, plaintiffs appeal.

Reversed.

Prior opinion, 163 P.2d 739.

Norman A. Eisner, of San Francisco, for appellants.

F. M. Brack, of Modesto, for respondent.

TRAYNOR, Justice.

Plaintiffs instituted this proceeding in the superior court under section 1282 of the Code of Civil Procedure to enforce an agreement to arbitrate controversies arising under a written contract for the sale of 3900 cases of No. 10 tomato paste from defendant's 1942 production. The contract was entered into on August 20, 1942 by defendant as seller and Pan American Food Corporation, plaintiffs' assignor as buyer and was on a form adopted by the Canners' League of California and approved by the National-American Wholesale Grocers' Association. It contained the following provisions: "Any controversy arising out of this contract shall be settled by arbitration in New York, Chicago or San Francisco. In the absence of agreement by the parties arbitration shall be held in the above city nearest to the point where the goods are located. Arbitrations shall be held before and under the rules of the joint arbitration boards appointed or approved by the National-American Wholesale Grocers' Association, the National Food Brokers' Association and the National Canners' Association. The arbitrators shall assess the costs of the arbitration and the decision shall be final and binding upon both parties, who hereby agree to comply therewith. No unimportant variations in the execution of this agreement shall constitute basis for a claim. Each party hereto hereby agrees that a judgment of the United States District Court in and for the District within which the award was made shall be entered upon the award made, but the State Courts shall have sole jurisdiction of enforcing this agreement to arbitrate and any arbitration award in all cases in which the United States District Court shall not have jurisdiction."

In their petition to enforce the arbitration agreement plaintiffs alleged that Pan American Food Corporation, a New York corporation, was voluntarily dissolved on December 29, 1942; that all of the assets of the dissolved corporation were assigned to plaintiffs as its sole stockholders; that plaintiffs formed a copartnership under the name of Pan American Food Company and carried on the business of the corporation without change in management or personnel. With respect to the claim to be arbitrated plaintiffs' petition asserts: "That Riverbank Canning Company failed to make any delivery whatsoever under said contract to either Pan American Food Corporation or Pan American Food Company, and that an actual controversy has arisen and exists as to liability of Riverbank Canning Company to Pan American Food Company for failure of Riverbank Canning Company to make deliveries under said contract." Defendant alleges that governmental requirements and other circumstances beyond its control prevented it from delivering the goods. It contends, however, that plaintiffs cannot invoke the arbitration provisions of the contract, on the ground that they are assignees and that the contract was nonassignable under the following provision of the contract: "This contract is not assignable and goods sold hereunder are not to be shipped or diverted to any destination other than that herein specified, without consent of seller." Plaintiffs contend that this provision is not applicable, on the grounds that it does not preclude an assignment of a claim for money damages for nonperformance of the contract; that defendant waived its right to object to the validity of the assignment by dealing with plaintiffs and making a compromise with them, knowing that they were assignees; and that in any event the transfer of the contract rights to them was not an assignment within the meaning of the contract.

The court found "That on or about December 29, 1942 * * * Pan American Food Corporation was voluntarily dissolved, at which time all of the assets of

said corporation were transferred to plaintiffs. That said plaintiffs were the sole stockholders of said corporation; that plaintiffs did thereupon form a co-partnership under the name of Pan American Food Company. * * * That on or about August 20, 1942, defendant entered into a contract in writing for the sale by defendant to said Pan American Food Corporation of 3900 cases of tomato paste. * * * That it is not true that since the dissolution of said Pan American Food Corporation, or at any other time, * * * said plaintiffs have been or ever were the owners of said contract or any rights arising thereunder; That it is true that Riverbank Canning Company never did make any deliveries under said contract; that no actual controversy has arisen between said Riverbank Canning Company and plaintiffs out of or by virtue of said contract. That it is not true that since the dissolution of Pan American Food Corporation, Riverbank Canning Company has repeatedly or at all recognized or dealt with plaintiffs as the owner of said contract. * * * That defendant never at any time consented to any assignment of said contract." The court concluded that plaintiffs had no right to compel defendant to arbitrate the controversy and dismissed plaintiffs' petition. Plaintiffs appeal.

[1-3] The trial court based its interpretation of the nonassignable clause solely on its written terms and made its other findings solely upon the correspondence between Pan American Food Corporation and defendant and between plaintiffs and defendant and their respective counsel. No other evidence was before the court, and the case was submitted on briefs. It is settled in this state that an appellate court is not bound by a trial court's construction of a contract or other written instrument based solely upon the terms of the instrument. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 827, 167 P.2d 719, 164 A.L.R. 685. It it contended that the arbitration clause requires arbitration not only of the merits but also of the question whether the rights asserted by plaintiffs were validly assigned to them by specifying "any controversy arising out of this contract." In the proceeding in the superior court plaintiffs did not contend, however, that the question whether the assignment was valid should be determined by the arbitration board; they submitted that issue to the court without reservation. A party waives his right to arbitrate an issue by failing to plead such right. Landreth v. South Coast Rock Co., 136 Cal.App. 457, 462, 29 P.2d 225; see 3 Cal.Jur. 54; 117 A.L.R. 301; 161 A. L.R. 1426. Thus it is unnecessary to determine whether plaintiffs had the right to withhold the issue of the validity of the assignment from the court; if they had such a right they waived it by seeking without reservation a judicial determination of that issue.

[4] Plaintiffs contend that what they acquired by the assignment was only a claim for money damages for nonperformance and that such claim is not within the scope of the clause prohibiting assignment of the contract. It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract (Butler v. San Francisco Gas & Electric Co., 168 Cal. 32, 41, 141 P. 818; Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 590, 25 P. 51; Dixon-Reo Co. v. Horton Motor Co., 49 N.D. 304, 191 N.W. 780; see, 76 A.L.R. 1307; 2 Williston, Contracts, Rev.Ed. sec. 422), or of money damages for the breach of the contract. Rosecrans v. William S. Lozier, Inc., 8 Cir., 142 F.2d 118, 124; Gulf States Creosoting Co. v. Loving, 4 Cir., 120 F.2d 195, 199; Ocean Accident & Guarantee Co. v. Southwestern Bell Telephone Co., 8 Cir., 100 F.2d 441, 122 A.L.R. 133; Florance v. Kresge, 4 Cir., 93 F.2d 784; Industrial Trust Co. v. Stidham, 3 Terry 339, 344, 42 Del. 339, 344, 33 A.2d 159; Liberty v. Pooler, 134 Me. 115, 117, 182 A. 216; Searcy v. Casualty Co. of America, 149 App.Div. 316, 133 N.Y.S. 685, 686; see Shively v. Semi-Tropic Land & Water Co., 99 Cal. 259, 261, 33 P. 848; Ginsburg v. Bull Dog Auto Fire Ins. Ass'n of Chicago, 328 Ill. 571, 160 N.E. 145, 56 A.L.R. 1387; 2 Williston, Contracts, Rev.Ed. sec. 412, p. 1180; 4 Am.Jur. 237, 239, 240; 6

C.J.S. Assignments, § 31, p. 1080. Defendant contends, however, that at the end of December 1942, when the corporation was dissolved and its assets transferred to plaintiffs, the asserted breach had not occurred and defendant was still entitled to perform the contract because of the provision for its termination on February 28, 1943. Plaintiffs rely on provisions of the contract that in their opinion compel the interpretation that defendant had to follow shipping instructions of the purchaser, given in September 1942 and reiterated in November 1942.

[5-7] It is not necessary to determine which construction of the contract is correct, for even if it be assumed that defendant could determine the date of delivery, it would not follow that the contract was breached at the end of December when the assignment occurred. The correspondence between Pan American Food Corporation and defendant leaves no doubt that defendant had decided that whatever delivery it made would be before the end of December 1942. On December 1, 1942, it refused to deliver on the ground that requisitions by the government made it impossible to deliver any goods of the kind sold under the contract. On November 14, 1942, defendant answered the urgent requests of Pan American Food Corporation for delivery of goods under the contract by the following letter: "Our deliveries on tomato paste sales will not exceed 35%. As yet our pack has not reached that much, but we bought some goods from other packers, and so we are able to make 35% delivery on tomato paste packed in tin. * * * On the glass pack, we will not make any delivery, because this year we had a lot of trouble. We are ready to forward shipment of one-third of your purchase; we have packed the goods for you and it is ready, but unfortunately when we analyzed it we found that some of the paste did not run as high as 25%. Perhaps a batch or two will run 18%, some 22%, some 25%, some 27%, and maybe 30%. We just discovered that we have a lot of merchandise packed that way. * * * We are ready to make delivery of 35% of your purchase, if you take it just as it is. You must take a chance on the density—we will not guarantee it. If we know that certain batches are not thick enough for tomato paste we will not label it as tomato paste. We will label it as heavy puree, because we do not want to get into trouble. Anything that is below 25 we cannot call paste. We are here to serve you, and we offer you what we have at the price you bought. If you will let us know within the next 3 or 4 days we shall be pleased to forward a car." Pan American Food Corporation was unwilling to accept such delivery, and the matter was discussed at defendant's plant some time between November 14 and December 1, 1942. On the latter date defendant wrote to Pan American Food Corporation: "It was indeed a pleasure to see you last week here at the plant. That will give not only satisfaction that what we tell you is the truth, but will give you knowledge that the government took all of our No. 10 tomatoes, tomato paste and puree. We were ready to make delivery of 35% of your order, but now we definitely cannot do that, because the minute the Quartermaster Depot telephones us not to ship any more No. 10 tomato paste in any shape or form, our hands are tied, and unfortunately you cannot get delivery. These are conditions beyond our control and we are sorry we cannot serve you as we would like * * * during the packing season, you know we could not ship goods because the WPB gave us instructions as per their order M–237. Then when some relief came on the M–237 we did not have any labor to pack and ship and we still haven't any labor to speak of. Unfortunately when we were almost ready to ship, this new order came in from the Quartermaster and left us without source to serve you." This letter terminated the correspondence with respect to the performance of the contract. Defendant's refusal to deliver as expressed in this letter was final, and it made no attempt to deliver the goods in the interval between the date of this letter and February 18, 1943, the date when the contract ended.

If a seller, in the absence of a contract provision specifying the date of delivery, is entitled to determine that date, he is bound to deliver the goods within a reasonable time. Civ.Code, sec. 1763(2); see cases

collected in 1 Uniform Laws Annotated, note III to sec. 43. In the present case defendant, which had not complied with shipping instructions given in September and at later dates, itself fixed the time for whatever delivery it would make under the contract. Since defendant refused to deliver at the time that it had set itself and based its refusal on a ground that prevented it from making any delivery, the buyer's claim for money damages for nonperformance, if defendant was not excused from performance, was in existence at the time of the assignment on December 29, 1942. Civ.Code, sec. 1787(1). Even if the date for delivery had not arrived, defendant's refusal to deliver entitled the purchaser immediately to bring an action for damages, since the doctrine of "anticipatory breach is recognized in California." Caminetti v. Pac. Mutual Life Ins. Co., 23 Cal. 2d 94, 104, 142 P.2d 741, 746, and cases there cited; see 5 Cal.Jur. 457. The assignment of the contract rights related clearly to the claim for nonperformance of the contract, for when it made the assignment Pan American Food Corporation could not reasonably expect that the goods would be delivered.

[8] Plaintiffs contend that defendant waived its rights under the nonassignable clause by entering into negotiations for a compromise and making a compromise of the claim for damages for nonperformance with plaintiffs, knowing that plaintiffs claimed the rights under the contract as successors to the corporation that entered into the contract with defendant. It is settled in this state that a party benefited by a clause against assignment in a contract or lease may waive his right thereunder by dealing with an assignee with regard to the contract or lease, with knowledge of the assignment. California Packing Corp. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 64 A.L.R. 1412; Maguire v. 411; German American Sav. Bank v. Lees, 74 Cal.App.2d 697, 705, 169 P.2d Gollmer, 155 Cal. 683, 691, 102 P. 932, 24 L.R.A.,N.S., 1066; Randol v. Tatum, 98 Cal. 390, 397, 33 P. 433; Randol v. Scott, 110 Cal. 590, 597, 42 P. 976; Chapman v. Great Western Gypsum Co., 216 Cal. 420, 426, 14 P.2d 758, 85 A.L.R. 917; Taylor v. Odell, 50 Cal.App.2d 115, 121, 122 P.2d 919; Ruppe v. Utter, 76 Cal.App. 19, 24, 243 P. 715; People v. Jones, 87 Cal.App. 482, 488, 262 P. 361; Rutledge v. Barger, 82 Cal.App. 356, 359, 255 P. 537; Spangler v. Spangler, 11 Cal. App. 321, 324, 104 P. 995; see, 3 Cal.Jur. 240; 25 Cal.Jur. 929; 3 Thompson, Real Property, Perm.Ed. sec. 1437, and cases there collected. In the present case defendant acquired knowledge of the assignment by a letter of plaintiffs' counsel dated June 2, 1943, which began with the statement: "I represent the Pan American Food Company, successor to the Pan American Food Corporation, with which said corporation you entered into a contract for the sale of 3900 cases of Tomato Paste under date of August 20, 1942." In this letter plaintiffs' counsel referred to the fact that despite successive demands made upon defendant, no delivery was made under the contract; that under the contract the seller's failure to deliver for any reasons, including requisitions by the government, must be sanctioned by a certificate issued by the Canners' League of California; and that without such a certificate the seller is under an obligation to pay damages for nonperformance. Counsel therefore demanded such a certificate. Defendant did not produce the certificate but expressed its wish to preserve the goodwill of its customer and to compromise the matter by making a new contract for the delivery of tomato paste at 1943 prices. In September 1943 it was agreed that in settlement of the controversy defendant would deliver 1½ carloads of tomato paste to plaintiffs; plaintiffs reserved the right to avail themselves of their claim for damages if such delivery was not made. Defendant failed to deliver under the compromise agreement, and when plaintiffs, at the end of October, requested an immediate answer as to why no delivery had been made, defendant sent a telegram on October 27, 1943, addressed to Pan American Food Company: "We have been trying to ship you tomato paste as per friendly settlement but the government is taking every can of paste we can pack and do not want to give us any relief. * * *"

Plaintiffs also contend that construed in the light of the purposes it was designed to serve and the meaning that traders may reasonably be expected to give its terms (Civ.Code, secs. 1643, 1644, 1647, 1648; Code Civ.Proc. secs. 1860, 1865; In Re City and County of San Francisco, 191 Cal. 172, 177, 215 P. 549; Cohn v. Cohn, 20 Cal.2d 65, 69, 123 P.2d 833; Stein v. Archibald, 151 Cal. 220, 223, 90 P. 536; Anderson v. La Rinconada Country Club, 4 Cal.App.2d 197, 200, 40 P.2d 571; Nelson v. Dutton, 63 Cal.App. 717, 722, 220 P. 12; see Restatement, Contracts, sec. 236; 6 Cal.Jur. 271; 17 C.J.S. Contracts, § 319, p. 739), the contract did not prohibit an assignment of the contract rights to the sole stockholders of the corporation who continued its business upon its dissolution and the distribution of its assets to its stockholders.

[9-11] "Where a bilateral contract in terms forbids assignment, it becomes a matter of interpretation as to what is meant. Is it intended that a duty under the contract shall not be delegated, or is it intended that a right shall not be assigned, or are both prohibitions intended?" 2 Williston, Contracts, Rev.Ed. 1217. Even if it is assumed that the prohibition against assignments relates to rights rather than duties, it does not necessarily apply to all claims under the contract or to all transfers of the contract rights. It is established that in the absence of language to the contrary in the contract, a provision against assignment does not govern claims for money due or claims for money damages for nonperformance (see cases cited, 182 P.2d p. 185); that a covenant against assignment in a lease is not broken by changes in the firm of the lessee incident to the admission of a new partner or the withdrawal of an old partner or by the dissolution of a partnership and transfer of the rights under the lease with all other assets of the partnership to one of the partners (Safeway Stores Inc. v. Buhlinger, 85 Cal.App. 717, 719, 259 P. 1013; Adelstein v. Greenberg, 77 Cal.App. 548, 553, 247 P. 520; Spangler v. Spangler, 11 Cal. App. 321, 323, 104 P. 995; Randol v. Scott, 110 Cal. 590, 594, 42 P. 976; Roosevelt v. Hopkins, 33 N.Y. 81, 82; Morris Glick, Inc. v. Grubman, Sup., 56 N.Y.S.2d 324, 326; Paul Pleating & Stitching Co. Inc. v. Levine, 137 Misc. 82, 242 N.Y.S. 729, 733; Galligan & Co. v. P. S. M. Inc., 116 Misc. 754, 191 N.Y.S. 523, 526; Miller v. Pond, 214 Mich. 186, 183 N.W. 24, 17 A.L.R. 179; Burleson v. Blankenship, 193 Wash. 547, 76 P.2d 614; Hunt v. Shell Oil Co., 10 Cir., 116 F.2d 598, 600; Boyd v. Fraternity Hall Ass'n, 16 Ill.App. 574); that a provision against assignment in a contract or lease does not preclude a transfer of the rights thereunder by operation of law (California Packing Corp. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 64 A. L.R. 1412; Farnum v. Hefner, 79 Cal. 575, 581, 21 P. 955, 12 Am.St.Rep. 174; Gazlay v. Williams, 210 U.S. 41, 47, 28 S.Ct. 687, 52 L.Ed. 950; Francis v. Ferguson, 246 N.Y. 516, 159 N.E. 416, 55 A.L.R. 982; see, 4 Am.Jur. 284); and that if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the nonassignability of the contract. Model Baking Co. v. Dittman, Tex.Civ.App., 266 S.W. 802, 803; Walker v. Mason, 272 Pa. 315, 116 A. 305; Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 617, 92 S.W. 1104, 9 L.R.A.,N.S., 979; Fisher v. Berg, 158 Wash. 176, 179, 290 P. 984; Gulf States Creosoting v. Loving, 4 Cir., 120 F.2d 195, 199; see 6 C.J.S. Assignments, § 26, p. 1075.

[12] No interest of the seller would be served by preventing the rights under this contract for the sale of standard goods from passing to a copartnership continuing the business of the corporation formed by its sole stockholders, who were entitled to the assets of the corporation upon its dissolution. Civ.Code, sec. 401a; N.Y. General Corporation Law, Consul.Laws, c. 23, sec. 117; North Hollywood Mortgage Co. v. North American Bond & Mortgage Co., 137 Cal.App. 180, 186, 30 P.2d 446; see, Capuccio v. Caire, 189 Cal. 514, 526, 209 P. 367; 97 A.L.R. 479; 47 A.L.R. 1355. Since the assets of a dissolved corporation can only be distributed to the shareholders subject to the rights of creditors of the corporation, the assets of the corporation remained subject

to an equitable charge for all debts owed by the corporation (see Civ.Code, sec. 402; Estate of Scrimger, 188 Cal. 158, 166, 206 P. 65; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 354, 181 P. 780; 16 Fletcher, Cyc. Corporations, Perm.Ed., secs. 8127, 8161; Ballantine, Corporations, Rev.Ed., 723; see 97 A.L.R. 480), and its shareholders who continued the business as a copartnership became personally liable to the creditors of the corporation on existing contracts. National Union Bank of Watertown v. Landon, 45 N.Y. 410; Steele v. Stanley, 237 Ky. 517, 35 S.W.2d 867; 16 Fletcher, Ibid. sec. 8132. Nor under modern statutes does the dissolution of the corporation terminate its ability to enforce a contract for the delivery of goods. Civ.Code, sec. 399; New York General Corporation Law, sec. 29; Stentor Electric Mfg. Co. v. Klaxon Co., 3 Cir., 115 F.2d 268; United States v. Safeway Stores, 10 Cir., 140 F.2d 834, 836, 838; I. Kalfuss Co. v. Ad Press, 184 Misc. 285, 53 N.Y.S.2d 496; People ex rel. Balbrook Realty Co. v. Mills, Sup., 54 N.Y.S.2d 244, aff'd 269 App.Div. 743, 54 N.Y.S.2d 707; 1 White, New York Corporations, 960, note 18.3 to sec. 29, General Corporation Law; see also Marcus, Suability of Dissolved Corporations, 58 Harv.L.Rev. 675; Ballantine, Corporations, Rev.Ed. 727–729; 13 Am.Jur. 1207; 16 Fletcher, Ibid. secs. 8170–8172; 19 C.J.S. Corporations, §§ 1727–1735, pp. 1485–1501; 97 A.L.R. 496; 47 A.L.R. 1548. If the dissolved corporation had brought an action for the delivery of the goods, the real parties in interest would have been its shareholders, and the purchase price would have been payable by the shareholders out of the assets of the corporation distributed to them or out of their other property. To require an action to be brought under such circumstances by the dissolved corporation rather than by the copartnership formed by its shareholders, which owns all the assets of the corporation and carries on its business, is to require compliance with a shallow formality that serves no substantial interest of the seller. The seller's financial interests were fully protected. The contract called for delivery "F. O. B. Pacific Coast rail shipping point", and provided that the purchase price was to be paid in cash upon delivery of the documents securing control of the merchandise. In addition, the contract also provided that "If during the life of this agreement the financial responsibility of the buyer becomes impaired * * * cash payment in advance with regular discount may be demanded by seller before further shipments are made." Thus performance of the contract involved only the receiving of money by defendant, not to be compared with fiduciary services such as were promised by the dissolved corporation in New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 73 N.E. 48, on which defendant relies, or with other services requiring special skill, capacity or taste.

[13-16] We have considered defendant's contention that notice of appeal was not filed by plaintiffs within the period of 60 days after entry of judgment as required by Rule 2(a) of the Rules on Appeal. Plaintiffs' petition was heard by the superior court on September 15, 1944. After oral argument and submission of briefs, the court on October 21, 1944, announced "that said petition be and the same is hereby denied and the Defendant's motion for dismissal is granted." The record does not reveal when this order was entered in the minutes. On October 27th the court made another order that defendant prepare and submit findings of fact and conclusions of law. On January 5, 1945, the court heard the matter for the purpose of settling the findings and adopted defendant's findings with immaterial changes. The minutes, after stating the order, recite: "Thereupon the Respondent objected to the signing or filing of any Findings of Fact and Conclusions of Law or any Judgment or Decision other than to set aside the Court's previous order directing preparation of Findings and said objection was overruled on the ground that the order of October 21, 1944, was intended solely to indicate the opinion of the Court and on the further ground that proposed Findings of Fact and Conclusions of Law were submitted by Respondent on November 16th

1944." The parties agree that the notice of appeal was filed within the prescribed period, if the time did not start to run from the date when the order of October 21, 1944 was entered in the minutes. It is settled that where findings are essential there is no rendition of final judgment until findings are signed and filed. Supple v. Luckenbach, 12 Cal.2d 319, 84 P.2d 52. A proceeding under section 1282 of the Code of Civil Procedure, although in form a special proceeding, is in substance a suit in equity for specific performance of a contract to arbitrate. See De Garmo v. Goldman, 19 Cal.2d 755, 759, 123 P.2d 1; California Prune & Apricot Growers' Ass'n v. Catz American Co., 9 Cir., 60 F.2d 788, 790, 85 A.L.R. 1117; Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124, 44 S.Ct. 274, 68 L.Ed. 582; Nippon Ki-Ito Kaisha v. Ewing-Thomas Corp., 313 Pa. 442, 170 A. 286, 93 A.L.R. 1067; Matter of Berkovitz v. Arbid & Houlberg, 230 N.Y. 261, 269, 130 N.E. 288; see 3 Am.Jur. 912. When the court in a contested case decides whether or not a claimant has a right to specific performance of a contract to arbitrate, such decision requires findings like any other determination of an equity case. Holland v. Kelly, 177 Cal. 43, 45, 169 P. 1000; see 24 Cal.Jur. 933; 10 Cal. Jur.Ten-Year Supp. 737. In any event section 1282 contemplates findings by the court. It provides: "If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

The judgment is reversed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

EDMONDS, Justice (dissenting).

As I read the record in this case, the evidence shows that there was no breach of the contract by the seller prior to the assignment, the seller did not waive his right to object to the validity of the assignment, and the assignment is one prohibited by the express terms of the contract. Furthermore, the authorities clearly establish that the issue of assignability is not one subject to arbitration but is a question for judicial determination. Under such circumstances there could be no waiver of a right to arbitration.

Although I agree that a general nonassignability provision, such as is found in the contract here in controversy, does not preclude an assignment of a chose in action for breach of contract, the present case does not fall within this rule because there is no proof of a breach of the contract by the seller prior to the assignment. Assuming that, by the terms of the agreement, the seller could determine the date of delivery, according to the correspondence between the parties, the seller did not decide to make any delivery before December 29th except a limited one which was rejected by the partnership. And although in the letter of December 1, 1942, the seller stated that it could not make delivery as agreed, this statement does not justify the conclusion, as a matter of law, that the canner then determined to breach the contract. The most that may be said is that the latter is susceptible of such an inference. On the other hand, the letter reasonably may be read as a statement by the seller agreeing to make future deliveries as soon as practicable and within a reasonable time. Under such circumstances, the findings of the trial court must be upheld. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, stands only for the rule that if the court has before it for interpretation only the instrument whose terms are in controversy, such as a contract or a will, an appellate court is not bound by the construction of the trial court.

There are other reasons for denying the partnership relief upon the theory that a breach of contract occurred prior to the assignment. It is conceded that the parties submitted the issue as to whether the assignment is valid to the trial court "without reservation". Upon the partners' theory of their rights, necessarily included

in that issue is the question as to whether performance by the seller prior to the assignment was excused. Clearly the contract's provision as to delays caused by war excused the seller's failure to deliver and, therefore, prevented or excused a breach of contract.

Furthermore, assuming that the corporation transferred a chose in action for breach of contract, the partnership's remedy would be an action for damages and not a proceeding to enforce an agreement to arbitrate. The partners are entirely different parties from the corporation with which the contract was made, and the assignment of the chose in action did not transfer to them the corporation's right to compel arbitration.

The second ground for the decision is that the seller waived its rights under the nonassignability clause by entering into negotiations for a compromise and making a compromise of the claim for damages for nonperformance. Evidence is summarized in the opinion which indicates that the seller waived its rights in this regard. But a careful reading of the correspondence clearly shows that the canner did not intend to waive its rights under the nonassignability clause.

In its first letter replying to the demands of counsel for the partnership, the seller's attorney stated, under date of June 10, 1943, that "We have not yet had an opportunity to assemble all the facts surrounding this matter", and he expressed the desire of his client to keep the good will of its customers. About three weeks later he wrote that "* * * after a discussion of the facts, we are forced to the conclusion that your client has no cause of action in this matter." Shortly thereafter, the seller offered to enter into a "new contract" and the partners agreed to this disposition of the controversy.

But the terms of the "new contract" were never agreed upon by the parties. The negotiations carried on into September when the partners stated that they would accept "* * * 1-1/2 cars of tomato paste in No. 10 containers at the prevailing market price provided delivery is made prior to the end of September, 1943." In their letter they added: "You, of course, will understand that our offer to settle upon this basis is without prejudice to our rights, in the event that your client does not make the delivery prior to the end of September." Confirmation of this offer was requested, but the seller, by a telegram dated October 27, 1943, rejected the proposal. The partnership then made a demand for arbitration. The seller replied that the contract was not assignable but it expressed a willingness to arbitrate with the corporation.

This correspondence shows, without conflict, that the seller did not waive its rights under the nonassignability clause. It repeatedly and consistently took the position that the partnership had no rights by virtue of the assignment. The offer to deal with the partnership related only, in the express words of the seller, to the entering into of a "new contract" between the parties. This "new contract" was never consummated. And if the correspondence reasonably is susceptible of the contrary interpretation that there was waiver, it constitutes evidence from which conflicting inferences may be drawn. This conflict was resolved by the trial judge in findings which declare: "That it is not true that since the dissolution of * * * [the corporation], [the seller] * * * has repeatedly or at all recognized or dealt with * * * [the partnership] * * * as the owner of said contract", and, "That * * * [the seller] * * * never at any time consented to any assignment of said contract."

The decision reversing the judgment is also placed upon the ground that the rights of the seller are not affected by the nonassignability clause of the contract when a corporation is the buyer and upon its dissolution the contract rights are assigned to the shareholders who continue the business of the corporation as copartners. I cannot concur in that conclusion. Furthermore, the partnership would not have had the right to arbitrate the issue as to assignability, even if there had been no waiver.

A well-established rule is that a contract is not assignable where the parties expressly stipulate to the contrary. La Rue v. Groezinger, 84 Cal. 281, 283, 24 P.

42, 18 Am.St.Rep. 179; Stein v. Cobb, 38 Cal.App.2d 8, 11, 100 P.2d 358; Murphy v. Luthy Battery Co., 74 Cal.App. 68, 74, 239 P. 341; 2 Williston, Contracts, Rev. Ed., sec. 422; Rest., Contracts, sec. 151; 4 Am.Jur. 234, 235; 3 Cal.Jur. 239. According to the Restatement, "A right may be the subject of effective assignment unless, (a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance, or (b) the assignment is forbidden by statute or by the policy of the common law, or (c) the assignment is prohibited by the contract creating the right." Rest., Contracts, sec. 151; see 4 Am.Jur. 235. The effect of a nonassignability clause is stated by Williston as follows: "In an agreement to convey real estate it is not unusual to provide that the vendee shall not assign his right to a conveyance, and the provision is usually upheld; so, likewise, of a provision in a contract to sell goods that the buyer shall not assign his right." 2 Williston, Contracts, Rev.Ed., sec. 422, p. 1214. And closely in point with the case now under review is Niagara Fire Extinguisher Co. v. Hibbard, 7 Cir., 179 F. 844, holding that the plaintiff, which took by bill of sale from another corporation, afterwards dissolved, all of its property, but without assuming any of the liabilities of the grantor, was not the legal successor of such grantor. The grantee corporation, said the court, did not succeed to the former's rights under a contract granting it a license, which, by the terms of the contract, was not assignable without the consent of the other contracting party. See also Dunkley Co. v. California Packing Corp., D.C., 277 F. 989; Burck v. Taylor, 152 U.S. 634, 14 S.Ct. 696, 38 L. Ed. 578.

The majority opinion also, in effect, disregards the corporate entity. This cannot be done unless the "observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence." Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, 17 P.2d 709, 711; see Dos Pueblos Ranch & Improvement Co. v. Ellis, 8 Cal.2d 617, 67 P.2d 340; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641. Nor may the stockholders disregard the fiction; only third persons dealing with the corporation to their detriment have the right to invoke that doctrine. Watson v. Commonwealth Ins. Co. of New York, 8 Cal.2d 61, 63 P.2d 295.

In New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 73 N.E. 48, 52, a contract owned by a corporation before dissolution was assigned to a reorganized corporation having the same stockholders. The New York Supreme Court held that, in effect, there was no assignment; the reorganization of a corporation did not prevent the new company from succeeding to all the rights and liabilities arising under contracts of the old organization. However, the Court of Appeal declared: "From this [conclusion] we wholly dissent. The plaintiff was not only technically but substantially a different entity from its predecessor. * * * The defendant the Kidder Company could not be obliged to intrust its money collected on the sale of the presses to the responsibility of an entirely different corporation from that with which it had contracted, and we hold that the contract could not be assigned to the plaintiff without the assent of the other party to it."

Accordingly, when, as in the present case, the contract of the parties includes a provision prohibiting assignment, their agreement in that regard should be upheld and enforced. As the court said in City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N.W. 859, 860, "* * * it is needless for us to speculate on the motives for the * * * action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid, and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be,

it seems to us, an inexcusable perversion of its terms."

The rule that a provision prohibiting assignment does not preclude a transfer by operation of law cannot aid Trubowitch and his associates. The assignment relied upon by them was made in connection with the voluntary dissolution of the corporation in which they were the sole stockholders. And not one of the cases cited in the majority opinion supports the statement that if an assignment of contract rights results merely from a change in the legal form in which the business is conducted, the court may determine whether such a transfer affects the interests of the parties to be protected by the prohibition against such action. Each of these decisions concerns a contract having no non-assignability clause. And most of them, by implication at least, recognize the rule to be that, if a contract contains a stipulation against assignment, it ordinarily prevents the assignment of contract rights from one legal form of business to another.

Nor are the cases relating to an assignment of a lease controlling. They concern the rule that a condition involving a forfeiture of rights under a lease must be strictly interpreted against the party for whose benefit it is created. No forfeiture of rights is involved in the present case. Furthermore, in Randol v. Scott, 110 Cal. 590, 42 P. 976, the only decision by this court relied upon to support the reversal of the judgment in favor of the sellers, the provision there construed, it was said, must be presumed to mean that the lease should not be assigned by the joint act of the lessees. An assignment by one joint lessee was held not to work a forfeiture of the lease. And in Safeway Stores, Inc. v. Buhlinger, 85 Cal.App. 717, 259 P. 1013, it was stated that the covenant against assignment is violated when made to a stranger to the original agreement, that is, not one of the joint lessees. In view of the legal fiction of corporate entity, the assignment by a corporation to a partnership is tantamount to the joint act of lessees, and, under the reasoning of the lease cases, the assignment should be declared invalid.

Moreover, whether the contract was assignable was an issue exclusively for the determination of the superior court; it could not have been submitted to arbitration even if the partnership had not waived its rights in this regard. As I read section 1282 of the Code of Civil Procedure, it requires a judicial decision as to all questions concerning the status of a contract whose provisions are in controversy. The statute provides: "* * * The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. * * * If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. * * *" Certainly, the requirement that the court shall summarily try any issue tendered by the parties as to "the making of the agreement or the default", compels a judicial determination as to whether an asserted assignment is valid. For if the assignment be invalid, there is no agreement upon which arbitration may be enforced, and there has been no default as to such provision.

This principle was stated and applied in Hanes v. Coffee, 212 Cal. 777, 300 P. 963, 964. The defendant, answering the allegations of the complaint to quiet title, set up an interest in the property under an oil lease. The lease required "any question of fact affecting the rights of the parties" to be settled by arbitration. The trial court struck out a pleaded defense that the action was premature because of the failure to invoke the provision for arbitration. The dispute concerning the title was not subject to arbitration in the first instance, this court held upon appeal from a judgment in favor of the plaintiff, because of the claim "that, by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or, if it did, is now terminated."

There can be no logical distinction drawn between the issues pleaded by the canning company in bar of Trubowitch's demand for arbitration and the situation of the parties in the Hanes case. Paraphrasing the language of this court in deciding the earlier controversy, if the allegations in regard to the assignment of the contract are sustained, the contract, including the arbitration provision, is wholly inoperative and Trubowitch can claim no rights thereunder. 212 Cal. at page 80, 300 P. 963. The district court of appeal has followed the Hanes case in three decisions. Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027; Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 108 P.2d 463; Friedlander v. Stanley Productions, 24 Cal. App.2d 677, 76 P.2d 145.

The field of arbitration is a limited one and presupposes a judicial determination of any disputed issue which concerns the question as to whether there is a valid contract between the parties at the time of the demand for arbitration. Professor Williston states the law in this regard as follows: "When the claim, however, is that the contract is invalid because of fraud, duress, failure of consideration, rescission, cancellation, accord and satisfaction, there is much doubt on the matter, but it is probable that the court will first pass on the issue of fraud, etc., even if the arbitration clause seems broad enough to allow the arbitrators themselves to pass on those issues of fraud." In a footnote to this statement, he adds: "It seems clear that the court should first pass on these issues before ordering arbitration. * * *" Williston on Contracts, sec. 1920, pp. 5370, 5371.

This rule rests upon fundamental principles. In the event that a defendant in resisting a proceeding to compel arbitration pleads a defense concerning the validity of the contract which would bar an award against him upon the merits of the controversy, a finding in his favor by arbitrators would destroy the only basis of their jurisdiction, which is a valid contract to arbitrate. Such an issue, therefore, requires judicial determination. "If the defendant is found correct in his contention, judgment for the defendant could be granted. If the finding is made for the plaintiff, unless the defendant has other issues to raise at the arbitration, judgment for the plaintiff should be given, or if the defendant is to raise issues other than his already presented defense at the arbitration, the arbitrators should be informed of the decision of the court on the motion to compel and be bound thereby." Phillips, The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding, 46 Harv.L.Rev. 1258, 1270–1272.

New York was the first state to enact a statute broadly allowing the arbitration of disputes otherwise requiring judicial determination. Its courts have refused to allow issues of fraud in the making of a contract to be decided by arbitration. In Application of Manufacturers Chemical Co., 259 App.Div. 321, 19 N.Y.S.2d 171, appeal dismissed 283 N.Y. 679, 28 N.E.2d 404; Manufacturers Chemical Co. v. Caswell, Strauss & Co., 287 N.Y. 840, 41 N.E. 2d 167, the defendant objected to arbitration upon the ground that the contract was obtained by fraud. The court held that the corporation had the right to a jury trial upon the question as to whether the contract was enforceable. It said [259 App.Div. 321, 19 N.Y.S.2d 173]: "While otherwise irrevocable, agreements to arbitrate are, nevertheless, subject to 'such grounds as exist at law or in equity for the revocation of any contract'; and where a contract may be avoided at law or in equity, a provision for arbitration may be resisted. (citing cases) * * * Our conclusion is that the petitioner is entitled to a trial with respect to the allegations in the petition concerning the making of the misrepresentations, their falsity and petitioner's reliance thereon. If proved, the petitioner is in a position where it rightfully has rescinded the contracts. If this be so, no arbitration may be had since the provision therefor in each contract would fall with the contract itself." Followed in Application of Jacoby, Sup., 33 N.Y.S.2d 621; see Cheney Bros. v. Joroco Dresses, 218 App.Div. 652, 219 N.Y.S. 96 (reversed on other grounds in 245 N.Y. 375, 157 N.E. 272); In re Exeter Mfg. Co., 254 App.Div. 496, 5 N.Y.S.2d 438

The position of the canning company in the present case is substantially the same as that taken by the defendant in Japan Cotton Trading Co. v. Farber, 233 App. Div. 354, 253 N.Y.S. 290, 292. The parties had made a contract which included provisions by which they agreed to submit to arbitration any differences between them. Farber pleaded, in defense of the right to arbitration, an asserted accord and satisfaction. The court held that this issue must first be determined in a trial by jury, saying: "If the compromise agreement or settlement shall be found to be as contended for by Farber, of course, no arbitration may be had, for the agreements calling for such were superseded by the terms of the settlement. If, on the other hand, the preliminary issues are determined in favor of Trading Company, arbitration well might be compelled * * *." See In re Worcester Silk Mills Corporation, D.C., 50 F.2d 966.

Each of these cases stands for the proposition that in every proceeding for the enforcement of a contract by which the parties have agreed to the determination by arbitration of disputes arising under it, a plea of the invalidity of the contract at the time of the demand entitles the defendant to a judicial trial of that issue. To imply that this issue may be determined by arbitration is contrary to the express terms of the statute.

For these reasons, I would affirm the judgment.

SCHAUER and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.



30 Cal.2d 372

ALDER et al. v. DRUDIS et al.
L. A. 19357.

Supreme Court of California, in Bank.
June 26, 1947.

Rehearing Denied July 24, 1947.

1. Contracts ⇐99(3)

Where defendants filed cross-complaint seeking rescission of agreement for development and commercializing of polyscope for producing three-dimensional motion pictures through a corporation, on ground of fraud and misrepresentation, findings favorable to plaintiffs on issues of fraud and misrepresentation were supported by evidence.

2. Contracts ⇐313(2)

Plaintiffs had choice of accepting defendants' offer of rescission of contract or of treating offer and accompanying conduct as an anticipatory breach or repudiation of contract.

3. Contracts ⇐321(1)

One who has been injured by breach of contract may treat contract as rescinded and may recover on quantum meruit so far as he has performed, or he may keep contract alive, for benefit of both parties, being at all times ready and able to perform, or he may treat repudiation as putting an end to contract for all purposes of performance, and sue for profits he would have realized if he had not been prevented from performing.

4. Contracts ⇐313(2)

Where plaintiffs elected to treat anticipatory breach as putting an end to contract for all purposes of performance, they could sue for damages.

5. Damages ⇐11

Where plaintiffs elected to treat defendants' anticipatory breach as putting an end to contract under which plaintiffs' profits would consist of dividends declared in favor of shareholders of proposed corporation for development and commercializing of polyscope but commercial possibilities of the polyscope were uncertain, any award of damages would have been nominal. Civ.Code, §§ 3300, 3301, 3358, 3359.

6. Contracts ⇐324(1)

The remedy of restitution will be granted in certain circumstances as an alternative to an award of damages for breach of contract.

7. Election of remedies ⇐3(1)

Damages for breach of contract and restitution are alternative remedies and an election to pursue one is a bar to invoking the other.

8. Cancellation of instruments ⇐55

Where defendants breached contract for development and commercializing of polyscopes, in granting to plaintiffs remedy of restitution and in ordering the delivery to them of the polyscopes and letters patent covering the polyscopes, court should have made decree for specific restitution, conditional on return by plaintiffs to defendants of money received from defendants.

9. Cancellation of Instruments ⇐24(1)

The purpose of restitution as remedy for breach of contract is restoration of status quo ante as far as is practicable, and in absence of qualifying circumstances, plaintiff must return any consideration he has received in order to obtain specific restitution. Civ.Code, §§ 1691(2), 3408.

10. Joint adventures ⇐5(1)

Where plaintiffs delivered polyscopes to defendants pursuant to joint enterprise contract for development and commercializing of polyscopes, on plaintiffs' electing to treat defendants' attempted rescission as an anticipatory breach, plaintiffs who made no offer to return amounts received from defendants under contract were not entitled to relief on first cause of action in claim and delivery for possession of the polyscopes and damages, for unlawful withholding.

11. Election of remedies ⇐3(3)

Plaintiffs could not recover on first cause of action in claim and delivery on theory that contract was eliminated because of defendants' anticipatory breach and at same time recover on second cause of action on theory that contractual relations still existed for purpose of securing damages or restitution.

12. Contracts ⇐318
Trusts ⇐249

Where a plaintiff was both a trustor and trustee under trust created by contract but plaintiffs elected to treat defendants' attempted rescission as an anticipatory breach, the contract was terminated for all purposes except for such recovery, and fact that trustor-trustee sued in individual capacity rather than in trust capacity, did not preclude recovery.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action in claim and delivery and for declaratory relief by William F. Alder and others against Jose Drudis and another, wherein defendants filed a cross-complaint against plaintiffs and Frederick G. Stoehr and another. From adverse judgments, the defendants and cross-complainants appeal.

Reversed and remanded.

Prior opinion, 170 P.2d 515.

Marcus L. Roberts in pro. per., Geo. W. Rochester, John W. Preston and John W. Preston, Jr., all of Los Angeles, for appellants.

Conroy & Conroy, Edward L. Conroy, Frederick G. Stoehr, Chambers & Lyman and Robert Chambers, all of Los Angeles, for respondents.

CARTER, Justice.

In this action in claim and delivery and for declaratory relief, with a cross-complaint raising issues of fraud and misrepresentation, defendants and cross-complainants Drudis and Roberts appeal from an adverse judgment.

In 1941 plaintiff William F. Alder, an inventor, was the holder of United States letters patent on a device for producing third dimensional motion pictures, known as a polyscope. Plaintiff McMahon, in return for an interest in the patent, was engaged in efforts to develop and commercialize the device. Plans were under consideration for the organization of a development corporation and sale of its stock. One John H. Morton, a possible investor, discussed the advisability of putting money in the project with his landlord, an attorney named Marcus L. Roberts. Mr. Roberts immediately expressed a desire to investigate the matter with the thought that the development might be entirely financed by one Jose Drudis.

Negotiations followed which led to the simultaneous execution on December 17, 1941, of two written agreements, which are to be considered as forming a single contract. One writing, executed by Alder and his wife and McMahon, recites that the

Alders are the sole owners of letters patent dated June 6, 1939, and that McMahon is desirous of acquiring the entire interest in the letters patent as trustee for himself, Drudis, the Alders, and others, for the purpose of forming a corporation and transferring the letters patent to it in exchange for stock as provided in a supplemental agreement, the Alders to receive one-tenth of the nonassessable stock. Following these recitals the writing provides that in consideration of $5,000 paid by Drudis and other considerations received from McMahon, the Alders do sell, assign, and transfer to McMahon as trustee, the whole right, title, and interest in the letters patent, subject to the obligation of McMahon to assign and transfer said letters to the corporation when formed. As a further part of the consideration it is also agreed that McMahon is to receive from the Alders, for the same trust use and purpose, all existing apparatuses of the patent, together with all drawings and dyes for manufacturing same, and all renewals, extensions, or reissues of the patent; also any further patents applied for by the Alders, and any improvements of or concerning the apparatus.

The second or supplemental writing refers to the terms of the first and the $5,000 there mentioned, and recites the willingness of Drudis to advance that sum and to pay into a corporation to be formed an additional sum for a beneficiary interest in the patent. It then provides as follows: 1. That Drudis will pay Alder $5,000. 2. That McMahon will take an assignment of the letters patent from the Alders and will hold it in trust, and thereafter will immediately cooperate with Drudis in forming a corporation. That when the corporation is formed McMahon will transfer to it the letters patent and all other things received from the Alders. 3. That the Alders will receive one-tenth of the stock issued by the corporation, Drudis 25%, Roberts 12½%, and Morton 12½%. (There is no provision for issuance of any stock to McMahon or for disposition of the remaining 40%.) 4. That Drudis will advance money for incorporation and will either pay in or make available for the corporation's use the total sum of $20,000, made up partly of the $5,000 paid to the Alders, and an allowance of $2,000 to form the corporation. That it is agreed that Drudis will receive either preferential stock in the corporation or the stockholders will assign all earnings and dividends declared, so that, other than the Alders, none of the stockholders except Drudis will receive any earnings, profits, or dividends until such time as he shall receive $20,000, after which McMahon will receive $7,500. That thereafter the dividends will be paid in accordance with the shares of stock held by each stockholder. Lastly, it is agreed that McMahon will pool and vote his stock with Drudis; that McMahon will be president of the corporation and Roberts the secretary-treasurer.

In the negotiations leading to the execution of these documents and throughout all proceedings thereafter Roberts was acting as attorney and agent of Drudis. Drudis paid $5,000 to the Alders upon execution of the contract, and the letters patent were handed to Roberts. Subsequently McMahon telephoned Roberts stating that it was advisable to move the polyscopes from Pasadena to Hollywood, where they would be more accessible, and that he was looking for a place to keep them. Roberts stated that he had plenty of room. He called for the devices about December 27, 1941, and placed them in his home where the parties could examine them and take tests. Later, with acquiescence of all, he took them to the Acme Tool Company to be redesigned. About two and a half months later he got them back and had them until they were produced in court on the trial of the present action.

Roberts proceeded with steps toward incorporation and about January 6, 1942, filed for record in Los Angeles County, articles of incorporation under the name of Third Dimensional Picture Corporation. The Alders and McMahon claim that they were not told of this action. About January 19th Roberts consulted the attorneys who had procured the letters patent for Alder regarding the contemplated changes in the polyscope. This interview, followed by an adverse report from the attorneys and further inquiry by Roberts indicated to him that he had been misled by fraud and deceit on the part of the Alders and Mc-

Mahon, in that the basic idea underlying the invention had been the subject of prior patents, of which he was unaware, and the polyscope possibly could be redesigned in such fashion as not to infringe the Alder patent.

About January 20th, at a stormy interview, Roberts gave written notice of rescission. He also telegraphed Alder demanding a return of the $5,000 paid him. On January 23rd, on behalf of himself and Drudis, he gave notice to the attorney for the Alders and McMahon of election to rescind the contract on the ground that plaintiffs were guilty of fraud and deceit in its procurement. This writing made claim for Alder's repayment of the $5,000 to Drudis, and contained an offer to restore all parties to their status quo and to return all things which had come into the possession of Roberts and Drudis. Upon rejection of the demand Roberts, on January 29th, filed a suit against Alder et al., in the superior court, based upon charges of fraud. After the case had been on trial for seven days, but before judgment, it was dismissed by Roberts.

Meanwhile, and on January 26th, and thereafter plaintiffs demanded possession of the polyscopes. In June, 1943, they brought the present action in claim and delivery and for declaratory relief against Drudis and Roberts. Count one, in claim and delivery, alleged that plaintiffs were the owners of the polyscopes and letters patent; that since January 26, 1942, defendants had wrongfully withheld and retained possession of them, to plaintiffs' damage to date in the sum of $36,000, and continuing damage in the sum of $2,000 a month; and that the reasonable value of the property was approximately $50,000. The prayer of this count was for possession of the property, or its reasonable value, together with charges for the reasonable value of the use of the property during the time of wrongful withholding.

Count two was for declaratory relief. It alleged the making of the written agreement, defendants' refusal to perform after January 26, 1942, and plaintiffs' contention that by virtue of defendants' breach they had waived and terminated all rights under the agreement and it should be cancelled. The existence of an actual controversy was also alleged, with a prayer that the court determine and adjudge the rights and liabilities of the parties under the terms of the agreement.

To this pleading defendants responded with an answer and a cross-complaint, bringing in as additional parties cross-defendant the attorney for the Alders and Morton, and seeking rescission of the agreement for fraud and deceit, return of the $5,000, or as an alternative to rescission, damages in the sum of $10,000.

The case, on issues joined under plaintiffs' first cause of action in claim and delivery, was tried before a jury which returned a verdict in favor of plaintiffs for possession of the polyscopes and for $20,000 damages. On issues joined under the cross-complaint the cause was heard before a jury sitting in an advisory capacity, and separate advisory verdicts were returned in favor of each of the cross-defendants. As to the second cause of action, which was for declaratory relief, the cause was heard by the judge sitting without a jury.

At the close of the trial the court entered judgment on the verdict under the first cause of action that plaintiffs recover possession of the polyscopes from defendants, together with $20,000 damages for the unlawful withholding, and costs. On issues joined by the other pleadings, the court made findings in substance as follows:

The court found that after January 20, 1942, defendant Drudis continually failed to perform the written agreement and that it was breached by the two written notices of rescission; that no misrepresentation, deception, or concealment of any material fact was practiced by plaintiffs in their dealings with Drudis and Roberts, and that after January 20th said defendants were in default under the terms of the agreement. The court further found that about December 27, 1941, defendants, having already taken possession of the letters patent, took possession of the only two polyscopes in existence; that the polyscopes were not delivered to defendants because of the payment by Drudis of $5,000 under the written

agreement, but were delivered to defendants for safe-keeping and so that they would be conveniently situated for use in carrying out the terms of the agreement; that Drudis and Roberts had the patent and polyscopes in their possession until April, 1943, since which time they have been in the possession of Drudis. Other detailed findings for plaintiffs relate to respective allegations of fraud, the existence of a controversy between the parties relating to their rights and duties under the agreement, and the wrongful termination of the agreement by defendants.

Following the findings, the court entered a second judgment (which, with the first, is to be considered one judgment), wherein it decreed (1) As to the second cause of action, that defendants breached and violated the written agreement and terminated their rights under it, and as to them the agreement is cancelled; that plaintiffs have immediate possession of the polyscopes and letters patent; and that defendants deliver them over; (2) As to the cross-complaint, that cross-complainants take nothing and that plaintiffs have costs.

The first contention made by defendants on their appeal from the judgment is that of insufficiency of the evidence to support the advisory verdicts and findings against them on the issues of misrepresentation, fraud and deceit. On these issues the evidence was conflicting. Defendants claimed that plaintiffs represented that the idea for the polyscope was basically and fully covered by the letters patent here in question and that the polyscope was the original instrument designed to produce third dimensional motion pictures by the means employed. Later defendants purportedly discovered that two prior patents had been issued for similar devices—that is, devices which also employed a moving picture camera, two mirrors with one mirror moving toward and away from another mirror in the course of the operation of the camera, and a picture taken by having the camera look into one of these mirrors and by varying the relative distance between the stationary mirror and the movable mirror, in an effort to produce a stereoscopic effect. The first prior, or original patent was obtained by a man named Cervenka in 1915, and it expired in 1932. The second prior patent was obtained about 1935 by Mr. Alder and one Merritt to whom he had made a one-half interest assignment as trustee, their device being known as the cinegraph. The polyscope patent here involved was obtained by Mr. Alder in 1939 and covered eleven claims for patentable refinements, improvements, or additions not found in the earlier devices. Defendants asserted that because of the prior patenting of the basic idea and concealment of that fact from them, and because of the necessity for redesigning the polyscope, they stood to receive nothing in return for their investment; that is, the basic idea passed into the public domain with expiration of the Cervenka patent and the claims for refinements and improvements granted by the polyscope patent could all be avoided in the redesigning of the device, so that that patent would not be infringed.

Evidence on behalf of plaintiffs was to the effect that the Cervenka patent was defective and that a machine made according to its specifications would be wholly unworkable; that the Alder-Merritt device or cinegraph was also useless commercially. There was evidence that defendants made an investigation of the polyscope patent before the contract with Alder was signed and before Drudis paid his money to Alder; also that at defendants' first meeting with Alder, Roberts announced that they had investigated and were satisfied. Test films, demonstrating the possibilities of the device and its third dimensional qualities, were shown to Drudis and Roberts before the contract was signed. The Cervenka and cinegraph patents were matters of public record and open to inspection and comparison by defendants before they entered into the transaction. Mr. Merritt, the owner of an interest in the cinegraph, was called as a witness. He made no claim that his patent was infringed by the polyscope patent, or that the cinegraph had been stabilized, or that it was other than useless commercially.

There was testimony that when defendants were first introduced to Alder at Alder's home near Santa Cruz, and before any discussion had taken place, Roberts in substance said, "Well, Mr. Alder, we have

come a long way to make this deal and I have a check for you for $5,000" ; that at the same time he started to reach for his pocket, whereupon Mr. Alder remarked, "Well, Mr. Roberts, I think there are a number of things that we should go into," thinking that Roberts "should hear all of the trials and tribulations that I had undergone in producing commercial stereoscopy, since 1911 practically continuous effort on my part, that I felt that he should hear all of that" ; but that Mr. Roberts said, "Never mind about that Mr. Alder, we have made our investigation, I have made a thorough investigation and I am quite satisfied and we needn't waste time because this has been a long trip and I am tired and I have got to go back to Hollywood tomorrow and I think we can waive all of that and get right down to the business of the evening; I have some papers here * * * that I have prepared myself and I want you to read them and sign them and then I will give you your check for the $5,000 * * *".

Mr. Alder testified that despite this discouragement, he insisted upon relating some of the details of his efforts to produce the polyscope; that his statement to Mr. Roberts occupied "probably forty continuous minutes," for he "was meticulously careful to explain every step * * * gone through in developing stereoscopy" because he realized that Mr. Roberts was a layman; but that Mr. Roberts finally interrupted his descriptions, reiterating that he had made his personal investigation, was thoroughly satisfied; that because the hour was getting late, he wanted to go into the matter of the contracts. He produced a cashier's check for $5,000 payable to Drudis. It was endorsed by Drudis and delivered to Alder, and the contracts were signed.

Defendants claimed to have been misled by a treatise given to them by McMahon entitled "A New Method of Adding Depth to Motion Pictures," and published by Professor Curtis R. Haupt, a recognized optical physicist. Plaintiffs deny that they represented this document as referring to the polyscope, and their denial is supported by the fact that the title page of the pamphlet shows that it was published in May, 1933, some months before the polyscope was constructed and patented.

The charge of misrepresentation by plaintiffs of the terms of Alder's agreement with McMahon is immaterial so far as defendants are concerned, since they purported to buy an interest in the polyscope and not the interest, if any, which McMahon was acquiring or had acquired from Alder. Likewise immaterial is the claim that it would have been a physical impossibility for Alder to have produced a sensation of depth in motion pictures by bodily weaving the camera back and forth. The material point was not how Alder originally conceived the thought of constructing a third dimensional motion picture machine but whether his idea resulted in a machine which would carry out his conception.

[1] In view of the substantial evidence favorable to plaintiffs on the issues of fraud and misrepresentation, it cannot be said that the trial court's findings on those issues are insufficiently supported. Complaint is made by defendants of alleged errors in charging the jury and in rulings on the admission of evidence. These contentions need not be separately discussed. No prejudice is shown.

Proceeding therefore from the premise that there was no fraud, misrepresentation, or deception in the procurement of the contract, it remains to be determined whether plaintiffs were entitled to the scope of relief accorded them by the judgment on the first cause of action—that they recover the possession of the two polyscopes and have $20,000 damages for the unlawful withholding thereof by defendants—and by the judgment on the second cause of action—decreeing that defendants breached the contract and terminated all their rights under it and as to them it should be cancelled; that plaintiffs should have immediate possession of the polyscopes and letters patent; that defendant Drudis should immediately deliver the same to plaintiffs; that no relief be given under the cross-complaint; and that plaintiffs have costs.

[2] Plaintiffs, in their election of the several remedies open to them, had the choice of accepting defendants' offer of

rescission of the contract (which would have given them an immediate return of their property upon their repayment to defendants of the $5000 received), or of treating the offer and the accompanying conduct as an anticipatory breach or repudiation of the contract. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 28–30, 142 P.2d 22; Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 51 P.2d 84; 4 Cal.Jur.Supp. pp. 196–9, § 274; Rest., Contracts, § 318. They took the latter course.

[3] It is well settled in this state that one who has been injured by a breach of contract has an election to pursue any of three remedies, to wit: "He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." Sobelman v. Maier, 203 Cal. 1, 262 P. 1087; McConnell v. Corona City Water Co., 149 Cal. 60, 64, 65, 85 P. 929, 930, 8 L.R.A.,N.S., 1171; Lemle v. Barry, 181 Cal. 1, 183 P. 150; see, also, House v. Piercy, 181 Cal. 247, 183 P. 807; 4 Cal.Jur. Supp. 196–199, § 274.

[4] The first remedy was of no avail to plaintiffs. As to the second remedy, plaintiffs made no effort to keep the contract alive for the benefit of all of the parties, or to procure the $13,000 needed for financing from other sources, or to proceed with the enterprise. It is evident that they elected to treat the anticipatory breach as putting an end to the contract for all purposes of performance. This being so, they were in a position to sue for damages. However, they made no direct claim to damages but instead sought declaratory relief, asking the court by their second cause of action, to "determine and adjudge the rights and liabilities of the parties under the terms of the written agreement." They also asked for any further relief to what they might be entitled.

[5, 6] Damages measured by the prospective profits to be derived from a successful promotion of the enterprise as finally reflected in the amounts which would come to plaintiffs individually as dividends declared in favor of the shareholders of the proposed corporation, were probably too speculative and conjectural for estimation, particularly in view of the evidence of uncertainty as to the commercial possibilities of the polyscope. At any rate they were not satisfactorily proved here. Any award made on this basis, therefore, would have been nominal. Civil Code, §§ 3300, 3301, 3358, 3359; Continental Car Na.-Var. Corporation v. Moseley, 24 Cal.2d 104, 148 P.2d 9; California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114; Lacy Mfg Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 574, 126 P.2d 644; 8 Cal.Jur. § 38, p. 777. Likewise, the value, if any, of the letters patent was undeterminable. The two polyscopes could have been duplicated at a construction cost of from $750 to $1000 each. Damages based upon the proportionate value to each shareholder of the $13,000 which defendants were to advance for financing would have been inadequate, since this would have given plaintiffs but a small sum and would have left them without patent or device. The trial court, therefore, concluded that damages would not afford an adequate remedy, and in lieu thereof it declared plaintiffs' right to a return of the polyscopes and letters patent and ordered delivery thereof to them. In other words, the trial court invoked the remedy of restitution for breach of contract, which in certain circumstances will be granted as an alternative to an award of damages.

The principle is declared in the Restatement, Contracts, p. 610, § 354, as follows: "If the performance received from the plaintiff by the defendant is the transfer of land, or of goods or choses in action of a unique character, and the defendant thereafter commits a total breach, the plaintiff can get a decree, on such terms as justice may require, for the specific restitution and retransfer of the property if the circumstances are such that other remedies are inadequate, and if (a) the

subject of the property still exists and the interests of innocent purchasers for value and of the defendant's creditors will not be unjustly affected; and (b) the facts are such as to make restitution an available remedy under the rules stated in the other Sections of this Topic, except that instead of the requirement of an offer to return the consideration as in § 349, the decree for specific restitution may be made conditional on such return or on payment of its value." As an illustration, the following is given (p. 614, number 7): "A transfers a patent right, with dies and tools, to B for the latter's promise to manufacture and to pay a royalty. B repudiates the contract and cannot respond in damages. A may be given a decree for restitution."

[7] Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other. Rest., Contracts, § 381, 384, pp. 712, 718. In 5 Williston on Contracts, Rev. Ed., sec. 1455, 1458, pp. 4064, 4075, it is said: "The right of rescission and restitution generally exists as an alternative remedy to an action for damages where there has been repudiation or a material breach of a contract, * * * This choice of remedies was not allowed by the early English law, and there are still many exceptions and inconsistencies in the application of the rule, * * * But where the transfer is of goods or choses in action of unique character, or of exclusive privileges such as patents and copyrights, specific restitution will generally be granted." See, also, DeMille Co. v. Casey, 121 Misc. 78, 201 N.Y.S. 20; Hansen v. Hall Mfg. Co., 196 Iowa 1, 193 N.W. 568; Dow v. Harkin, 67 N.H. 383, 29 A. 846 (patent and tools).

The doctrine has not been expressly declared in this state but there are a number of cases in accord. In Howlin v. Castro, 136 Cal. 605, 69 P. 432, the plaintiff placed a deed in escrow to be delivered to the defendant upon performance of his promise to care for and attend the plaintiff during his remaining years. Defendant failed to care for plaintiff, and the court ordered a redelivery of the deed to plaintiff. In land cases it has been held that the vendor is entitled to repossession of the premises where the vendee has abandoned them or has defaulted, and similarly restitution of lands and equipment has been decreed in oil and gas lease cases. These authorities are collected in the California Annotations to the Restatement, Contracts, sec. 354. See, for example, Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Champion Gold Min. Co. v. Champion Mines, 164 Cal. 205, 128 P. 315; Payne v. Neuval, 155 Cal. 46, 99 P. 476; Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 P. 296; McAdams v. Felkner, 140 Cal. 354, 73 P. 1064; Downing v. Rademacher, 133 Cal. 220, 65 P. 385, 85 Am.St.Rep. 160; Sledge v. Stolz, 41 Cal.App. 209, 182 P. 340; Coates v. Cleaves, 92 Cal. 427, 28 P. 580; Covington v. Lewis, 83 Cal.App. 8, 256 P. 277.

[8, 9] In granting to plaintiffs the remedy of restitution and in ordering the delivery to them of the polyscopes and letters patent, the court should have made its decree for this specific restitution conditional upon the return by plaintiffs to defendants of the $5,000 received. The purpose of restitution as a remedy for breach is the restoration of the status quo ante as far as is practicable, and in the absence of qualifying circumstances, the plaintiff must return any consideration he has received in order to obtain specific restitution. While there is no literal rescission of the contract, the result reached by the restitutionary remedy approximates that reached by rescission. It is not necessary that plaintiff should have made an offer to return the consideration, but the decree for specific restitution may be made conditional upon such return. Restatement, Contracts, sec. 349, p. 596; sec. 354, p. 611; 5 Williston on Contracts, Rev. Ed., sec. 1460A, pp. 4082, et seq. California authorities dealing with the rescission of contracts illustrate this rule. See cases collected in California Annotations to the Restatement, sec. 349, supra; Civil Code, secs. 1691(2), 3408.

For these reasons, the trial court properly limited its judgment on the second cause of action to a return by defendants to plaintiffs of the polyscopes and letters patent, but it erred in failing to condition

delivery upon a repayment by plaintiffs to defendants of the $5,000 received.

[10] The remaining question is whether plaintiffs were also entitled to the relief granted by the judgment on their first cause of action—possession of the two polyscopes and $20,000 damages for the unlawful withholding. In their complaint, plaintiffs entitled this cause as one in "claim and delivery". However, in their supplemental brief, their position is clarified by their response to questions propounded by this court. These two questions, among others, were asked: "Is the cause of action in claim and delivery (a provisional remedy) asserted as an aid to restitution and as an election to seek that relief rather than damages?"; "Or is the cause of action for claim and delivery asserted entirely apart from the existence of any claim under or for breach of the contract? If so, what is the basis for such claim to relief apart from any claim under the contract?"

Plaintiffs' reply is: "Because of the repudiation of the contract by the defendants, the plaintiffs treated it as at an end. A perfectly legal action on their part * * * Under this state of facts the plaintiffs had the following remedies: They could bring an action for damages for breach of contract; they could remain quiet and in the event that the defendants should bring an action against them they could then set up the breach of contract and the resulting damages in defense of such action. They elected to remain passive as to damages for breach of contract. The plaintiffs did avail themselves of the statutory remedy of claim and delivery to recover the polyscopes and, as authorized by the statute, they asked for the possession of their property and damages for its wrongful detention. The plaintiffs, unnecessarily we think, included a second cause of action for a declaration that the contracts were terminated. As we have seen, under the law applied to the acts of the parties, the contracts had been terminated and the court so held. The second cause of action may, therefore, be disregarded. There is no contention the contracts are not at an end."

This statement makes it clear that plaintiffs' first cause of action was not asserted as an aid to enforcement of the relief sought by their second cause. By their first cause they attempted to bring a simple suit for the recovery of property entrusted by them to another, a voluntary bailment, and asked damages for wrongful withholding, their theory being that the contract was at an end and eliminated from consideration. This theory of voluntary bailment is reflected in a finding of the trial court to the effect that the polyscopes were not delivered to the defendants because of their payment of $5000 under the contract, but were delivered to the defendants "for safe-keeping and so that said polyscopes would be conveniently situated for use in carrying out the terms of the said agreement between the parties."

The fallacy in plaintiffs' reasoning is that the termination of the contract by defendants' anticipatory breach did not, as plaintiffs seem to assume, operate of itself to restore the status which existed prior to the making of the contract. Neither did it convert transfers made by reason of the existence of the contract into transfers made as though no contract had ever existed. Upon the election to treat the attempted rescission as an anticipatory breach, the rights of the parties culminated and the contractual relation ceased to exist, except for the purpose of maintaining an action for the recovery of damages or for restitution.

Although it may be true, as the court found, that the polyscopes were not delivered to the defendants because of their payment of $5,000 under the contract, it is also true, as the court further found, that they were delivered for safe-keeping and so that they would be conveniently situated "for use in carrying out the terms" of the contract. The evidence shows beyond dispute that had there been no contract, there would have been no delivery of the polyscopes to defendants. The delivery was made in pursuance of the joint enterprise, and in fact one of the devices was taken by defendant Roberts to a concern for redesigning in furtherance of the objective sought to be accomplished by the con-

tracts. There is no evidence which would support the conclusion that the devices were placed with defendants as a voluntary bailment, for safe-keeping, entirely separate and apart from any purpose to be accomplished by the contract or from the existence of the contract. Up to the time of plaintiffs' demand for return of the polyscopes, defendants, as parties to the joint enterprise, had as much right to possession as did plaintiffs. Plaintiffs, in their demand made no offer to return the $5,000, and therefore the demand was ineffective to alter the situation. There is no showing that the defendants did not stand ready to return the machines upon repayment to them of the money advanced under the contract.

[11] Under these facts, as established by the evidence, plaintiffs are not entitled to relief on their first cause of action. There is no showing of a right in plaintiffs to possession of the property except upon the return by them to defendants of the $5,000. Neither is there proof of any wrongful withholding by defendants. Moreover, it is obvious that plaintiffs could not recover on the first cause of action on the theory that the contract was eliminated and at the same time recover on the second cause of action on the theory that the contractual relation still existed for the purpose of securing damages, or restitution.

[12] There is no merit in defendants' contention that McMahon can recover only as trustee, and he has failed to sue in that capacity. Although McMahon testified that he was both a trustor and the owner of the property as trustee under the trust created by the contract, the pleadings show that he appears as plaintiff herein in his individual capacity. The suit is simply one between the original parties to the contract to recover for an alleged breach, and the contract is terminated for all purposes except such recovery.

It is obvious from what we have said in the foregoing opinion that the judgment must be reversed and the cause remanded for further proceedings in the trial court. In view of the rules of law which we have announced as applicable to the facts of this case the parties may desire to amend their pleadings in order to seek the relief which may be accorded pursuant thereto and they should be permitted to do so.

The judgment is reversed.

SHENK, TRAYNOR, and SCHAUER, JJ., concur.



80 Cal.App.2d 778

PACIFIC EMPLOYERS INS. CO. v. DIGGS et al.

Civ. 13276.

District Court of Appeal, First District, Division 2, California.

July 9, 1947.

1. Insurance ⇐182

Where corporation employed general contractor and architect on cost plus basis for construction of race track, and insurer issuing workmen's compensation insurance treated corporation as only party insured, based its premiums on audits of payroll of corporation alone and sent no bill for payments to contractor and architect until after corporation had been ordered liquidated in bankruptcy, contractor and architect were not liable for premiums.

2. Insurance ⇐182

Evidence that general contractor employed by corporation on a cost plus basis for construction of race track requested a "rider" to policy of workmen's compensation insurance to cover contractor's own employees, did not imply that he thereby agreed to pay premiums covering employees of the corporation.

3. Insurance ⇐182

Where workmen's compensation policy issued at request of corporation, insuring corporation and general contractor and architect jointly "or" severally, by use of the word "or" instead of "and" disclosed an intention of insurer to cover contractor and architect severally only so far as they

had individual employees not on corporation's payroll, there was no obligation on their part to pay premiums for coverage based wholly on corporation's payroll after bankruptcy of corporation.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Pacific Employers Insurance Company (a corporation) against M. I. Diggs and J. A. Casson and others to recover premiums accruing on a policy of workmen's compensation insurance. From a judgment in favor of defendants, the plaintiff appeals.

Judgment affirmed.

W. N. Mullen and Earl B. Myers, both of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover premiums accruing on a policy of workmen's compensation insurance. The cause was tried to the court sitting without a jury and defendants had judgment on findings that the defendants were not responsible for any portion of the premiums. The appeal rests on these two grounds—that "the evidence is insufficient to support a judgment" and that "the findings of fact * * * do not support the conclusions of law."

The Golden Gate Turf Club executed a contract with Diggs, as supervising architect, and Casson, as supervisor of construction, for the construction of a race track on the Club's property in Albany. The Club procured from plaintiff a policy of insurance covering its employees and premiums were estimated on the payroll of the Club. Sometime after the Club became bankrupt the plaintiff asserted its claim against these defendants on the theory that they were jointly and severally liable for the payment of the premiums.

The trial court found that under a written contract Diggs was employed by the Club as its architect and Casson was employed as supervisor of construction and that they were not engaged in the construction of the race track in any other capacity; that the policy of insurance was issued at the request of the Club insuring " 'Golden Gate Turf Club, a corporation & M. I. Diggs & J. A. Casson, jointly or severally' insuring Golden Gate Turf Club, the defendant, M. I. Diggs, and the defendant, J. A. Casson, against claims which might be made upon them by reason of industrial injuries sustained by their joint employees, if any, engaged in the construction operations in connection with Golden Gate Turf Club; said policy also insured Golden Gate Turf Club against claims which might be made against it by reason of industrial injuries sustained as aforesaid, to the several employees of Golden Gate Turf Club; said policy also insured the defendant, M. I. Diggs, against claims which might be made against him by reason of industrial injuries, sustained as aforesaid, to his several employees; said policy also insured the defendant, J. A. Casson, against claims which might be made against him by reason of industrial injuries, sustained as aforesaid, to his several employees; * * *

"It is not a fact nor was it a part of said policy that the defendants, or either of them, promised to be responsible for or to pay any premiums due under said policy for work done in connection with said Golden Gate Turf Club or race track, or otherwise.

"As provided by the terms of said policy of workmen's compensation insurance, plaintiff, on or about the first day of January, 1941, and at various times prior thereto, caused an audit to be made of the books and payroll of the Golden Gate Turf Club. It is not a fact that at that time, or at any other times, plaintiff has made, or caused to be made, any audit or audits of the payrolls or books of the defendants, or either of them, nor is it a fact that the defendants, or either of them, had any payroll or any employees of any kind, either joint, or several, or general or special, in connection with the work done in the construction of Golden Gate Turf Club and said race track * * *."

It was also found that no account was stated between plaintiff and these defendants and that neither of them promised to pay any portion of the premiums.

[1] It must be conceded that if the evidence supports these findings the judgment must be affirmed. The evidence is not in substantial conflict. The contract for the construction of the race track was executed by the corporation under which Casson was employed as general contractor on a cost plus ten per cent basis. He hired the several employees, but the corporation reserved the right to discharge any one found objectionable. The corporation agreed to furnish all funds for payrolls and materials, bills to be paid monthly on audit. Diggs had a similar contract under which he agreed to provide architectural supervision. Both of the defendants agreed to take their compensation in stock of the corporation. Neither was carried on the corporation payrolls. From the beginning of operations the plaintiff treated the corporation as the only party insured, based its premiums on audits of the payroll of the corporation alone, and sent no bill or demand for the premiums to the defendants until April, 1942, after the corporation had been ordered liquidated in bankruptcy. Though the policy covered the period until February 5, 1941, it was cancelled by the plaintiff and returned without knowledge of either defendant.

This evidence is sufficient to support the findings and further elaboration is unnecessary. Appellant attacks the credibility of one of respondents and relies upon evidence which is in some slight conflict with what we have stated.

[2] Even if valid to the extent that respondents' individual employees were also covered (the undisputed evidence is that there were none) there is no evidence and no testimony which would have supported an inference that either respondent agreed to pay any portion of the premiums. The evidence that Casson requested a "rider" covering his own employees proves nothing more than that he sought individual coverage under the policy to be issued to the corporation. It does not imply that he thereby agreed to pay premiums covering the employees of the corporation. Directly in point are Schmitt v. Gripton, 77 Cal.App. 429, 247 P. 505; Reid v. State Bank, App.Term, 119 N.Y.S. 242.

[3] Much of the argument of appellant is based upon a misconception of the terms of the policy. It alleged in its complaint and states repeatedly in the briefs that the policy covered the corporation and the respondents jointly and severally. The terms of the policy are clear, as found by the trial court, covering the corporation and the respondents jointly or severally. The use of the word "or" instead of "and" discloses an intention of the insurer to cover the respondents severally only so far as they had individual employees not on the payroll of the corporation. Hence, assuming that the additional coverage of employees of respondents outside the corporation payroll were valid there is no obligation on their part to pay the premiums for coverage based wholly on the corporation's payroll. In re John B. Rose Co., 2 Cir., 275 F. 409.

Since the evidence conclusively shows that the respondents did not obligate themselves to pay any part of the premiums sued for, the conclusion followed properly that they were not bound.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



80 Cal.App.2d 787

WILBUR v. KEMP et al.

Civ. 15885.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

1. Trial ⚖395(3)

General fact findings by trial court that all allegations of complaint are untrue and that all allegations in answer are true constitute sufficiently specific findings as to all material issues in cause.

2. Work and labor ⚖28(2)

In action for money alleged to be due for labor performed and materials fur-

nished by plaintiff in construction of private road, evidence was sufficient to sustain trial court's finding that no money was due plaintiff.

3. Appeal and error ⇐1011(1)

An appellate court will disregard conflicting testimony in determining whether there is substantial evidence sustaining trial court's fact finding.

Appeal from Superior Court, Ventura County; Charles F. Blackstock, Judge.

Action by Roy Wilbur against Claus Kemp and others to recover money due for labor performed and materials furnished by plaintiff. Judgment for defendants, and plaintiff appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

McGee & Smith and John W. Watling, Jr., all of Santa Barbara, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover money alleged to be due for the performance of labor and the furnishing of materials, plaintiff appeals.

Disregarding conflicting evidence the record discloses substantial evidence to sustain these facts:

Plaintiff and defendant Mecham were partners in the ownership of a rod mill. Defendant Mecham introduced to plaintiff defendants Scott and Moffett, who knew where there was a mine which could be leased. On August 22, 1944, these four men entered into an agreement to secure a lease on the mine and organize a corporation. The parties were to receive the following number of shares of stock in the corporation: "Wilbur, 25% (1250 shares), Mecham, 25% (1250 shares), Scott, 10% (500 shares), Moffett 10% (500 shares)."

A lease was secured upon the mine for $600, $400 of this amount being paid by defendant Mecham, and $200 by plaintiff. Prior to the securing of the lease the parties had started to build a road to the mine about September 27, 1944. This road was completed about January 15, 1945. Plaintiff furnished most of the equipment and did most of the work on the road. He was assisted by defendant Scott and defendant Moffett who did the cooking for himself and his associates.

On February 16, 1945, a Nevada corporation was organized under the name of Condor Mines, Inc. The lease which had been obtained on the mine was assigned to the corporation and stock was issued to each of the parties as provided in the agreement mentioned above. In addition defendant Dibblee was sold 600 shares of treasury stock for the sum of $5,000 cash. Defendant Mecham sold 200 shares of his stock to a Mr. Kemp for $2,000. It is to be noted that Mr. Kemp was not connected with the venture in any way until after the corporation was formed. It was agreed that on and after April 1, 1945, plaintiff and defendants Moffett and Scott were to receive a salary of $200 per month. This sum was paid to each of these parties until August 1, 1945. Plaintiff, however, was not paid for the period from August 1 to August 16, 1945. About the latter date the corporation ran out of money and an emergency meeting was held on August 16, 1945, to determine what should be done about the corporation's debts. Plaintiff, defendants Kemp, Mecham and Dibblee were present at such meeting.

It was concluded by the parties present that the total debts of the corporation amounted to about $1,200, whereupon defendants Kemp, Mecham and Dibblee each agreed to loan the corporation $400 to pay its debts. Mr. Kemp was to act as trustee for the others. Such sums were advanced, except that Mr. Dibblee advanced only $325.

On November 15, 1945, plaintiff sold his 1,250 shares of stock in the corporation to defendant Kemp for the sum of $1,500. At the time of this transaction plaintiff stated that all his accounts with the corporation were settled and that he was paid up in full.

Thereafter on February 11, 1946, plaintiff filed the present complaint in the form of a common count for labor performed

and materials furnished to defendants. Defendants' amended answer (1) denied the material allegations of the complaint, (2) pleaded (a) payment in full, (b) the wrong choice of remedies, and (c) estoppel in pais. On the issues thus raised by the pleadings the trial court found in favor of defendants.

[1] These are the only two questions necessary for us to determine:

First: Are the trial court's findings sufficiently specific?

This question must be answered in the affirmative. The trial court made the following findings of fact: "That all of the allegations of the complaint are untrue and all of the allegations in the Amended Answer are true."

Findings in this form are sufficient. It is the rule that general findings to the effect that all the allegations of the complaint are untrue, and that all of the allegations in the answer are true constitutes a sufficiently specific finding as to all of the material issues in a cause. (Carey v. Brown, 58 Cal. 180, 184; Kendrick v. Gould, 51 Cal. App. 712, 717, 197 P. 681; Carr v. International Indemnity Co., 58 Cal.App. 614, 617, 209 P. 83.)

[2] Second: Was there substantial evidence to sustain the trial court's finding that there was not any sum of money due or owing to plaintiff?

This question must likewise be answered in the affirmative. Defendant Kemp gave the following testimony as to his conversation with plaintiff when he purchased Mr. Wilbur's stock in November of 1945; "I asked Mr. Wilbur if that settled all accounts of his with the corporation. I said I was putting up the money and I was buying him out and I certainly wanted to know what if any other obligations or what steps or what trouble I was facing or anything else, if anything. I asked him if he had any other claims at all. And he said, *'No, that pays me up in full. That is all there is.'* And that is when we raised the agreement up from $1000 to $1500." (Italics added.)

Likewise defendant Mecham in answer to questions of the trial court gave the following testimony:

"The Court: You paid him each two weeks up until that time? Why wasn't he entitled to be paid the last two weeks? A. We did the same with Mr. Moffett and Mr. Scott. They did the same thing, and they didn't get it either.

"The Court: Had they been paid right up to that time? A. Yes.

"The Court: They didn't get paid the last two weeks? A. They didn't get paid the last two weeks; all three didn't.

"The Court: Did all of you agree to take nothing for the last two weeks? A. Yes.

"Q. *Did Mr. Wilbur say he didn't expect to be paid for the last two weeks? A. Yes.*" (Italics added.)

Clearly the foregoing testimony which the trial judge apparently believed was substantial evidence to sustain the finding that defendants did not owe plaintiff any sum of money.

[3] It is elementary that an appellate court will disregard conflicting testimony in determining whether there is substantial evidence to sustain a finding of fact. (Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424.)

In view of our conclusions it is unnecessary to consider other questions argued by counsel since it is apparent that there is a clear failure by plaintiff to prove a material allegation of his complaint.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

80 Cal.App.2d 675

YAHR-DONEN CORPORATION v. CROCKER et al.

Civ. 15755.

District Court of Appeal, Second District, Division 2, California.

July 1, 1947.

1. Partnership ⇐279

Contract whereby plaintiff agreed to render services to partnership in and about the buying of merchandise, the supplying of market information, etc., was not a contract for personal service within the rule that contracts to perform personal acts for a partnership are discharged upon dissolution of the firm.

2. Partnership ⇐243

Upon the dissolution of partnership by death of one of the partners, the partnership was not terminated but continued until its affairs should be completely wound up. Civ.Code, § 2435.

3. Partnership ⇐277

The dissolution of a partnership affects only future obligations of the business, and as to past transaction the partnership continues until it satisfies all its pre-existing obligations. Civ.Code, § 2435.

4. Executors and administrators ⇐202(1) Partnership ⇐247

On death of one partner money due under contract was payable out of the assets of the partnership or by the successors of the partnership, or in the event of the failure to realize payment from the business the debt became one of the deceased partner's estate. Probate Code, § 571.

5. Executors and administrators ⇐202(1)

Where surviving partner failed to pay money due under contract entered into by partnership, claim was properly filed with administratrix of the estate of deceased partner for payment in course of administration. Probate Code, § 571.

6. Executors and administrators ⇐453(2)

Where surviving partner in winding up affairs of partnership had not paid claim sued on, a separate judgment should have been entered adjudging the validity of the claim and directing the administratrix to pay it in course of administration. Probate Code, § 730.

7. Appeal and error ⇐1152

Where judgment as to substance was valid but there were certain technical errors, the judgment would be amended to conform with the evidence and decision and judgment and, as amended, affirmed.

8. Executors and administrators ⇐453(2)

Where estate of deceased partner was also indebted to plaintiff for sum found to be due, the administratrix should not be included in the judgment as subject to execution, but should be directed to pay it, or any unpaid portion thereof, in due course of administration.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Yahr-Donen Corporation against Maude E. Crocker and Grace Evans Buchner, partners doing business under the name and style of "Petite Shop", Rachel Crocker Fenton, administratrix of the estate of Maude E. Crocker deceased, and others for money allegedly due under employment contract. From a judgment for plaintiff for $562.20 with interest at 7 per cent. after February 15, 1946, Rachel Crocker Fenton, as administratrix of the estate of Maude E. Crocker, deceased, and Grace Evans Buchner, surviving partner of the partnership formerly existing between Maude E. Crocker, deceased, and Grace Evans Buchner, appeal.

Judgment amended and, as amended, affirmed.

C. E. Crowley, of Ontario, for appellants.

Tscharner & Miller, of Azusa, for respondent.

MOORE, Presiding Justice.

Prior to February 15, 1945, Maude E. Crocker and Grace E. Buchner as a partnership had engaged in retail merchandising at Pomona under the firm name of "Petite Shop." On that day they entered into a contract with respondent whereby the latter was to act as resident New York buyer for the partnership, and in connection therewith agreed to render services

in and about (1) the buying of merchandise, (2) special orders, (3) market information, (4) best sources, (5) best proven re-order style numbers, (6) daily and weekly bulletins, (7) follow up on orders, (8) advantages of group purchases, and (9) to furnish personal buying services to the partnership on their periodic visits to New York. In addition to such services respondent was to allow the partnership the use of its facilities in New York, St. Louis, Chicago, Los Angeles and Dallas. As consideration for such services and privileges the partnership agreed to pay respondent the sum of $125 in advance on the first day of each and every month during the term of the agreement which commenced on February 15, 1945, to terminate on February 14, 1946. The contract provided also for the payment to respondent of three per cent of the gross retail volume of business done by the partnership during its term in excess of $100,000, to be determined through a certified audit.

During the summer of 1945 the partners visited respondent's establishment in New York. Expert buyers furnished by respondent accompanied them to the exhibits of the various manufacturers of garments to be worn during the fall and winter season of 1945-1946. The recommendations of such buyers were accepted by the partners in making purchases.

After their return to California Mrs. Crocker deceased on August 29, of which fact respondent was advised by Mrs. Buchner on December 10, 1945, although her attorney had written respondent to the same effect on October 4, 1945. On the tenth day of the latter month Mrs. Fenton qualified as administratrix of the decedent's estate and duly published notice to creditors. On November 20 respondent filed its claim with the administratrix. After its rejection this action was brought to recover $562.20 "salary as provided in said contract and for the further sum of $1500 which is three per cent of the gross retail volume of business above $100,000.00 during the term of said contract."

Following a trial the court found the facts to be as alleged by respondent and concluded that the partnership had never been dissolved and that respondent was entitled to a judgment against Mrs. Buchner and the administratrix in the sum of $562.20 with interest at 7 per cent after February 15, 1946. Judgment was entered accordingly.

Although the judgment requires revision as to its form, yet as to substance no valid ground appears for its reversal. The correctness of the court's order in overruling the general demurrer to the complaint will appear from the following discussion of the decision and judgment.

[1] Contrary to appellants' contention the contract is not one for personal service. A reasonable interpretation of the writing is that respondent was to perform the specified services for the total sum of $1500 payable in 12 equal monthly installments. Fuller information as to the nature and scope of such services was developed at the trial. The court determined that the contract required respondent to make daily investigations of market conditions as to all kinds of ready-made merchandise; to keep informed as to styles that would prevail during approaching seasons; to furnish the partnership with the benefits of the contracts of respondent with manufacturers and to supply its client with the best information available as to prices and available merchandise; to advise the partnership as to its needs and to arrange for the Petite Shop's purchase thereof from the proper manufacturers. Under the system and practice of respondent the retailer must so arrange his purchases in advance that when a season arrives he will have seasonal merchandise in stock. Manufacturers produce in spring and summer the garments to be worn the following winter. Respondent placed the partnership's orders for merchandise and kept check of and followed up such orders to make sure that they would be delivered as per order and on time.

It thus appears that the contract was not for a personal service but on the contrary it was a contract to render through its agents expert and professional service and advice to the partnership for their guidance in buying at greater advantage than by relying upon their own efforts.

Louis v. Elfelt, 89 Cal. 547, 26 P. 1095, is not pertinent. Louis was a traveling salesman and sued for wages earned after the partnership had been dissolved by the death of a partner. His work was for a nonexisting entity. In the instant case respondent sold a year's service to the partnership and practically all the service had been rendered prior to Mrs. Crocker's demise. However, if any order of the partnership had remained to be checked up such service could have been performed by an agent of respondent which fact makes inapplicable the general rule that contracts to perform personal acts for a partnership are discharged upon a dissolution of the firm. (Husheon v. Kelley, 162 Cal. 656, 666, 124 P. 231.)

[2-5] The partnership obligated itself to respondent for a year's service. Upon the dissolution by the death of Mrs. Crocker the partnership was not terminated but continued until its affairs should be completely wound up. When a partner dies the business of the firm is not thereby liquidated but is continued and the rights of the creditors of the dissolved partnership remain as if there had been no dissolution. Civil Code, sec. 2435. The dissolution of a partnership affects only future obligations of the business. As to past transactions the partnership continues until it shall have satisfied all of its pre-existing obligations. Cotten v. Perishable Air Conditioners, 18 Cal.2d 575, 116 P.2d 603, 136 A.L.R. 1068. It follows that the debt due respondent by the "Petite Shop" on account of the contract remained unsatisfied at the death of Mrs. Crocker and was payable out of the assets of the partnership or by the successors or successor of the partnership; and in the event of a failure to realize payment from the business then the debt became one of Mrs. Buchner and of the estate of her deceased partner. Mrs. Buchner as surviving partner having failed to pay respondent as required by the Probate Code, section 571, it was justified in filing its claim with the administratrix of the estate of Mrs. Crocker, to be paid by her in the course of administration.

[6] In this action upon the claim, service of summons upon Mrs. Buchner authorized a judgment binding the partnership property the same as though Mrs. Crocker had been living and served with process in the action. Code Civ.Proc., sec. 388. Inasmuch as the administratrix has never sold the interest of Mrs. Crocker in the partnership, and since it appears that Mrs. Buchner as surviving partner in winding up the affairs of the partnership has not paid the claim a separate judgment should have been entered adjudging the validity of the claim and directing the administratrix to pay in the course of administration the amount ascertained by the court to be due. Probate Code, sec. 730. The abortive effort of Mrs. Buchner to dispose of the obligations of the partnership and to acquire title to its assets by a settlement with the heirs of Mrs. Crocker was contrary to law. The safeguards of the titles of decedents were not thrown around them merely to create a fanciful kaleidoscope. They are real barriers for the protection of creditors and legitimate heirs and can be removed only by the procedure ordained by law.

[7] Certain technical errors disconsonant with the evidence, decision and judgment will be corrected to conform with the pleading and the proof. Finding XV declares that "there is due from the plaintiff to defendant partnership * * * the sum of $652.20 salary under said agreement for the months of October, November, and December, 1945, and the months of January and to February 15, 1946." Of course such declaration is due to inadvertence. The proof is, and other findings of the court are, that the partnership became indebted to respondent for services rendered by it as provided by its contract with the partnership, for which services the partnership was to pay $125 on the first of each and every month of the contract's term beginning on the date of the contract and continuing to and including January 15, 1946; that the partnership has paid respondent each of such installments prior to October 1, 1945, leaving unpaid the sum of $562.20 for the last 4½ months of the term. Such finding will be revised accordingly. Code Civ. Proc., sec. 956a.

A similar inadvertence occurred in the formulation of finding XVI which found all of the allegations of the complaint to be true. By stipulation in open court it was agreed that the gross retail volume

of business done by the partnership during the term of the contract did not exceed the sum of $53,000. Finding XVI will be revised accordingly.

[8] Inasmuch as the complaint demanded interest at the rate of 6 per cent after February 15, 1946, conclusion I and the judgment will be amended to conform with the demand of the pleading for interest at 6 per cent from February 14, 1946. Since the estate of Mrs. Crocker is also indebted to respondent for the sum found to be due, the administratrix should not be included in the judgment as subject to execution, but should be directed to pay it or any unpaid portion thereof in due course of administration.

It is therefore ordered:

(1) That finding XV be and it is amended to read as follows: That the defendant, Grace Evans Buchner, individually and as the surviving partner of the copartnership, doing business under the name and style of Petite Shop, and Rachel Crocker Fenton, administratrix of the estate of Maude E. Crocker, are indebted to the plaintiff in the sum of $562.20 which constitutes the sum total of the payments to be made under the contract for the months of October, November, and December, 1945, and for January and to February 15, 1946;

(2) That finding XVI be and it is revised to read as follows: The Court finds that all the allegations of the complaint are true and that the denials contained in the answer of Rachel Crocker Fenton as administratrix of the estate of Maude E. Crocker and the answer of Grace Evans Buchner are untrue, except that it is not true that the gross retail volume of business done by the defendants during the term of the contract is the sum of $150,000 but that pursuant to stipulation of the parties said volume of business done by the partnership during the term of the contract did not exceed the sum of $53,000;

(3) That conclusion I be and it is hereby modified by striking therefrom the following "with interest thereon at the rate of 7 per cent since February 15, 1946" and by substituting in lieu thereof these words, namely, "with interest at six per cent per annum from February 15, 1946."

(4) That the judgment be and is hereby amended as follows: (a) Strike the last paragraph thereof and substitute in lieu thereof the following: It is ordered, adjudged and decreed that plaintiff have and recover from defendant Grace Evans Buchner the sum of $562.20 with interest at six per cent per annum from February 14, 1946; (b) It is further ordered, adjudged and decreed that in the event that said sum shall not be obtained by the sheriff from a sale of the estate and assets of the partnership of Crocker and Buchner, doing business under the firm name of Petite Shop at Pomona, or from a sale of the separate property of Mrs. Buchner, the defendant Rachel Crocker Fenton, administratrix of the estate of Maude E. Crocker, deceased, shall pay said judgment in due course of administration.

With the decision and judgment thus amended the judgment is affirmed.

McCOMB and WILSON, JJ., concur.



80 Cal.App.2d 412

CHURCH v. WADE et al.

Civ. 15646.

District Court of Appeal, Second District, Division 1, California.

June 18, 1947.

Rehearing Denied July 11, 1947.

Hearing Denied Aug. 14, 1947.

1. Appeal and error ⇐931(1)

In considering appellant's claim of insufficiency of evidence to support trial court's findings, appellate court would construe evidence as to support contention of respondents to extent that it was fairly susceptible of such construction, and in case of conflict, would accept as true the evidence which tends to sustain the findings and judgment, unless it was inherently so improbable as to be palpably false.

2. Deeds ⇐211(1, 4)

Evidence supported finding that plaintiff's decedent was competent at time he

made conveyance of his property to defendants, who were no relatives of decedent, upon defendants agreeing to provide home and care for decedent for the balance of his life, and that decedent, in making the conveyance, was not acting under undue influence, so as to justify refusal to set aside the conveyance.

3. Contracts ⇐32

A contract to make or execute a written agreement, when the terms thereof are mutually understood and agreed on, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed.

4. Deeds ⇐210

Evidence supported finding that there was an oral agreement between plaintiff's decedent and defendants whereby decedent was to convey his property to defendants upon defendants agreeing to provide home and care for decedent for balance of his life, which agreement was fully performed by both parties thereto, and that parties did not contemplate a reduction to writing of their agreement before it was to be considered as complete, so that the agreement served as adequate consideration for the conveyance.

5. Asylums ⇐1

Defendants, who agreed to provide home for plaintiff's decedent for balance of his life upon decedent conveying certain property to defendants, were not maintaining an "institution, boarding home, or other place for the reception or care of aged persons", so as to have been required under statute to have obtained a written permit therefor from State Department of Social Welfare or from an inspection service approved or accredited by the Department. Welfare and Institution Code, §§ 2300–2360.

See Words and Phrases, Permanent Edition, for all other definitions of "Institution, Boarding Home, or Other Place for Reception or Care of Aged Persons".

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Earl L. Church, executor of the estate of John L. Church, deceased, against W. F. Wade, Mary Wade, and others, to set aside a conveyance of certain real property by plaintiff's decedent during his lifetime to named defendants, wherein defendants filed a cross-complaint whereby they sought to quiet title in them to the property in question. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Lindelof & Perelli-Minetti, of Los Angeles, for appellant.

I. Henry Harris and Robert J. Magdlen, both of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by the special administrator of the estate of John I. Church, deceased, against W. F. and Mary Wade, husband and wife, to set aside a conveyance of certain real property by the decedent during his lifetime to defendants. The action is grounded on the claim that at the time of the conveyance the decedent was so mentally incompetent and unsound in mind that he was at that time and until his death wholly incompetent and incapable of comprehending or understanding the nature of such conveyance, and upon the further ground that there was a total lack of consideration.

Defendants by their answer denied the incompetency or physical and mental infirmity of the decedent, and also denied lack of consideration for the conveyance in question.

Defendants also filed a cross-complaint whereby they sought to quiet title in them to the aforesaid property.

Following trial before the court, judgment was rendered in favor of defendants and cross-complainants—denying plaintiff any relief under his complaint and quieting title to the property in defendants and cross-complainants. A motion for a new trial was denied. From the judgment and the order denying their motion for a new trial defendants prosecute this appeal.

The decedent John L. Church died at Lancaster, in Los Angeles County, California, on March 30, 1945. At the time of his demise he was 79 years old. The immediate cause of death as reflected by a certified copy of the death certificate introduced into

evidence was chronic myocarditis (10 years duration), arteriosclerosis (15 years duration), and asthenia, defined by a physician witness as "general weakness" (15 years duration). The decedent had lived in Lancaster since 1929, residing there with his wife until the latter's death in January, 1940. They lived on the property which is the subject of this litigation. It consisted of four apartments, each of three rooms with private bath and garage, and all furnished.

Defendant William F. Wade testified that the property was worth $5,000, and that the four apartments yielded a gross annual income of $1,404. Expenses for upkeep of the property did not exceed $200 per year. From February until November, 1944, the decedent was residing at the Horn Inn at Lancaster under what was characterized at the trial as "poor" conditions. Shortly after taking up residence at the Horn Inn the decedent offered the witness Mrs. Hazel Mae Pic a deed to his property if she would care for him, which offer she declined. Several times thereafter decedent asked her "if I had changed my mind about it", to which she replied, "It is just like it was before".

Neither of the defendants were related to the decedent. Defendant William Wade was acquainted with decedent since 1940 and would casually meet and talk with him approximately two or three times a month.

In August of 1944, defendant William Wade and the decedent met on a street corner in Lancaster. During the conversation that ensued, according to defendant Wade, the decedent said, "Mr. Wade, you are just the fellow I wanted to see" to which defendant Wade replied, "What is wrong now, Dad?"; whereupon the decedent stated, "I have got to have a home, and if you will give me a home, I will deed you my property over here on Date Avenue". During the interim from August until decedent moved into the Wade home, on November 22, 1944, defendant Wade met and talked with the former some five or six times.

On the day decedent moved into the Wade home, the defendant Mrs. Wade accompanied him to the Bank of America Escrow Department where an escrow was opened covering the conveyance by decedent of the property here in question to the defendants. On December 8, 1944, decedent executed a grant deed conveying his Lancaster property to the defendants. No written agreement to care for the decedent was executed by the defendants.

Defendants caused to be prepared an agreement between themselves and the two sons of the decedent whereby it was agreed that decedent's sons would waive any claims to the Lancaster property which they might acquire "by reason of inheritance or otherwise", in consideration of the defendants providing their father with a home and incidental expenses in connection with his care "which shall include medical and hospital expenses when necessary, and paying expenses of his last illness and burial." This proposed agreement was forwarded to one of decedent's sons by defendant Mrs. Wade with a letter of explanation dated February 21, 1945, some three months after decedent went to live with the defendants, but was never signed by either of decedent's sons or by either defendant.

Following the death of decedent, one of his sons offered defendants the sum of $1,250 to relinquish the Lancaster property to the estate of his father, which offer was refused by defendant William Wade.

At the trial plaintiff herein agreed to reimburse defendants in any amount fixed by the court as reasonable for the care and support extended by them to the decedent.

As a first ground of appeal, it is earnestly contended that the trial court's findings of fact numbered V and VIII are not supported by the evidence. The challenged findings read as follows:

"V. That the said decedent John L. Church knew the nature and extent of his property at the time of such conveyance and was competent and capable."

"VIII. That the act of conveyance of said decedent John L. Church was his free and voluntary act, and he was not acting under undue influence, nor was he cheated or defrauded, nor was such the intention of the defendants W. F. Wade and Mary Wade."

In support of his claim in this regard, appellant directs our attention to certain letters written by defendant Mrs. Wade to

decedent's sons between November 22, 1944, and the death of decedent on March 30, 1945, which, according to appellant, show that decedent was "ill, unable to write, confused." Appellant also points to the causes of death and testimony of decedent's attending physician. Conceding that medical treatises dealing with the diseases with which decedent was afflicted point out that mental defects occasioned by such diseases in a chronic state constitute a serious handicap to the transaction of business, nevertheless it is conceded by medical authorities that the rule in that regard is not fast or rigid and each case must be decided by a study of the facts thereof and the conduct and behavior of the particular patient so afflicted. In the instant case decedent's attending physician, who had known him since 1935 or 1936 and had seen and talked with him "many times", testified as follows concerning decedent's mental condition during the last four days of his life:

"Q. Was there anything in his conduct at that time to indicate to you that he was suffering from any mental ailment? A. None whatsoever, no.

* * * * * *

"Q. Now, on these visits did you have conversations with him at that time? A. Yes.

"Q. Was he rational? A. As far as I could determine, yes.

"Q. Was there anything to indicate at any of these conversations you had with him, either at the time of the last illness or at the time that you talked to him in the fall of '44, that indicated to you that he was incompetent? A. No, none that I could see."

While there was evidence that the decedent was weak and sickly; was suffering from the infirmities of old age; that he wandered "all over town at odd hours"; that he refused to eat regularly or properly; that at times he was given to mumbling and talking to himself; that he frightened small children by slipping his dentures out of his mouth, and that he was incompetent, there was nevertheless, the positive medical testimony hereinbefore narrated, coupled with the testimony of the escrow clerk that upon the occasion of the opening of the escrow and execution of the deed here under consideration the decedent knew "what was going on", that he "was competent", and at all times "knew all of the details of what was going on and what he was getting for the property he was conveying". It was also shown in evidence that at all times preceding the execution of the deed to defendants the decedent was managing his property, collecting his rents, writing to his sons and displaying a knowledge of the nature and extent of his property. There was also other direct and positive testimony that the decedent was competent.

In view of the foregoing, appellant's attack upon the findings of fact as not being supported by the evidence must fall. It is well settled and firmly established in our law that where findings or a judgment are assailed on the ground that the record is barren of any substantial evidence to support the same "* * * the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183." Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487.

Pertinent to the situation with which we are here concerned is the language of this court in Poe v. Lawrence, 60 Cal.App.2d 125, 131, 140 P.2d 136, 140, wherein we said: "Legion of authority supports the statement that when an attack is made upon a judgment on the ground that it is unsupported by the evidence, the power of reviewing courts is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered. Therefore, on appeal from a judgment for plaintiffs in an action for damages for negligence, all conflicts in the evidence must be

resolved in favor of the prevailing party. Because it is the rule that all intendments are in favor of the judgment arrived at upon conflicting evidence, the fact that contradictory inferences can reasonably be drawn from the facts in evidence does not authorize an appellate tribunal to substitute other inferences for those drawn by the constitutional and statutory arbiter of the facts. Of course, if the evidence is inherently improbable it may be disregarded, but before such action is warranted there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without any resort to inferences or deductions. Whitsett v. Morton, 138 Cal.App. 628, 629, 630, 33 P.2d 54; Arundel v. Turk, 16 Cal.App.2d 293, 295, 296, 297, 60 P.2d 486."

[1, 2] In considering appellant's claim of the insufficiency of the evidence to support the challenged findings, it is our duty to so construe the evidence as to support the contention of respondents to the extent that it is fairly susceptible of such construction, and in cases of conflict to accept as true that evidence which tends to sustain the findings and judgment, unless it is inherently so improbable as to be palpably false. No such stricture can reasonably or justly be applied to respondent's evidence herein.

[3, 4] Appellant next urges that findings made by the trial court that the agreement on the part of the defendants "was adequate consideration for such transfer" and that the defendants "performed each and every term, condition and covenant of the agreement" are not supported by the evidence. That on the contrary the evidence shows that the conveyance was predicated upon a written contract for life care—which in fact was never drafted or signed. The only evidence to that effect to which appellant directs our attention is the testimony of the escrow clerk, who testified that the decedent and defendants "discussed" the preparation of an "agreement" and the escrow clerk suggested "they see an attorney". What the nature of the proposed agreement was, or its terms, is not made to appear in the record. Appellant seemingly contends that the agreement referred to was the above-mentioned unsigned agreement which defendants had prepared and forwarded to one of decedent's sons, but this contract was not one between decedent and defendants. The former was not intended to be a party thereto. It was a proposed agreement prepared by the defendants at the suggestion of the decedent some three months after he executed the grant deed. The only testimony in regard to that contract was given by defendant Wade who testified, "Well, it seems as if Mr. Church (decedent) wanted to be sure that he had an agreement with me in writing that he did have a home * * * and have them (decedent's sons) sign those papers to let them know that he was securing a home." Nowhere in the evidence does it appear that the contract was contemplated or considered by the parties during the negotiations leading up to the opening of the escrow and the execution of the grant deed, and, in any event, by its very terms the proposed contract clearly indicates that it was not intended that the decedent should or would be a party thereto. It was merely a proposed agreement, prepared subsequent to the transfer of the property to defendants whereby the two sons of the decedent would quit claim to defendants any interest they might presently have or be entitled to by right of inheritance. Furthermore, the terms of the oral agreement between decedent and defendants were fully performed by both parties thereto.

The futility of appellant's claim that the understanding between decedent and defendants was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them, is manifest from what was said by this court in Kreling v. Walsh, 77 Cal.App. 2d 821, 176 P.2d 965, 973 (hearing denied by the Supreme Court) as follows: "Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and ac-

cepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform. Thompson v. Schurman, 65 Cal.App.2d 432, 440, 150 P.2d 509; Nolte v. Southern California Home Building Co., 28 Cal.App.2d 532, 534, 82 P.2d 946; Clarke v. Fiedler, 44 Cal. App.2d 838, 847, 113 P.2d 275."

The evidence sustains the view of the trial court that there existed an oral agreement between decedent and defendants which was fully performed by both parties thereto. There is no evidence to support a finding that decedent and defendants contemplated a reduction to writing of their agreement before it was to be considered as complete. The full performance by both parties to the oral agreement negatives any such finding.

[5] Finally, appellant insists that the agreement which was entered into between decedent and defendants was void because of failure to comply with certain provisions of the Welfare and Institutions Code of the State of California. Appellant concedes that this issue was not pleaded or raised during the trial, but urges that regardless of his failure to set up the claim of illegality of the contract, when the case made out by appellant showed its illegality it became the duty of the court sua sponte to declare the agreement void and cancel the conveyance. Endicott v. Rosenthal, 216 Cal. 721, 728, 16 P.2d 673. Appellant also proposed amendments to the findings of fact and conclusions of law submitted by respondent, covering the claim that respondent had not complied with the provisions of the Welfare and Institutions Code. Appellant argues that if as a matter of law, the contract is illegal, this court should now refuse to enforce it regardless of the pleadings of the parties. Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 92, 109 P.2d 650. On his motion for a new trial in the court below, appellant raised the question on the ground of newly discovered evidence which with reasonable diligence he was not able to produce at the trial. In a supporting affidavit by appellant's counsel it was averred that on March 5, 1946, following the trial, the Department of Social Welfare advised appellant's counsel in writing that "neither defendant had received a license or permit from the department or the State to care for aged people or to receive property as consideration for old age contracts; and also that Mr. Zahl, of the Department, on March 12, 1946 in counsel's office advised him the provisions of the Welfare and Institutions Code involved here were so poorly indexed and obscure that attorneys were not aware of them and for that reason the Department had an article published in the State Bar Journal which did not come to counsel's attention until after the trial".

Appellant proceeded to try this case on the theory that the decedent John L. Church was incompetent at the time he entered into the agreement with respondents and that there was a total lack of consideration for such agreement. The theory upon which a case was tried must be adhered to on appeal. This rule of law is grounded on the premises that were the grounds raised for the first time on appeal, urged before the trial court, such grounds might have resulted in the admission of evidence and the making of findings which would have obviated a reversal. Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715; Reiner v. Hermann, —— Cal.App.2d ——, 176 P.2d 734; Mathews v. Pacific Mut. Life Ins. Co., 47 Cal.App.2d 424, 428, 118 P.2d 10.

However, deciding as we have, to give consideration to appellant's last-mentioned claim, the record reveals that for support of his contention that the agreement here in question was void and illegal, he relies upon sections 2300 to 2360 of the Welfare and Institutions Code of this state, which he claims "provide a complete scheme under which aged persons may be boarded, life-care agreements entered into, and property transferred in return for life-care".

Section 2300 reads: "No person, association, or corporation shall, without first having obtained a written license or permit therefor from the State Department of Social Welfare or from an inspection service approved or accredited by the depart-

ment, maintain or conduct any institution, boarding home, or other place for the reception or care of aged persons, nor receive or care for any such person."

The foregoing section is found in chapter 2 of division 3 of the Welfare and Institutions Code and is titled "Institutions and Boarding Homes for Aged Persons". Manifestly, under the facts here present, respondents did not "maintain or conduct any *institution, boarding home, or other place for the reception or care of aged persons*". (Emphasis added.) The agreement here in question did not therefore offend against any of the aforesaid code provisions.

The attempted appeal from the order denying plaintiff's motion for a new trial is dismissed. For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



80 Cal.App.2d 437

BOUCHER v. KRIEHN et al.
KRIEHN v. BOUCHER.

Civ. 15427.

District Court of Appeal, Second District, Division 3, California.

June 18, 1947.

1. Judgment ⇐5

A judgment for defendant after a trial limited to special defenses that action was barred by two former judgments under the doctrine of res judicata and by the statute of limitations was not improper as rendered without a trial. Code Civ.Proc. § 338, subd. 4; § 597.

2. Judgment ⇐585(2)

Action to determine ownership of real property and to set aside a deed as fraudulent, involving the same matters in issue as two former cases to which plaintiff was a party and therein determined adversely to plaintiff by judgments which became final, was barred by the rule of res judicata.

3. Judgment ⇐540

The rule of res judicata is to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy.

4. Judgment ⇐714(1)

A final judgment on the merits in a prior action is conclusive between the same parties in a subsequent action involving the same subject matter.

5. Limitation of actions ⇐100(1)

An action to determine ownership of real property and to set aside a deed for fraud of which plaintiff became aware more than three years prior to suit was barred by limitations. Code Civ.Proc. § 338, subd. 4.

6. Judgment ⇐5

A judgment in favor of defendant on his cross-complaint to quiet title and for injunction was not improper as rendered without trial because on date that matter of cross-complaint was regularly before the judge for trial, judge declined to hear matter further and permitted record to show that evidence introduced at first hearing on special defenses to main complaint was admitted in evidence at hearing on cross-complaint.

7. Injunction ⇐128
Quieting title ⇐44(3)

In action to determine ownership of real property and to set aside a deed as fraudulent, evidence supported judgment for defendant on his cross-complaint to quiet title and for injunction.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Emma Boucher, administratrix, etc., against John O. Kriehn, Jr., and others, to set aside a deed, wherein John O. Kriehn, Jr. filed a cross-action against Emma Boucher to quiet defendants' title to the real property involved. From judgments for defendants in both the main action and cross-action, plaintiff appeals.

Affirmed.

See, also, 69 Cal.App.2d 720, 160 P.2d 28.

Emma Boucher, in pro. per.

K. B. Kennicott, of Los Angeles, for respondents.

WOOD, Justice.

In this action, by plaintiff in propria persona, the third amended complaint is not in clear and concise language, but it appears that the action is to set aside a grant deed on the ground that defendant's grantor was guilty of fraud "for keeping this property under cover." Upon a trial, limited to the special defenses that the action was barred by two former judgments and by the statute of limitations, judgment was for defendant. Upon another trial at a later date, which was upon the cross-complaint to quiet defendant's title to the real property and to enjoin plaintiff from commencing any further action based upon the same transaction, judgment was for cross-complainant quieting his title and so enjoining plaintiff. Plaintiff appeals from both judgments, and asserts that they were rendered without trials and without evidence.

The plaintiff alleged in her third amended complaint that she "is the Administratrix with Special Letters in the Estate of Morris I. Grossman, deceased"; that said Grossman was on December 28, 1922, and still is, the owner of certain described real property in Los Angeles County; that "the trust deed given to Emma Boucher" and recorded "does not state anything prior but Johanna K. Buck and J. or Jacob Segel were put on record, Johanna K. Buck first and then J. or Jacob Segel second. That the trust deed of J. or Jacob Segel slipped to Emma Boucher was never put on record"; that "Grossman and his wife, Libbie, deeded their property to Libbie's father, William Smith, October 15, 1929, and gave Emma Boucher security on same property October 22, 1930, for $4,900.00"; that $1518.50 of Emma Boucher's money is on deposit in a certain named bank in the name of Morris I. Grossman as trustee for said Grossman and said Segel; that "a Grant Deed is a request deed supposed to be, but John O. Kriehn Jr. gave $7,600.40"; that Emma Boucher was thrown in the psychopathic hospital for 24 days "to cover up the crooks and their supporters crime"; that plaintiff suffered damages in certain specified amounts "for this fraudulent deal to cover up this property." She prayed "that said deed be set aside and cancelled," and for damages in certain amounts.

The interpretation which plaintiff places upon her said complaint is indicated in her brief. She there states that the action is to determine ownership of said real property and to set aside a fraudulent grant deed made by Johanna K. Buck, now deceased, to defendant; that it was a fraudulent deed in that it was executed when Johanna K. Buck was not competent to make it; that Morris I. Grossman owned the property from December 28, 1922, and his estate is still the owner of it legally; that Mollie E. Daniel, Johanna K. Buck, Jacob Segel and William Smith held the property under cover to defraud Grossman's creditors; that in 1923 Daniel transferred her "fake" mortgage to Buck for "supposed" $5000, and Buck held the fake mortgage until June, 1929, when Grossman and wife "made some new Fake Deals"; and that Buck "never had a Trust Deed, to make a Gift Grant Deed" to defendant.

The situation seems to be (by reference to the files in the prior cases received as exhibits herein) that on September 16, 1929, Grossman and wife executed a trust deed in favor of Emma Boucher, which was recorded on September 18, 1929, but it did not state that there were prior trust deeds; that Grossman and wife had executed a trust deed in favor of Johanna K. Buck, which was recorded on June 25, 1929, and was a first lien on the property; that Grossman and wife had executed a trust deed in favor of Jacob Segel, which was recorded on June 25, 1929, and was a second lien on the property; that on October 8, 1929, Grossman transferred the property by grant deed to William Smith, which deed was recorded October 15, 1929; that Emma Boucher acquired the Segel trust deed, but asserts that Segel and Grossman defrauded her in the transaction; that Grossman died about December 23, 1934; that on March 18, 1935, Johanna K. Buck obtained a judgment foreclosing her first trust deed, and thereafter she purchased the property at the foreclosure sale, and after the expiration of the year for redemption she re-

ceived a commissioner's deed to said property; that on December 14, 1944, Johanna K. Buck transferred the property by grant deed to defendant Kriehn, her nephew; that Johanna K. Buck died February 17, 1945. Emma Boucher was appointed special administratrix of the estate of Grossman on the ground that she was a creditor of Grossman, and it seems that this action is for the purpose of recovering the property for the estate in order that she might satisfy her claim against the estate.

In answer to the third amended complaint defendant alleged, among other things, that on March 18, 1935, in an action in the superior court of Los Angeles County, between Johanna K. Buck as plaintiff and the Security-First National Bank and others, including Emma Boucher, as defendants, Case No. 346508, being an action to foreclose a trust deed upon the property described in the complaint herein, the said Emma Boucher appeared as a defendant and filed her cross-complaint; that the issue here joined was tried and finally adjudicated in favor of said Buck; that the issues herein are res judicata, and the judgment in said action therein is a bar to this action; that defendant is the successor in interest of said Buck.

In further answer to said complaint defendant alleged that on January 4, 1945, in an action then pending in the superior court of Los Angeles County, between Emma Boucher, Administratrix with Special Letters in the Estate of Morris I. Grossman, deceased, as plaintiff, and Johanna K. Buck and others, as defendants, Case No. 454547, being an action for damages on account of fraud and particularly on account of fraud of Johanna K. Buck in obtaining said first trust deed, the issue here was tried; that the court therein found that the judgment in said former action No. 364508 (hereinbefore mentioned) was a bar to said action No. 454547 (the action then before the court), that the issues in said action then before the court were res judicata, that the action was barred by the provisions of Section 338, subdivision 4, of the Code of Civil Procedure; that the court rendered judgment therein in favor of defendant Buck; that said plaintiff Boucher appealed and the appeal was dismissed (on August 28, 1945); that after said judgment was rendered said Buck died, and defendant Kriehn herein (as special administrator of her estate) was substituted (on April 4, 1945) as defendant therein; that the issues herein are res judicata, and the judgment in said action No. 454547 is a bar to this action.

As a further answer to said complaint herein, defendant alleged that said action was barred by the provisions of Section 338, subdivision 4, of the Code of Civil Procedure.

[1-4] Appellant's contention that judgment was rendered without a trial is not sustained. It is provided in Section 597 of the Code of Civil Procedure that "When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment * * * the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court * * * upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had * * *." Two special defenses that this action was barred by two prior judgments, and a special defense that the action was barred by the statute of limitations, were alleged. Those special defenses were regularly set for trial in accordance with said Section 597, and came on for trial on November 1, 1945. Plaintiff was present at that time and participated in the proceedings by making objections and other statements. The original files in the case of Buck v. Security-First National Bank, Emma Boucher, et al. and in the case of Boucher, Administratrix, etc., v. Buck et al., were received in evidence. As to the special defenses the court made findings which were practically the same as the allegations in the special defenses, which includes of course the findings that the issues herein were res judicata, and that the two former judgments barred the action herein. The findings were supported by the evidence. We have examined the original files in those two former cases and find that the matters in issue in the present action were in issue therein and were determined ad-

versely to appellant, and that the judgments therein became final. The rule of res judicata is applicable herein. That rule "is to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy." Miller & Lux, Inc., v. James, 180 Cal. 38, 44, 179 P. 174, 177. "[A] final judgment on the merits in a prior action is conclusive between the same parties in a subsequent action involving the same subject matter." Hamilton v. Carpenter, 15 Cal.2d 130, 133, 98 P.2d 1027, 1028.

[5] The finding of the court herein that the present action was barred by the statute of limitations is also supported by the evidence. In her cross-complaint in case No. 364508 she alleged that she became aware of the fraudulent acts in October, 1933. In her complaint in case No. 454547 she alleged that she discovered the fraud in August, 1939. The period prescribed for the commencement of an action for relief on the ground of fraud is three years after discovery, by the aggrieved party, of the facts constituting the fraud. Code Civ. Proc. sec. 338, subdiv. 4. The present action was commenced on May 21, 1945, which of course was not within three years after she discovered the facts constituting the fraud.

[6, 7] Appellant's further contention that the judgment upon the cross-complaint was rendered without a trial and without evidence is not sustained. When the matter of the special defenses only was before the court for trial on November 1, 1945, the court in announcing its decision also stated that "plaintiff is enjoined from filing any further actions concerning the title to this property." It is true that at that time the matter of the cross-complaint was not before the court for trial, and therefore at that time there was no trial as to it. Although the court announced then that the injunction was granted, the judgment which was signed and entered as a result of that trial did not include the injunction. On January, 11, 1946, the matter of the cross-complaint was regularly before the same judge for trial. It is true that the judge then said he had previously disposed of the matter by ordering an injunction, and said further, "Off calendar. I decline to hear it further." After some discussion to the effect that only the special defenses were properly before the court at the prior trial, the court said, "If you now introduce the same evidence on the matter, I will make an order." Thereupon counsel for cross-complainant said that he offered the same evidence, and he asked "that the record show that the evidence introduced at the first hearing is admitted in evidence at this hearing." The court said, "Let the record so show." There was no testimony as to whether a personal judgment against cross-defendant would be collectible, but she admitted in her answer to the cross-complaint that she was insolvent. The evidence was sufficient to support the judgment on the cross-complaint.

Respondent made a motion on June 16, 1946, to dismiss the appeal from the judgment (as to the special defenses) entered on November 16, 1945, on the ground that the appeal was not taken within proper time. The motion was denied without prejudice. The second judgment (as to the cross-complaint) was entered March 18, 1946. On March 28, 1946, appellant filed one notice of appeal as to both judgments. The notice of appeal was filed, of course, more than sixty days after the judgment of November 16, 1945, was entered. By reason of the conclusions herein upon a consideration of the merits of the appeals, it is not necessary to decide whether such appeal, under the circumstances here involving a cross-complaint, was taken in proper time.

The judgments are affirmed.

SHINN, Acting P. J., and KINCAID, J. pro tem., concur.

80 Cal.App.2d 422

LIFTON v. HARSHMAN et ux.

Civ. 15654.

District Court of Appeal, Second District, Division 2, California.

June 18, 1947.

Rehearing Denied July 8, 1947.

Hearing Denied Aug. 14, 1947.

1. Vendor and purchaser ⇐144(1)

Under escrow agreement by buyer to deposit consideration provided that within 30 days instruments had been filed for record entitling escrow holder to procure title insurance showing title vested as required by escrow instructions, where sellers had not within the 30 days period deposited a cancellation of outstanding lease, an order from insurance company for reconveyance of trust deed and a termite clearance, buyer was not obligated to deposit any money in the escrow.

2. Pleading ⇐36(3), 376
Trial ⇐388(4), 396(7)

Where allegations in a complaint are admitted by answer, no evidence need be offered in their support, evidence is not admissible to prove their untruth, no finding thereon is necessary, and a finding contrary thereto is error.

3. Evidence ⇐441(1)

Evidence of conversations and negotiations leading up to the execution of a contract in writing is inadmissible, since such conversations and negotiations are merged in the contract. Civ.Code, § 1625.

4. Evidence ⇐384
Trial ⇐105(2)

The incompetency of parol evidence to vary a written contract is a matter of law, and such evidence though admitted without objection must be ignored. Civ.Code, § 1698.

5. Specific performance ⇐123

In action for specific performance of contract to convey, embodied in written escrow agreement, or for damages, findings that agreement was amended and portions thereof waived were improper, in absence of writing or executed oral agreement varying terms of escrow agreement.

6. Specific performance ⇐121(9, 11)

In purchaser's action for specific performance of a contract to convey, embodied in written escrow agreement, evidence was insufficient to establish that certain provisions of agreement were waived and amended, but established that vendors had agreed to deliver into escrow a cancellation of lease, a release of deed of trust and a termite clearance, and that they failed to do so.

7. Vendor and purchaser ⇐144(1)

Vendors who were obligated to deliver into escrow a cancellation of lease, a release of deed of trust and a termite clearance were required to fulfill all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed upon them, before they could require purchaser to perform his part of agreement. Civ. Code, § 1439.

8. Vendor and purchaser ⇐159

A seller who is in default for failure to deliver his deed may not rightly contend that buyer is in default.

9. Vendor and purchaser ⇐129(1)

A purchaser is not bound to make payment until seller is prepared to give a good deed.

10. Vendor and purchaser ⇐144(1)

Where vendors had not deposited in escrow the necessary papers that would enable a title company to issue a policy of title insurance showing title to be vested in purchaser free of the liens of lease and deed of trust, as required by escrow agreement, purchaser was not required to tender purchase price.

11. Contracts ⇐211

Provision making time the essence of contract may be waived by parties.

12. Contracts ⇐305(1)

A party who has waived requirement as to time must, in order to put other party in default, not only give notice that strict compliance will thereafter be required but must allow the other party reasonable time within which to perform.

13. Vendor and purchaser ⇐92

Vendors who, three days after expiration of 30 day period specified in escrow

agreement, deposited money in the escrow for application on encumbrances, and participated in preparation of letter with reference to surrender of lease and who did not give notice to purchaser that strict compliance would thereafter be required or allow purchaser a reasonable time to perform, were not relieved of obligations under escrow agreement by notice of immediate cancellation of the contract, in view of fact that purchaser was not in default but was ready, able and willing to perform as soon as he was called upon to do so.

14. Specific performance ⇐99

A buyer who is in default but whose failure is only partial and is either entirely immaterial or can be fully compensated may nevertheless obtain specific performance. Civ. Code, § 3392.

15. Specific performance ⇐99

Vendors who admitted by their answer to complaint for specific performance that consideration named in contract as total purchase price was fair and that there was no change in market value between date of escrow instructions and date of tender by purchaser and that vendors did not sustain any loss on account of delay in tendering balance of consideration could not refuse specific performance on ground of damage by reason of delay.

16. Specific performance ⇐121(8)

In action for specific performance of a contract to convey, embodied in written escrow agreement, evidence did not sustain a finding that agreement was entered into under circumstances created by purchaser rendering agreement unjust and unreasonable to vendors.

17. Pleading ⇐8(7)

An allegation that contract to convey was, as to vendors, just and reasonable is merely a conclusion of law and need not be alleged in that form by purchaser seeking specific performance.

18. Pleading ⇐8(7), 63

Purchaser seeking specific performance of contract to convey need not allege fairness of contract in words of the code but should allege the facts from which the court may conclude that the contract is supported by an adequate consideration and is fair and reasonable to the vendor.

19. Specific performance ⇐114(2)

In action by purchaser for specific performance of contract to convey or for damages, a complaint which pleaded facts by setting out contract in haec verba and by alleging that consideration at time of executing contract was fair and reasonable value of the property, that there was no change in market value between date of contract and date of written tender and that vendors did not sustain loss by reason of delay in tender was sufficient as a pleading that contract was just and reasonable as to vendors.

20. Specific performance ⇐52

Vendors who at first meeting with purchaser, real estate broker and escrow officer, did not sign escrow agreement because of some disagreement in its contents and who later signed agreement as modified by changes to which all parties agreed could not avoid specific performance on ground that they did not understand purport of escrow instructions and that a full explanation of instructions was not given to them.

21. Specific performance ⇐126(2), 129

In action for specific performance of contract to convey, embodied in escrow agreement, purchaser was entitled under agreement to a conveyance of property in accordance with its terms and if vendors were unable to furnish title to the property and policy of title insurance in conformity with escrow instructions purchaser was entitled to damages in an amount to be ascertained by the court.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Sam Lifton against Harry T. Harshman and another for specific performance of a contract to convey certain property or for damages. Judgment for defendants and plaintiff appeals.

Reversed with instructions.

Newmark & Hamblin and George I. Devor, all of Los Angeles, for appellant.

Stephen Monteleone and W. Torrence Stockman, both of Los Angeles, for respondents.

WILSON, Justice.

The actors in the transaction that is the subject of this appeal whose names will frequently recur in our discussion are as follows: Appellant Sam Lifton, the purchaser who for a number of years had been engaged in the business of buying and operating apartment houses; respondent Susan B. Harshman, one of the sellers, who during her many years' residence in Los Angeles has bought, owned and sold a number of houses; respondent Harry T. Harshman, her husband, the other seller, who is not engaged in any active business, being a retired builder; W. P. Anderson, a real estate broker; and Samuel H. Hanks, escrow officer in the Wilshire La Brea Branch of the Security-First National Bank of Los Angeles. The Harshmans owned the apartment house and the furniture and furnishings in question.

This action results from the failure of respondents to comply with a written contract wherein they agreed to convey to appellant real property in the City of Los Angeles consisting of an apartment house and the land on which it is situated, together with its furniture and furnishings. Upon their refusal to convey apellant brought this action for specific performance or for damages. Judgment was rendered in favor of respondents from which this appeal is taken.

Anderson, knowing that Lifton desired to purchase an apartment house, ascertained that the Harshmans desired to sell their building with its furniture. After obtaining the terms on which the Harshmans would sell he discussed the matter with Lifton and all parties met in Hanks' office on January 8, 1945; escrow instructions were typed by Hanks but by reason of the failure of the parties to agree on all the terms of sale the instructions were not signed. On January 11th the parties again met in Hanks' office where new escrow instructions were typed and signed by Lifton and the Harshmans, which constitute the only contract between the parties. These instructions, omitting portions not material to a decision of this action, read as follows:

"Escrow Instructions

"Buyer

January 11th, 1945

"To Security-First National Bank of Los Angeles

"I will hand you $28,000.00 and any additional funds and instruments, required from me to enable you to comply with these instructions, which you are to use provided on or before 30 days after date instruments have been filed for record entitling you to procure Standard Owner's or Joint Protection policy of title insurance, with title company liability for the amount of total consideration on real property in the County of Los Angeles State of California, viz: [Description of real and personal property] showing title vested in Sam Lifton or nominee

Free of encumbrances except: 2nd. installment Taxes for fiscal year 1944, 1945. . . .

Mortgage or Trust Deed securing an indebtedness of $ none, . . .

Existin– loan to be paid off by sellers, however buyer will pay bonus required to pay off said loan up to but not exceeding $480.00. . . .

Trust Deed on your usual form securing Note for $67,000.00 . . . executed by the above named Grantee(s) and Said note to be further secured by Chattel Mortgage on the personal property described on Bill of Sale. . . .

Seller agrees to furnish buyer with a termite and dry rot clearance on said property. . . .

Seller agrees to deliver possession of said property free and clear of the existing lease, said lease to be cancelled by seller prior to close of escrow without any liability or obligation to buyer. . . .

Immediate delivery to buyer without liability any landlord's copies of Office of Price Administration rental registration forms handed you by seller, said forms to be subject to the approval of the buyer and to show a monthly rent approved by O.P.A. of not less than $1840.00 in actual rentals. . . .

'Close of escrow' shall mean the day papers are filed for record. . . .

"If the conditions of this escrow have not been complied with at the time provided herein you are nevertheless to complete the same as soon as the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and/or instruments deposited by me. . . .

"Buyer's

Signature..... Sam Lifton.....

"Seller

"The Foregoing Terms, Conditions and/or Instructions are Hereby Concurred in, Approved and Accepted. I will hand you all instruments and money necessary for me to comply therewith, including a deed of the property described, executed by the undersigned which you are authorized to deliver provided you hold in this escrow for the account of the parties executing said deed the money and instruments deliverable to me under these instructions. Pay at close of escrow any encumbrances necessary to place title in the condition called for. . . .

"Seller's

Signature..... Susan B. Harshman...

"Seller's

Signature..... Harry T. Harshman"

The only material difference between the escrow instructions typed on January 8, which were not signed, and those typed on January 11, which became the contract of the parties, were these: In the first instructions Lifton agreed to pay $25,000 cash and to execute a promissory note secured by a trust deed on the real estate and a chattel mortgage on the personal property for $70,000; in the instructions signed he agreed to pay $28,000 and to execute a note for $67,000. In the first instruction the Harshmans agreed to pay Anderson his brokerage fee of $1,000; in the second Lifton agreed to pay the fee.

It will be observed that the Harshmans agreed (1) to deliver the property free of encumbrances except the second installment of taxes for the fiscal year 1944-45; (2) to pay off an existing loan; (3) to furnish buyer with termite and dry clearance; (4) to deliver possession "free and clear of the existing lease, said lease to be cancelled by seller prior to close of escrow without any liability or obligation to buyer"; (5) to deliver to buyer without liability landlord's copies of Office of Price Administration rental registration forms.

The contract required of Lifton (1) that he hand into the escrow $28,000 and any additional funds and instruments required from him to enable the escrow holder to comply with the instructions "which you are to use *provided on or before 30 days after date instruments have been filed for record*" in order that a title policy could be obtained; (2) that he pay the bonus, not exceeding $480, that would be required by the holder of the outstanding trust deed for accepting premature payment thereon; (3) to pay the broker's commission.

Two days after the escrow instructions were signed Mr. and Mrs. Harshman left Los Angeles for Chicago and did not return until February 5. On February 7 Mrs. Harshman visited Hanks, the escrow officer, and left with him a tax bill showing the amount of taxes on the property and a statement from the Pacific Mutual Life Insurance Company showing the principal balance unpaid on the outstanding trust deed but not stating the exact amount necessary to satisfy the company's demand for payment. Until that time Hanks did not know who held the trust deed. He immediately wrote to the insurance company asking for the papers necessary to clear the encumbrance from the record.

While the Harshmans were absent Lifton called on Hanks several times inquiring about the escrow, and he and Anderson both endeavored to contact Mrs. Harshman, not knowing that she had departed from Los Angeles. In the latter part of January Anderson ascertained that the Harshmans were absent from the city and left a message for Mrs. Harshman to call him as soon as she returned. On January 22 Hanks, likewise not knowing that Mrs. Harshman had left the city, addressed a letter to her asking if he could be of any assistance in obtaining a cancellation of the lease. Although she returned to Los Angeles on February 5th, and called on Hanks on the 7th, Mrs. Harshman did not call Anderson until the 12th and they met in the escrow office on the following day.

During the absence of the Harshmans when Lifton was making his inquiries of

Hanks as to whether the escrow was ready to close, he repeatedly inquired whether he should deposit his money. Hanks told him that nothing had been done by the Harshmans, that it would be useless for him, Lifton, to deposit any money, and that he would be notified by Hanks as soon as the transaction was ready to be closed and his money was needed. On each occasion Lifton stated that he was ready, able and willing to pay the amount required of him at any time and would do so whenever requested by Hanks.

The evidence is uncontradicted that it was the settled escrow practice in Los Angeles that a purchaser was not required or called upon to pay his money into escrow until the seller's papers had been deposited. This uniform escrow practice was testified to by Hanks, who had had 20 years' employment exclusively in escrow work, and by Lifton, who had long experience in buying and selling property. There was no evidence to the contrary. It is also in evidence that the Security-First National Bank had printed forms which were customarily used to notify the purchaser when the time had arrived for him to deposit his money. No such notification was ever sent to Lifton.

After Mrs. Harshman's return to Los Angeles Hanks repeatedly told her that it was necessary for her to place in escrow the documents required from her before Lifton would be called upon for his money. That Lifton was ready, able and willing to proceed with the transaction and to deposit his money is shown not only by his own evidence but by his repeated inquiries of Hanks above mentioned, by his willingness to complete the transaction after the 30-day period had expired, and by evidence as to his financial ability given the vice president of a bank other than the escrow holder.

The 30-day period in the escrow instructions expired on February 10. At that time neither party had deposited the money or the documents required to close the transaction, but Lifton, both before and after that date, expressed his willingness to deposit his money at any time when Hanks had the necessary papers to convey title to him according to the contract.

Prior to February 10 no steps had been taken by the Harshmans to obtain a cancellation of the outstanding lease, and no statement had been obtained from the Pacific Mutual Life Insurance Company of the amount necessary to obtain a reconveyance of the trust deed held by that company. Termite and dry rot clearance had not been deposited.

Parol evidence was admitted which will be discussed hereafter to the effect that Lifton or Anderson, or both, agreed to attend to the details of obtaining the cancellation of the lease and the release of the Pacific Mutual trust deed. Hanks had not been advised as to who held the trust deed until February 7, when Mrs. Harshman gave him the information.

On February 13 Mrs. Harshman, Lifton and Anderson met with Hanks in his office. She there participated in the preparation of a letter to Taylor, the lessee of the apartment house whose lease was to be cancelled, with reference to obtaining an abrogation of the lease. At that time she deposited $3,000 in the escrow, which she testified was paid upon Lifton's promise to deposit his money on the same day. Her testimony as to Lifton's promise is contradicted by Hanks, Lifton and Anderson. She also testified that Hanks told her that the sum which she deposited, added to the amount which Lifton would be required to deposit, would be sufficient to clear that title to the property. This statement is also denied by Hanks, Lifton and Anderson. Their denial is supported by the evidence that Hanks did not know how much money would be needed, one reason being that the amount necessary to be paid to Taylor for a cancellation of his lease had not been ascertained, and no inquiry had been made of Taylor as to what he would demand. Her statement is further contradicted by the contents of the letter sent by Hanks to Taylor regarding the cancellation of the lease, in the preparation of which Mrs. Harshman participated.

Mrs. Harshman testified, over the objection of appellant, that at the meeting on February 13 Lifton said he was waiving the lease. The inadmissibility of this evidence will be discussed later. In the letter sent by Hanks to Taylor, which was pre-

pared with Mrs. Harshman's active participation, Taylor was advised that the sellers (the Harshmans) were making arrangements to pay Taylor eight months' rent for a cancellation of the lease. Appellant inquires why this offer was authorized by Mrs. Harshman if, during the conference at which the letter was prepared, Lifton had waived the lease. We have looked in vain in respondents' argument for the answer.

Anderson and Lifton both visited Taylor on February 13th and delivered Hanks' letter to him. They obtained no definite answer from him. They called on Taylor again on February 16 when they were told by him that Mrs. Harshman had notified him that she would not complete the transaction. Mrs Harshman advised Hanks, Lifton and Anderson that "the deal was off." Upon inquiry for a reason she stated that "it was her business." She sent letters to Lifton and Hanks terminating the transaction. On February 17 Lifton's attorney sent letters to the Harshmans and to the escrow holder advising that Lifton was ready, able and willing to perform his portion of the contract and demanding that the Harshmans complete the transaction. Lifton made a written tender and deposited in escrow all money and documents necessary for complete performance on his part. The Harshmans never procured a cancellation of the lease, a release of the trust deed or a termite clearance.

[1] Respondents contend that they were justified in refusing to perform their part of the agreement for the reason that appellant had not deposited, within 30 days after the date of the escrow, the sum of $28,000 and his promissory note for $67,000 with a trust deed and chattel mortgage securing it. Appellant did not make an unconditional agreement to deposit his money and note within 30 days. He agreed to make the deposit "provided on or before 30 days after date instruments have been filed for record" entitling the escrow holder to procure a policy of title insurance showing the title vested as required by the escrow instructions. Since respondents had not within the 30-day period deposited a cancellation of the outstanding lease, an order from the insurance company for a reconveyance of its trust deed and a termite clearance, there was no obligation on the part of appellant to deposit any money in the escrow.

It is alleged in paragraph 7 of the amended complaint that the cash and the promissory note were to be deposited "as hereinafter set forth" ("hereinafter" refers to the terms of the escrow instructions); that appellant agreed to deposit the cash and the note with the trust deed and chattel mortgage securing the same "provided that on or before 30 days after the date of said escrow instructions, instruments should have been filed for record" entitling the escrow holder to procure a policy of title insurance. In paragraph 9 it is alleged that to enable the escrow holder to procure the policy of title insurance it was necessary that respondents should execute and furnish to the escrow holder a deed to the real property, a bill of sale to the personal property, and a duly executed cancellation of the existing lease. All these allegations are expressly admitted by respondents' answer to be true. Notwithstanding these admissions and the plain terms of the escrow instructions, the court found that the instructions required appellant to make his deposit "within thirty (30) days from January 11, 1945." This finding is contrary to the facts admitted by respondents' pleading.

The court made findings that on February 13, 1945, (1) appellant waived the requirement of the escrow instructions that the escrow holder should hold instruments or documents releasing the real and personal property from the lien of the deed of trust and chattel mortgage held by Pacific Mutual Life Insurance Company; (2) appellant waived instruments and documents releasing the property from the outstanding lease; and (3) appellant agreed that he or his agent would attend to and secure the deposit in escrow of the necessary documents to effect the release of the deed of trust, chattel mortgage and lease. The court made a further finding, contrary to an expressly admitted allegation in the amended complaint, that it was not true that respondents should furnish the escrow holder with a cancellation of the lease or with documents effecting the release of

the deed of trust and chattel mortgage because those provisions of the escrow instructions were, on February 13, 1945, expressly waived by appellant and that respondents were thereby expressly excused and exonerated by appellant from so doing. The foregoing findings are not only contrary to the facts alleged by appellant and expressly admitted by respondents' answer but there is not a scintilla of evidence in the record to support them.

[2] When allegations in a complaint are admitted by the answer (a) no evidence need be offered in their support; (b) evidence is not admissible to prove their untruth; (c) no finding thereon is necessary; (d) a finding contrary thereto is error.

[3] Evidence of conversations and negotiations leading up to the execution of a contract in writing is inadmissible since such conversations and negotiations are deemed to have been merged in the contract. (Civ.Code, sec. 1625.) "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ.Code, sec. 1698; Dollar v. International Banking Corp., 13 Cal.App. 331, 341, 109 P. 499; Rottman v. Hevener, 54 Cal.App. 474, 478, 202 P. 329.

[4] The parol evidence rule is not a rule of evidence, but is one of substantive law. Estate of Gaines, 15 Cal.2d 255, 264, 100 P. 2d 1055; Nourse v. Kovacevich, 42 Cal.App. 2d 769, 771, 109 P.2d 999; Fogler v. Purkiser, 127 Cal.App. 554, 560, 16 P.2d 305. Such evidence, though admitted without objection, must be ignored as of no legal import and its incompetency to vary a written contract is a matter of law. Rottman v. Hevener, supra, 54 Cal.App. at page 479, 202 P. 329; Middlecamp v. Zumwalt, 100 Cal.App. 715, 723, 280 P. 1003; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 645, 73 P.2d 1241; Dollar v. International Banking Corp., supra, 13 Cal.App. at page 343, 109 P. 499.

[5] Since there was neither writing nor executed oral agreement to vary the terms of the contract contained in the escrow instructions and since the parol evidence erroneously admitted by the court must be entirely ignored, any finding that the agreement was amended or that any portion of it was waived by appellant is error.

[6] Under the evidence and the rules above stated no finding is possible other than that respondents agreed to deliver into the escrow a cancellation of the lease, a release of the deed of trust and a termite clearance, and that they failed to do so.

[7-10] Respondents in their portion of the escrow instructions "concurred in, approved and accepted" the terms of the escrow as set forth in the buyer's (appellant's) instructions and agreed to deposit in escrow "all instruments and money necessary" for them to comply with the agreement. As we have previously stated, they never deposited a cancellation of the lease, a release of the deed of trust and chattel mortgage or a termite clearance. Before respondents could require appellant to perform his part of the agreement they must have fulfilled all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed upon them. Civ.Code, sec. 1439; Boone v. Templeman, 158 Cal. 290, 298, 110 P. 947, 139 Am.St. Rep. 126. Where a seller is in default for failure to deliver his deed he may not rightly contend that the buyer is in default. Moresco v. Foppiano, 7 Cal.2d 242, 246, 60 P.2d 430. A purchaser is not bound to make payment until the seller is prepared to give a good deed. Cates v. McNeil, 169 Cal. 697, 706, 147 P. 944; Luchetti v. Frost, 6 Cal.Unrep., 763, 765, 65 P. 969; Ohanian v. Kazarian, 123 Cal.App. 196, 200, 11 P.2d 42. Since respondents had not deposited in escrow the necessary papers that would enable a title company to issue a policy of title insurance showing title to be vested in appellant free of the liens of the lease and deed of trust, it was not incumbent upon appellant to tender the purchase price. Tatum v. Levi, 117 Cal. App. 83, 89, 3 P.2d 963.

[11-13] Time was not declared to be of the essence of the contract, but even when time is of the essence it may be waived by the conduct of the parties. On February 13, three days after the expiration of the 30-day period, Mrs. Harshman deposited

money in the escrow to be used toward paying the encumbrances and she participated in the preparation of the letter to Taylor with reference to the terms on which he would surrender and cancel his lease. When the requirement as to time has been waived by one party he must, in order to put the other in default, not only give notice that strict compliance will thereafter be required but must allow the other party a reasonable time within which to perform. Boyd v. A. E. J. Chivers Co., 134 Cal.App. 566, 569, 25 P.2d 878; Sherwood v. Greater Berkeley Land Co., 99 Cal.App. 663, 665, 279 P. 167; Stevinson v. Joy, 164 Cal. 279, 285, 128 P. 751. Respondents did not give such notice and did not allow appellant a reasonable time to perform, even if he had been in default. They gave notice of immediate cancellation of the contract, although appellant was not in default but was ready, able and willing to deposit his money as soon as he was called upon to do so, and although Hanks told Mrs. Harshman that it was necessary for her to deposit the cancellation of the lease and the release of the deed of trust before the money could be demanded from appellant.

[14] Even if the buyer is in default specific performance may nevertheless be enforced where the failure is only partial and is either entirely immaterial or is capable of being fully compensated. Civ.Code, sec. 3392; Tonini v. Ericcsen, 218 Cal. 43, 52, 21 P.2d 566; Brown v. Roberts, 121 Cal. App. 654, 657, 9 P.2d 517; Furtinata v. Butterfield, 14 Cal.App. 25, 30, 110 P. 962.

The escrow instructions did not limit the time of performance to 30 days after their date. The final paragraph of the seller's instructions, to which respondents agreed, provided that if the conditions had not been complied with at the time provided therein the escrow holder might nevertheless complete the same as soon as the conditions (except as to time) had been fulfilled.

[15] The amended complaint alleged and the answer admitted that the consideration named in the contract as the total purchase price of the property was the fair and reasonable value of the property, that there was no change in the market value thereof between the date of the escrow instructions and the date of the written tender of the purchase price on February 24, 1945, and that respondents did not sustain any loss or injury on account of appellant's delay in tendering the balance of the consideration. These admissions preclude respondents from predicating their refusal to complete the transaction and from defending against specific performance of the agreement on a contention that they have suffered damage by reason of the delay.

The finding that respondents performed each and every act incumbent upon them within the time required by the contract is contrary to the evidence to which we have referred.

[16] The final finding made by the court is that "the contract hereinabove mentioned was entered into under circumstances instigated and created by the plaintiff which rendered the said contract unjust and unreasonable to the defendants." Whether this be construed as a finding of fact or, as suggested by appellant, a misplaced conclusion of law, it is without foundation. No facts were alleged or proved and none were found by the court that furnish a basis for the finding.

[17-19] Respondents contend that the finding last mentioned was justified because appellant failed to plead that the contract was, as to respondents, just and reasonable. An allegation in that form is merely a conclusion of law. Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67; Anderson v. Charles, 52 Cal.App. 290, 292, 198 P. 641; Bonney v. Petty, 125 Cal.App. 527, 529, 13 P.2d 969. It is not required that the allegation should be in the words of the code. The proper method of pleading is to allege the facts from which the court may conclude that the contract is supported by an adequate consideration and is fair and reasonable to the defendant. Armstrong v. Sacramento V. R. Co., 52 Cal.App. 110, 114, 198 P. 217; Magee v. Magee, 174 Cal. 276, 281, 162 P. 1023. Appellant did not plead conclusions of law but pleaded the facts by setting out the contract in haec verba in his amended complaint and by alleging the fact (which was admitted by re-

spondents' answer) that the consideration named in the contract was, at the time of the execution of the contract, the fair and reasonable value of the property; that there was no change in the market value of the property between the date of the contract and February 24, 1945; that respondents did not sustain any loss or injury by reason of appellant's delay in tendering the balance of the consideration.

The matters alleged in the separate and affirmative defense set forth in respondents' answer have been fully covered in our previous discussion and need not be referred to in detail.

The elimination from our consideration of all parol evidence concerning "side agreements" alleged to have been made when the escrow instructions were signed, alleged oral modifications of the contract and alleged waivers of any of its provisions leaves nothing but the written contract before us.

Respondents made no allegation in their answer, nor do they assert in their brief, that the contract was unfair, unjust or inequitable. There is no claim of fraud, misrepresentation or unfairness, or of any other ground upon which respondents could predicate an action to set aside the contract, and there is no evidence whatsoever indicating in the slightest degree any circumstance which renders the contract unjust and unreasonable. The absence of any basis for such a contention is emphasized by the admission of respondents that the consideration named in the contract was the fair and reasonable value of the property.

[20] Respondents advance the tenuous theory that they did not understand the purport of the escrow instructions because they were actually typed by Anderson, the broker, and not by Hanks, the escrow officer, and that a full explanation of the instructions was not given to them. However, on January 8th, when respondents first met in the escrow office with Lifton, Anderson and Hanks the latter, after a discussion of the terms of the sale, prepared and typed a form of instructions. By reason of some disagreement those instructions were not signed. They are in evidence as an exhibit. A comparison of the instructions prepared by Hanks on January 8th with those typed by Anderson on the 11th and signed by the parties shows that there is no material difference between the two documents. The variations are detailed in an earlier portion of this opinion. The form typed by Hanks contains notations written in pencil indicating the changes agreed upon by the parties. The signed instructions are an exact copy of those previously prepared except for the changes indicated by the pencilled interliniations to which all parties agreed. There is no contention that the signed contract was not read or was not fully understood by respondents.

[21] Appellant made allegations in his amended complaint in an amendment thereto, and in a supplemental complaint, that by reason of the failure of respondents to convey the property he had been deprived of rents, issues and profits thereof and further that should respondents be unable to carry out the terms of the contract he would suffer damage. In view of the fact that we have determined that the only admissible evidence relating to the agreement between the parties consists of the escrow instructions signed by them, appellant is entitled to a conveyance of the property in accord with the terms of the agreement, and if respondents are unable to furnish a title to the property and a policy of title insurance in conformity with the escrow instructions appellant is entitled to damages in an amount to be ascertained by the court. Coleman v. Dawson, 110 Cal.App. 201, 213, 294 P. 13; Heinlen v. Martin, 53 Cal. 321, 340; Smith v. Schrader, 80 Cal.App. 478, 489, 251 P. 967.

The judgment is reversed with instructions (1) to make and file findings of fact that all allegations in paragraphs 1 to 21, both inclusive, of plaintiff's amended complaint as amended by paragraphs 1 and 2 of the amendment to amended complaint are true, and that all allegations contained in defendants' answer inconsistent with the allegations in plaintiff's pleadings are untrue; (2) to take evidence upon the sole question of the loss and damage suffered by plaintiff as alleged in paragraph 22 of the amended complaint, paragraphs 1 to 5, both inclusive, of the supplemental com-

plaint, and paragraph 3 of the amendment to amended complaint which adds paragraph 23 to the amended complaint; (3) to include in its findings of fact a finding of the amount of damages suffered by plaintiff as shown by the evidence which the court is hereby directed to receive; (4) to make and file conclusions of law consonant with the findings; (5) to render and enter a judgment in favor of plaintiff in accord with the findings hereby directed to be made and with this opinion.

MOORE, P. J., and McCOMB, J., concur.



80 Cal.App.2d 686

JANES v. GOYNE.

Civ. 15642.

District Court of Appeal, Second District, Division 3, California.

July 1, 1947.

1. Deeds ⇐211(3)
Marriage ⇐50(1)

In suit to annul joint tenancy deed as to defendant's interest in realty conveyed thereby to her and plaintiff while they were living together illicitly as husband and wife and to quiet plaintiff's title to such realty and certain personalty, evidence supported allegations of complaint that plaintiff purchased realty and personalty in reliance on defendant's false promise to marry plaintiff and disproved allegations of defendant's cross-complaint that parties entered into valid marriage ceremony in Mexico.

2. Deeds ⇐70(8)

A man purchasing realty, which he had conveyed by joint tenancy deed to himself and a woman, with whom he was living illicitly, in reliance on her repeated promises to marry him, was entitled to annulment of deed as to her interest in realty on ground of fraud after her refusal to marry him.

3. Partition ⇐14

A woman, fraudulently inducing a man, with whom she was living illicitly, to have realty purchased by him conveyed to both of them as joint tenants, by promising to marry him, without intending to do so, was not entitled to sale of realty and equal division of proceeds between them under equitable rules that invalidity of common-law marriage or parties' belief that it is valid does not affect character of joint tenancy property, acquired by their joint efforts while living together, and that woman living with man as his wife in belief that valid marriage exists is entitled to share in property, acquired by them during existence of such relationship, on termination thereof.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Robert Janes against Julia Ivola Goyne, also known as Betty Goyne, to annul a joint tenancy deed as to defendant's interest in realty conveyed to the parties thereby and to quiet plaintiff's title to such realty and certain personalty, in which defendant filed a cross-complaint for partition of the real and personal property. Judgment for plaintiff, and defendant appeals.

Affirmed.

Connelly & Angelillo, of Los Angeles, for appellant.

Helen Lee MacKellar, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This controversy between Robert Janes and Julia Ivola Coyne concerns the ownership of real and personal property acquired when the parties were living together as husband and wife, although plaintiff had a wife and defendant had a husband, under marriages which had not been dissolved. The complaint sought an annulment of a joint tenancy deed, as to defendant's interest, through which the parties derived title, upon the ground of defendant's fraud, and a decree quieting plaintiff's title to said real property and certain household personal property. De-

fendant by cross-complaint sought a partition of the real and personal property. The complaint alleged that in September, 1942, while he was living with defendant, as aforesaid, plaintiff purchased lot 34 of tract 12194 in the City of Los Angeles, subject to certain encumbrances, and caused title to be placed in his name and that of defendant, as joint tenants; that he also purchased some $3,000 worth of furniture which was placed in the home occupied by the parties, and purchased for $450 certain furniture and furnishings from the defendant. In addition, he expended large sums for clothing, jewelry, and other gifts for the benefit of defendant and defendant's son and daughter. It was also alleged that defendant promised she would marry plaintiff as soon as they had both procured final judgments of divorce from their respective spouses; that plaintiff procured such a decree in September, 1941, and defendant procured her final decree in October, 1941; that all the money used in acquiring said property was provided by plaintiff; that plaintiff believed and relied upon the promise of defendant that she would marry him; that defendant made said promise without intention to perform the same and for the sole purpose of inducing plaintiff to put said real property in the names of the parties in joint tenancy; that after said final decrees of divorce were issued, defendant refused and ever since has refused to marry plaintiff, but claims an interest as joint tenant in the real property and an interest in the household furniture purchased, as aforesaid, by plaintiff. By her answer and cross-complaint defendant alleged the cohabitation while each of the parties was under legal disability to marry, but that they had nevertheless entered into a matrimonial ceremony in Tijuana, Baja California, Mexico; that defendant in good faith believed that cohabitation and representation that the parties were husband and wife were sufficient to and did constitute a valid marriage. Defendant asserted the interest of a joint tenant in the real property and also in the personal property. After judgment for plaintiff annuling the conveyance to defendant of an interest in the property and quieting plaintiff's title thereto, and to the personal property, defendant instituted this appeal. The sole contention upon the appeal is that the evidence was insufficient to justify the findings.

[1] Among the findings was one that the allegations of the complaint were true and that the allegations of defendant's cross-complaint with respect to the Tijuana marriage, and her belief in its validity, were untrue. Our attention is not called by either party to the testimony with relation to this alleged marriage, or other material facts in issue. Instead, it is stated in appellant's opening brief: "That in order to determine whether or not the evidence is sufficient to sustain the position of respondent, it is necessary to consider the reporter's transcript as a whole." Nevertheless, we have made an independent examination of the transcript. Plaintiff testified to many promises made by defendant that she would marry him; that when he bought the real property defendant promised that she would marry him if he would place the property in joint tenancy; that he believed and relied upon her promises and otherwise would not have given defendant an interest in the property. He also testified that he had purchased with his own funds the household furniture and furnishings in which defendant claimed an interest. Defendant denied having promised to marry plaintiff, testified that she was employed as a waitress while she was living with plaintiff, that from her wages and tips she purchased different articles of household furniture, and she denied that plaintiff had ever purchased such articles from her. However, plaintiff produced corroborative evidence of his testimony that he had paid defendant $450 as the purchase price of furniture that he bought from her. Defendant's earnings as a waitress were shown to have been meager and scarcely above her personal expenses. There was ample evidence that plaintiff's money paid for the personal property.

We have gleaned from the record that the parties occasionally went to San Diego to visit defendant's mother and that they were in Tijuana on more than one occasion; that there was no record produced

of a marriage in Tijuana; that defendant testified that she and plaintiff went through a marriage ceremony there and that plaintiff testified that no such ceremony had been performed or planned. The parties did, however, represent to defendant's mother that they had engaged in a ceremony of marriage. It appears that defendant was 47 years of age, that she had contracted three prior marriages, had secured two divorces and one annulment, and that the annulment was granted upon the ground that the man to whom she was married had not procured a final decree of divorce from a former wife. One of plaintiff's witnesses, a Mrs. Wells, testified that defendant had stated to her, during the period of the cohabitation of the parties, that she had married plaintiff in Yuma, but when reminded that she could not marry legally until she had received her final decree she admitted that they could not be married, and had not been married, but stated that she did not want her daughter to know that she was not married to plaintiff. This witness also testified that she had heard plaintiff ask defendant to marry him and that defendant had replied, "Well, I don't feel very well right now, Don [plaintiff]. I would rather wait until I am feeling better," and that when plaintiff left the room defendant was asked, "When are you going to get married?" and replied, "O, Ruth, I never intend to marry Don. Just as soon as I get to feeling better I am going to Arizona to live with my daughter." There was therefore ample evidence to justify a finding that there was no marriage ceremony in Mexico, and even if there had been an attempted marriage in Tijuana the court would have been fully justified in finding that defendant did not believe it to be a valid marriage. She apparently was well informed as to the limited effect of an interlocutory decree of divorce. It is unnecessary to quote the record further to show that there was sufficient evidence to support the allegations of the complaint and to disprove the affirmative allegations of the cross-complaint.

[2] There is no doubt as to the law that is applicable to the facts found. Plaintiff purchased the real property and placed it in the joint tenancy of himself and defendant in reliance upon repeated promises of defendant that she would marry him when she became free to do so; defendant lived in illicit relationship with plaintiff and, although she promised him that she would marry him if he would place the property in joint tenancy, she did not at any time intend to marry him. Although she denied having promised to marry plaintiff, she claimed that she had married him in Mexico. Upon these facts plaintiff could properly claim that he had been made the victim of defendant's fraud. The interest in the real property which defendant acquired under the joint tenancy deed came to her as a gift from plaintiff which was induced by her fraud. There can be no question as to the plaintiff's right to have the gift annulled upon that ground. It appears that he was anxious to make defendant his wife until she repeatedly and finally refused to marry him. The fact that he was living with her in an illicit relationship did not justify defendant in the perpetration of a fraud upon him. He did not give her an interest in the property to induce her either to assume or to continue that relationship, but for the purpose of ending it and joining with her in one that would be legal and respectable. Such is the case as it was viewed by the trial judge, and as we must take the same view of it, for the reasons stated, it is a proper case for equitable relief. The findings of fraud entitle plaintiff to have the joint tenancy deed annulled. Cox v. Klatte, 29 Cal.App.2d 150, 84 P.2d 290.

[3] Defendant relies upon McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454, as supporting her position that the joint tenancy property should have been ordered sold and the proceeds equally divided, as was done in that case. It was there held that the invalidity of an alleged common-law marriage, or the belief of the parties that it was valid, did not affect the character of joint tenancy property which had been acquired by the joint efforts of the parties while living together, and voluntarily placed in joint tenancy. No question of fraud was involved. Reliance is also placed upon the rule that a woman

who lives with a man as his wife in the belief that a valid marriage exists is entitled, upon termination of their relationship, to share in the property acquired by them during its existence. Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.2d 421. The findings were adverse to defendant upon all the material issues affecting the real property and the personal property. They have sufficient support in the evidence and bar her from relief under the equitable rules which she invokes.

The judgment is affirmed. The attempted appeal from the order denying defendant's motion for new trial is dismissed.

WOOD, J., and KINCAID, J. pro tem, concur.



80 Cal.App.2d 500

HOYT et al. v. ROSENBERG.

Civ. 3635.

District Court of Appeal, Fourth District, California.

June 20, 1947.

Hearing Denied Aug. 14, 1947.

1. Infants ⇐61

Though a minor, like an adult, is required to exercise ordinary care, he is only required to exercise that degree or amount of care that is ordinarily exercised by one of like age, experience and development.

2. Infants ⇐102

Whether a minor has been negligent under particular circumstances is ordinarily a question of fact.

3. Infants ⇐61

Though the question whether a minor has been negligent is ordinarily one of fact for the jury, an affirmative finding thereon must not only be supported by evidence with reasonable inferences therefrom, but it must conform to and be in accordance with established rule that a minor is expected to use, not the quantum of care expected of an adult, but only that degree or amount of care ordinarily used by children of the same age under similar circumstances.

4. Infants ⇐61

Failure of 12½ year old boy to look before he kicked a can in order to see that he was not kicking it in the direction of other children playing "kick the can", did not constitute negligence that would render boy liable for injuries sustained by the one who was "it" when the kicked can struck her and put out her eye.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Mary Marlene Hoyt, a minor, by William W. Hoyt, her guardian ad litem, and William W. Hoyt against Jack Lee Rosenberg to recover for injuries sustained by the minor while playing a game with defendant. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment reversed.

John W. Holler, of San Diego, and H. J. Hunter, of Los Angeles, for appellant.

Monroe & McInnis, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages growing out of injuries received by Marlene Hoyt while playing a game.

The accident happened on March 28, 1945, in the alley at the rear of the home occupied by the plaintiffs. The Hoyt family lived on a 50-foot lot on the east side of Twenty-eighth Street in San Diego, which street runs north and south. The Rosenberg family lived on a 50-foot lot immediately to the north. At the rear of the Hoyt yard was a picket fence five feet high, with a gate three feet wide leading into the alley. This gate swings inward and at the time of the accident was open. Across the alley from the Hoyt yard, to the east, was the Miller yard with a high board fence along the alley. A telephone pole stood in the alley near that fence.

At the time of the accident four children of these families were playing in this al-

ley. These were Marlene Hoyt, the minor plaintiff, who then lacked four months of being twelve years old; her sister Annette, who was eight years old; Jack Rosenberg, the defendant, who was 12½ years old; and his sister Connie, who was eight years old. Until shortly before the accident Rosemary Hoyt, an older sister, who was thirteen years old, had been playing with them but she had been called to the telephone.

These children were playing a variation of the old game of hide and seek, which is generally known by youngsters as "kick the can", the can used being an old coffee canister. Rosemary Hoyt, in her testimony, fully described how this game was customarily played. Briefly stated, the manner of playing was as follows: one of the players, who was selected as "it", would place the can in the middle of the alley and count to a prearranged number, thus allowing the other players to run and hide. They were limited, as a place of hiding, to four or five of the surrounding yards. The one who was "it" would then go in search of the others. If "it" saw another player, both would run for the can. If "it" got there first the other was a prisoner and must remain in the vicinity of the can, and "it" would continue until all players had thus been taken prisoner. However, if one of the other players succeeded in beating "it" to the can, that player would kick the can as far as he could, which would release the other prisoners, and all would again go and hide. "It" would then have to go and get the can, bring it back to the same place and start over. In order to obtain the most possible time in which to hide again, the one thus kicking the can would try to kick it as far as possible. Rosemary testified that they always kicked the can either north or south, along the alley; and that when the girls played there was a rule that the can should not be kicked over the fence because none of them were strong enough to kick it over the fence. She also testified that while the player who was seen would usually race "it" to the can, if either thought he could not make it he would stop and walk in; that it often developed into a race as to which would get to the can first; that sometimes the race was pretty close; and that sometimes "it" would barely get there before the can was kicked by the other. This game had frequently been played by these children and was generally played by other groups of children throughout the city.

On the occasion here in question Marlene was "it" and the can had been placed on a spot near the center of the alley opposite the dividing line between the Hoyt and Rosenberg properties. This spot was twenty-four feet northerly from the open gate into the Hoyt yard, and was nineteen feet northerly from the telephone pole by the Miller fence, on the easterly side of the alley. Marlene had caught the two younger children and while they were waiting, with the hope that Jack would come and kick the can and release them, Annette was standing immediately to the south of this telephone pole, on the east side of the alley, and Connie was leaning against the Hoyt fence immediately across the alley from her. Marlene was in the Hoyt back yard looking for Jack, who was hiding behind some chairs in the Rosenberg back yard. Jack saw her starting toward the other side of her own house and he immediately started to race for the can, running through a garage on the Rosenberg property, and thence some twenty-five or thirty feet to the can. When Marlene saw Jack start for the alley she also started to run, but having decided that she could not beat him she stopped at the Hoyt back gate. Jack kept on running and as he arrived at the can he kicked it, trying to kick it over the Miller fence. Unfortunately, his aim or execution was no better than that of some golf shots, and the can struck Marlene in the face, with the result that she lost the use of one eye.

Jack testified that Marlene was a good runner and could outrun him; that as he ran down and kicked the can he "didn't see anybody over there"; that as he was running "just as a flash" he saw Annette and Connie out of the corner of his eyes; that after he started to run he did not watch Marlene any more; that he knew that if she started to run she would go out of her back gate; that while a person could be seen through the pickets of the Hoyt fence he did not see Marlene; and that "I didn't see her, because

I was looking at the can and because I didn't want to run by and miss it." Jack testified that he saw the can strike Marlene. While he also testified that when the can struck her she was "in the alley", it appears from other evidence that when she was struck she was standing "in the gateway."

There is little dispute in the evidence except with respect to the exact position of Marlene when she was struck, and it must be assumed that she was then standing in or very near the open gateway. The defendant, a twelve year old boy, was running to kick this can, an object of the game, and as he was approaching from the north he would naturally kick it in a southerly direction, and equally naturally he would kick it while on a dead run. The essential question here was, and is, whether in so doing he was guilty of some negligent act or omission, judged by the standard of care that is reasonably to be expected of boys of similar age and development, under similar circumstances. The case was submitted to the jury under appropriate instructions, concerning which no complaint is made, and the jury returned a verdict for $27,000 in favor of the plaintiffs. The defendant has appealed from the ensuing judgment.

[1, 2] There is no dispute as to the general rules of law here applicable. While a minor, like an adult, is required to exercise ordinary care he is only required to exercise that degree or amount of care that is ordinarily exercised by one of like age, experience and development. Hernandez v. Murphy, 46 Cal.App.2d 201, 115 P.2d 565. The rule is thus stated in 19 Cal.Jur. 604: "The ordinary care which a child of limited judgment and experience is called upon to exercise in a given situation is not the quantum of care required of an adult under the same circumstances. A child is required to exercise only that measure of care which children of the same age, and under similar circumstances, ordinarily exercise." Whether or not a minor has been negligent under a particular set of circumstances is ordinarily a question of fact. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26.

The appellant contends that, under these rules, the evidence here is not sufficient to show negligence on his part, and that if any negligence existed the minor respondent was equally culpable and, therefore, guilty of contributory negligence.

Apparently recognizing that some degree of danger was inherent in the playing of this game, the respondents concede that the appellant should not have been held liable merely because he engaged in the game, and insist that this was not done. It is contended that his liability arose from the negligent manner in which he played the game and that the evidence sufficiently discloses, under the rule above mentioned, that he failed to use ordinary care to avoid injury to the other children. In other words, it is thus contended that this appellant did something while playing this game that the ordinary boy of like age and experience would not have done, or that he failed to do something which such an ordinary boy would have done. In support of this contention it is argued that the apppellant was a large boy for his age, with "a rather remarkable grasp of the English language"; that he knew that the two smaller children had been caught and would be standing near the home base; that he violated a rule by attempting to kick the can over the Miller fence, rather than directly along the alley either to the north or to the south; that this was negligence because he could not see whether there was anyone on the other side of the Miller fence; that when he kicked the can he could have seen Marlene where she stood, if he had looked at all; that there was not a clear field ahead of him when he kicked the can as the two eight year old girls were in the alley between the can and the place where Marlene was standing; that he knew that Marlene might come into the alley and, if she did, she would come out of this gate; that, had he taken the trouble to look, he would have seen that Marlene was not running toward the can; that he could just as well have kicked the can northerly along the alley, instead of southerly toward the children; and that he knew the possible danger because he admitted that he realized fully that serious injury might result if one were struck by the can.

This argument is not fully sustained by the evidence. There is nothing in the record or in the testimony to sustain the conten-

tion that the appellant had a mental development that was unusual for a boy of his age. He did not admit, and we find nothing in the record to justify the inference, that before the accident happened he "realized fully that serious injury might result if one were struck by the can." The evidence in this regard is that after Marlene was hit he went to help her, and that he then "realized the possibility that that can having hit her might have hurt her pretty badly." While he knew that the two smaller children had been caught and were standing near, one was behind the telephone pole and the other was up against the fence on the other side of the alley. The way looked clear to him, as he testified, and even the respondents insist that Marlene had not entered the alley. While he did not look to see where Marlene was during the time he was running, it was natural that he would not do so and that he would bend all his efforts to winning the race to the can. While he knew that Marlene, if she entered the alley, would come through the gateway it would hardly be natural to expect him to delay his kicking of the can until she appeared. The essence of the game was to kick the can as quickly and as far as possible and anyone who has played or observed such a game knows that such a player, at the moment of accomplishing his object of kicking the can, would not stop to look around, and much less would he take a chance on stopping his run, turning around and going back in order to kick the can the other way. As a practical matter, in this game, the can is often kicked toward the approaching runner who is racing to get to the can first. Marlene's older sister indicated this when she testified that there was usually a race to get to the can first, that the race was often a close one, and that sometimes "it" would barely get there before the can was kicked. That the other players in this game expected Jack to kick the can in a southerly direction along the alley clearly, and without conflict, appears from the evidence. Marlene herself testified that she saw Jack start from his yard and saw him running toward the can; that when she saw she could not beat him to the can she stopped in her yard "back a little ways from the gate"; that she "stopped in the gateway"; and that she stopped because "I was afraid I would get hit by the can if I ran out, so I just stayed back." It also appears that even the two eight year old girls knew what was to be expected in the circumstances as one of them stood behind the telephone pole on the one side of the alley, and the other up against the fence on the other side of the alley. The fact that all three of these girls, who were familiar with the game, knew and understood that in the natural course of playing the game Jack would kick the can southerly along the alley, very clearly appears. It is not material here that the appellant tried to kick the can over the Miller fence. While the girls had a rule among themselves that this would not be done it does not clearly appear that Jack was informed of this rule. In any event, any violation of this rule could not have been a proximate cause of the accident as Marlene was standing in the gateway on the other side of the alley. If the appellant had succeeded in breaking the rule the only effect would have been to have fully protected her from this accident.

If there was any negligence here it was in thus kicking this can southerly along this alley when Marlene was standing in the gateway of her yard. The kicking of the can in this direction was the very thing the appellant was supposed to do in playing this game and was the thing the other players expected him to do, and even Marlene, knowing this, remained in a position which she regarded as one of safety. It is argued that he did not use ordinary care to avoid injury because he failed to look, before he kicked, to see where Marlene was and that he could have seen her had he so looked. Not only is it unreasonable to expect a boy of that age to stop in such a moment in such a game, at the risk of losing his advantage, in order to look for something that was apparently outside his field of action, but if he had looked and had seen her it would naturally have appeared to him, as it seemed to her, that she was in a position of safety. If it could be assumed that an ordinary boy of that age would have looked and have seen Marlene in that position, it cannot reasonably be inferred that such an ordinary boy would have real-

ized that she was in a position of danger, or that he would have refrained from following up his advantage by kicking the can in that general direction.

The fact that Marlene was not in the alley was an added reason, normally and naturally, why the appellant would not realize that any special danger existed. He would even have been expected to have kicked the can in that direction if Marlene had actually been in the alley running toward him and the can; and much less could he be reasonably expected to realize or expect that the can kicked along the alley between the fences would happen to go through the narrow opening of the gateway and inflict an injury on his opponent. Such things are possible but somewhat unusual even in that game with its natural and inherent danger. As a matter of fact, the thing that happened was the result of a danger that was inherent in this game and if any finding of negligence were to be here sustained, it should be on the real ground that it was dangerous and therefore negligence to play this game in the way it was supposed to be, and customarily was, played. However, in such an event the minor respondent would be equally negligent.

[3] While the question as to whether a minor has been negligent in certain circumstances is ordinarily one of fact for the jury, an affirmative finding thereon must not only be supported by the evidence, with reasonable inferences therefrom, but it must conform to and be in accordance with the established rule that a minor is expected to use, not the quantum of care expected of an adult, but only that degree or amount of care which is ordinarily used by children of the same age under similar circumstances. In deciding whether, in such a case, there has been a failure to use ordinary care to avoid injury to other children, the test is, and must be, not what an adult would have there done or what the results indicate should have been done, but what an ordinary child in that situation would have done.

[4] Under these rules, it cannot be held that the evidence sustains this verdict and judgment. In Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893, 894, 35 L.R.A., N.S., 574, Ann.Cas. 1912C, 176, a case similar in some respects to the instant case, although the game there being played was inherently less dangerous, the court used the following language, which is not inappropriate here: "* * * can any man truthfully say as he recalls the scene that the ten-year-old defendant in the present case was doing anything more or less than healthy boys of his age have done from time immemorial and will continue to do as long as the race retains its activity and love of innocent sport? It seems to us that this question can receive but one answer, and that in the negative."

Under established rules, the idea that this appellant should, or that the ordinary boy would, have seen Marlene and turned around and kicked this can in the other direction is fallacious, in view of the circumstances which here appear. Any one so thinking not only does not know boys of that age, but either never played similar games, including "shinny", or played them too long ago. There is no room here for a reasonable difference of opinion as to what the normal and ordinary boy of that age would have done under the circumstances shown by this record. It cannot be reasonably inferred from the evidence that the appellant on this occasion and under these circumstances did "anything more or less than healthy boys of his age have done from time immemorial and will continue to do so long as the race retains its activity."

As the Wisconsin court further said in the case above cited: "The injury here was serious and deplorable, but the severity of it does not affect the character of the act which caused it, so far as the question of negligence is concerned." The serious injury here was an unfortunate accident which, if it could have been anticipated at all, must be attributed to the natural danger inherent in this game and not to any lack of care which could reasonably be expected to have been exercised by this twelve year old boy. The evidence being insufficient to show that he did or failed to do anything which would have been done or omitted by an ordinary boy of that age and experience, under these circumstances, it is insufficient to sustain the implied finding that he failed to use

ordinary care to avoid injury to the minor respondent.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.



80 Cal.App.2d 681

GAUDIO v. HOSKINS.

Civ. 15815.

District Court of Appeal, Second District, Division 2, California.

July 1, 1947.

1. Appeal and error ⇐1010(1)

Where the evidence in support of findings and judgment is substantial, the District Court of Appeal is without power to reject such proof or to substitute other findings.

2. Appeal and error ⇐1010(1)

Where facts established by respondent are such as reasonably to warrant the findings, the findings will not be disturbed.

3. Mortgages ⇐38(1)

In suit to have a deed absolute declared a mortgage and to establish plaintiff's right to a cancellation thereof on tender of amount of debt, evidence sustained finding that deed was in fact a mortgage.

4. Mortgages ⇐32(1)

Though there is no inhibition against the purchase of realty by one in whom confidence is reposed from a person who relies on the integrity and advice of the purchaser, such transactions are carefully scrutinized so that a deed absolute may not prevail and a sale be approved when the record vendor alleges that a sale was not intended and contends that only a mortgage was contemplated by oral agreement for a loan. Civ.Code, § 2889.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Suit by Madeline Gaudio against William B. Hoskins to have a deed absolute declared to be a mortgage and to establish plaintiff's right to a cancellation thereof on tender of amount of her debt. From a judgment in favor of plaintiff, and from order denying new trial defendant appeals.

Judgment affirmed and appeal from order dismissed.

Roy C. Kaiser and Roy A. Linn, both of Los Angeles, for appellant.

Sanner, Fleming & Irwin, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent sued to have a deed absolute declared to be a mortgage and to establish her right to a cancellation thereof upon tender of the amount of her debt. Upon all of the issues raised by the pleadings the court made findings favorable to respondent and entered judgment declaring that the deed is a mortgage given as security for the loan of $1,850; that respondent is sole owner and entitled to a reconveyance of the realty and to an accounting by appellant upon payment of the amount of his lien. The principal ground for reversal urged is that the evidence does not sustain the findings and the judgment. The following brief resume of the evidence adopted by the trial court will suffice to dispel such illusion.

Prior to May 19, 1944, respondent was associated with appellant in the ownership and operation of a restaurant. As a result of such association and of four years of friendship she believed in his integrity and his good judgment, and in all business dealings relied upon his advice. Prior to May, 1944, appellant, having arranged to return to the real estate business, stated to respondent he had an exclusive listing of a flat building on south Detroit street in Los Angeles, hereinafter referred to as lot 56, and advised her to purchase it for $15,000; that he had a buyer for her home in Beverly Hills, the sale of which would enable her to acquire lot 56. When he notified her that such buyer had failed him, she hesitated to go further with her plan to make her purchase but her fears having been banished by his assurances that her home

could be sold, she entered into an escrow for the purchase of the flat building on his statements that (1) she could borrow $5,000, (2) that he would loan her the amount of his commission, and (3) that he would loan the balance of her down payment, which with a loan of $8,500 from one Mrs. Curran on lot 56 would enable her to consummate the deal. He negotiated the $8,500 loan and procured a loan on her home, the net of which was $4,847.51. The combined proceeds of the two loans having been less than $15,000, appellant loaned her $1,850 to enable her to close the transaction, "such sum to be repaid upon the sale of her home," which he promised to effect promptly, "as property was selling at the time."

Prior to close of escrow and about July 18 appellant asked respondent to call at the bank to sign some papers. When he met her there he stated, "I want to secure my loan * * * suppose you die * * * how would anyone know that I had any money in the property." She inquired, "Is that the way you do it?" "Yes," said he, "sign here, and make it secure for you and for me. After the house is sold you can pay me back." She signed as he requested, and he agreed to take care of the property and collect the rents until she had gained experience.

Respondent subsequently sold her home and advised appellant of her readiness to pay her debt to him. He replied, "What do you think I am? Property has gone up. I cut myself in on that property in case you don't know it * * * I am half owner * * * Do you think I am a fool? * * * The property is worth about $22,000 now." Her efforts to induce him to accept payment of his loan and to give her an accounting of the rents were futile. Her testimony was corroborated by the escrow clerk to the effect that appellant received a commission of $750 from the seller of lot 56; that after the deed for a half interest was signed by respondent the bank took instructions "to use the deed in escrow without collection, for her account"; that respondent was present but had nothing to say about the instructions which in each instance were given by appellant; that he did not sign the Curran note or trust deed for the $8,500 loan.

While the escrow was pending appellant drew $1,000 from the joint bank account of himself and his wife to whom he stated that he was making a loan to complete the transaction because Mrs. Gaudio did not have the total amount of the purchase price. He subsequently told her that he had loaned respondent the commission. In August, 1946, when Mrs. Hoskins inquired as to where he got the money to buy a one-half interest in lot 56, he replied that it was his commission and the loan to respondent, and that "it was very customary when you loaned money in escrow to accept a deed for a part of the property to secure your loan. He told me it was written in the California real estate law." On another occasion he told his wife that he would not release his title; "that he owned a half interest in the property, and he was not going to release that undivided one-half interest as the property had increased in value, and he felt if he did release it he would be entitled to the increase in the value of the property."

Appellant testified that he told Mrs. Curran that her loan was for Mrs. Gaudio; he did not sign the note or otherwise obligate himself to pay it; he had never paid respondent anything; he desired to give her a note at the escrow for his share of the purchase price but "she didn't want it." He collected the rentals earned by the property and deposited them to the account of respondent. He did not pay any taxes on the property; neither did he report on his income tax return any rents collected or any interest paid in 1945.

While appellant gave certain testimony contrary to the evidence of respondent, the court determined that the proof of respondent was true; that appellant advanced $1,850 to respondent; that he presented to her for execution an instrument which he represented to her was to be made and delivered to him as security for his loan and that she executed it while reposing full confidence in him and while relying wholly upon his experience and integrity, without seeking other advice; that while the writing was in form a deed pur-

porting to grant appellant an undivided one-half interest in lot 56, yet it was intended to be and is a mortgage; that it was obtained from respondent without adequate consideration and by means of false representations and by unfair advantage taken of her confidence in him. It was concluded that respondent is entitled to a discharge and cancellation of such mortgage upon payment by her of $1,850 with interest at six per cent from August 1, 1944, to March 1, 1945.

[1, 2] The evidence in support of such findings and judgment being substantial, this court is without power to reject such proof or to substitute other findings. (Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183; Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corporation, 58 Cal.App.2d 684, 690, 138 P.2d 43.) The facts established by respondent being such as reasonably to warrant the findings, the latter will not be disturbed. (Davidson v. American Liquid Gas Corporation, 32 Cal.App.2d 382, 389, 89 P.2d 1103.)

[3, 4] Not only does the proof in this action justify the findings, but as viewed in the cold record of the trial a contrary decision would have been a denial of justice. While there is no inhibition against the purchase of property by one in whom confidence is reposed from a person who relies upon the integrity and advice of the purchaser, such transactions are carefully scrutinized to the end that a deed absolute may not prevail and a sale be approved when the record vendor alleges that a sale was not intended and contends that only a mortgage was contemplated by their oral agreement for a loan. (See Beeler v. American Trust Company, 24 Cal.2d 1, 23, 147 P.2d 583; Civil Code, sec. 2889.)

One other point raised by appellant requires but brief notice. About three months prior to the trial of this action appellant's wife obtained an interlocutory decree of divorce against him and by the decree entered by the superior court of Los Angeles county Mrs. Hoskins was awarded 55 per cent "of any and all right, title or interest" owned by either or both in lot 56. The court having decided in the present action that such interest is no more than a mortgage lien for the sum of $1,850, it awarded 55 per cent thereof to Mrs. Hoskins payable directly to her by respondent. Appellant deplores the act of the court in thus awarding Mrs. Hoskins' interest in lot 56 as being without the issues. The court below did not disturb the divorce decree but merely adjudicated the extent of appellant's interest in the property. But appellant is not called upon to plead for Mrs. Hoskins. She is able to speak for herself; and having had knowledge of the action and having served as a witness at the trial she was familiar with the facts and could have intervened prior to the entry of the judgment if she had willed to do so. At any rate, the judgment herein is not intended as a ban against such action as she may be advised to take to assert any claim.

The attempted appeal from the order denying a new trial is dismissed. The judgment is affirmed.

McCOMB and WILSON, JJ., concur.



80 Cal.App.2d 542

CHURCH et ux. v. BLOCH et al.

Civ. 15402.

District Court of Appeal, Second District, Division 3, California.

June 24, 1947.

1. Physicians and surgeons ⇐18(8)

Generally, propriety or impropriety of particular medical treatment can be established only by expert medical testimony.

2. Physicians and surgeons ⇐18(9)

In malpractice action against corporation which furnished medical services to its members and physicians charged with so negligently performing their services that a breech birth occurred, where it appeared

from expert medical testimony that physician chose a recognized and approved method of practice in not taking x-rays or attempting to turn the child, evidence of negligence was insufficient for jury. Code Civ.Proc. § 2055.

3. Physicians and surgeons ⇐14(4)

A physician, in addition to selecting a recognized and approved method of treating a patient, must use that degree of care ordinarily exercised by reputable physicians practicing in the same locality, in pursuing such method.

4. Physicians and surgeons ⇐18(8)

Where negligence of physician is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Cecil E. Church and Jewel Church, husband and wife, against J. L. Bloch and another for personal injuries allegedly sustained by wife as result of negligence of the named defendant. From judgments of nonsuit, plaintiffs appeal.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellants.

Reed & Kirtland and Henry Kappler, both of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs, husband and wife, commenced this action to recover damages for personal injuries allegedly sustained by the wife as the result of the negligence of Dr. Jessie L. Bloch in rendering medical services. A jury was impaneled. At the conclusion of plaintiffs' case, counsel for Dr. Bloch made a motion for nonsuit on the grounds that there was no proof insofar as the allegations of the complaint are concerned that Dr. Bloch was negligent, and that there was no evidence that "any condition" the wife has or ever did have was proximately caused by any negligence as alleged in the complaint on the part of Dr. Bloch. The motion was granted, and the court also ordered a nonsuit as to defendant California Physicians Service. Plaintiffs appeal from the judgments of nonsuit.

Appellants contend that the evidence was sufficient to establish a prima facie case of negligence warranting submission of the question of fact to the jury.

The complaint alleged in substance that the California Physicians Service is a corporation engaged in the business of selling memberships under which said corporation agrees to furnish medical care and services to its members and their families; that plaintiffs had purchased a membership in said corporation; that at all times mentioned therein Dr. Bloch was acting as the agent or servant of said corporation; that plaintiff Jewel Church gave birth to a child on July 25, 1943; that, pursuant to the agreement with the said corporation, Dr. Bloch acted as her physician and surgeon, giving her prenatal care and attending the delivery; that defendants so negligently performed their services that a breech birth occurred; that as a result of said negligence plaintiff Jewel Church suffered injuries to her person, including lacerations and tearing of the tissue, an erosion of the cervix, an infection of the uteral genital tract, and a general impairment of her health; that she is still receiving medical care and attention for the injuries so sustained, and as a result of such negligence she has suffered damages in stated amounts. As a second cause of action defendant Cecil E. Church alleged damages for loss of his wife's companionship and society.

Plaintiff testified that she first consulted Dr. Bloch in February, 1943; that he took a history of her case, gave her a physical examination, and told her the baby would be born about August 4, 1943; that she returned to him for medical attention periodically thereafter; that on one visit to his office he told her husband to get her to the hospital in a hurry when she "gets sick" because the baby is "coming quick"; that she went to him for treatment 3 times in July—on the 3rd, 7th and 21st; that on one of those visits she had swollen ankles and he gave her a prescription; that on the 21st she told him she did not feel well, and

felt that the baby's head was up under her ribs; that on that occasion Dr. Bloch said she was doing all right; that at no time during the pregnancy did he make a stethoscopic examination of her abdomen or take any x-rays; that labor pains started about 1 p. m. on July 24, 1943; that she arrived at the hospital about 8 p. m.; that about one hour later a Dr. McCracken, whom she had never seen but who she had heard was Dr. Bloch's assistant, came in and examined her and remained about 15 minutes; that she, the nurses and her husband were then alone in the room until Dr. Bloch arrived "just before" 3 a. m., and the baby was born at 3 a. m.; that Dr. Bloch left immediately thereafter, and she next saw him on the following day when he "stuck his head in the door" of her room and asked her how she was; that she told him she felt terrible; that he did not come into the room or reply to her, but made a remark about the weather and a $50 fee, and then departed; that the next time she saw him was 13 days later when she took the baby to his office; that she did not talk with the doctor at that time, but she told the nurse that she did not feel right, and the nurse told her she would have to wait and come back for her "8-weeks check-up"; that she was in so much misery that she could not wait and she returned to Dr. Bloch's office about September 17, 1943, at the end of the seventh week; that at that time her legs tingled, she felt weak and dizzy, her head ached, and her left side from under the ribs down felt like she had been scraped "or something"; that she told Dr. Bloch that she felt there was something drastically wrong with her, and she didn't feel right at all; that Dr. Bloch gave her a vaginal examination, told her she was coming along nicely, and gave her a prescription but did not tell her what it was for; that that was the only vaginal examination he had given her except one he gave her when she first consulted him in February; that thereafter she changed doctors and went to a health clinic 3 times a week for over a month; that she then went to a Dr. Coleman and a Dr. Swartz for a period of about 6 months; that when she first went to them she told Dr. Coleman that her back ached, and she was sore all through the lower abdomen, and her left leg and left hip bothered her; that she told him the condition started in June, 1943, before the child was born; that they took x-rays of her lower abdomen, her hip, chest and back; that Dr. Coleman's treatments included "shots" for her hip, diathermy to her pelvic region, and he told her she should have a rest; that she then went to New Mexico where her family lived, and there consulted a Dr. Thearle who put her in a sanitorium; that he treated her all the time she was in the sanitorium; that he gave her iron and liver injections each day, and treated her blood; that she was on a special diet, and received vaginal swabbings; that she remained in the sanitorium 3 months and then consulted a Dr. Tanney; that she gave him a history of "discharge," and he told her she would have to undergo a major operation; that on November 27, 1944, Dr. Tanny performed surgery through the vaginal canal in the abdominal region on her pelvic organs; that she was not on her feet again until the latter part of February, 1945; that she was under Dr. Tanny's care after that, and last saw him on November 28, 1945.

Plaintiff Cecil E. Church testified that he telephoned Dr. Bloch's office about 2:30 p. m. on July 24, 1943, and talked to the secretary about taking his wife to the hospital that day for the birth of the child, and he told the secretary he would call again about 5 p. m.; that he called again about 5 p. m., and told the secretary to inform Dr. Bloch that he was taking his wife to the hospital; that they arrived at the hospital about 7:30 p. m.; that the baby was born about 3 a. m.; that after the baby was born Dr. Bloch made no sutures, and left the room immediately; that when his wife went to Dr. Coleman's office she was complaining of her side and kidney; and that she was still unable to do all of her household duties.

Dr. Coleman, an osteopathic physician and surgeon, testified that Mrs. Church came to his office on November 17, 1943, at which time she complained of her back, left leg and hip; that she said her leg went numb and bothered her before and after the birth of the child, and she was

very nervous and irritable; that he gave her a vaginal examination, and found a severe and large erosion of the cervix; that in his opinion it was of long standing, and had been present several years; that he did not believe the ulceration was infected, but it may have contributed to her nervous irritability; that all he did was treat her for the erosion and his associate, Dr. Swartz, treated her for chest conditions.

Dr. Swartz testified that Mrs. Church gave him a history of having had a cough 2 weeks before she came to him, of loss of weight, no tubercular contact, no coughing up of blood, no history of heart trouble, and no operations or previous diseases except bronchial pneumonia 2 years previous to consulting him.

Defendant Jessie L. Bloch, M. D., called under Section 2055 of the Code of Civil Procedure, testified that he is a physician and surgeon, licensed to practice as such in California; that he is a general practitioner, and at the time he rendered medical services to Mrs. Church obstetrics was a part of his general practice; that he agreed to take care of Mrs. Church during her pregnancy, and to give postnatal care if necessary; that he gave her a physical examination on March 4, 1943, at which time he found she had a 1-plus systocele, a 1-plus rectocele, and mild lacerations of the cervix which had been caused by a previous childbirth and had healed; that had he attempted to do surgery on the lacerations he would have caused an abortion; that Mrs. Church had a breach presentation; that 3 percent of the babies born are breach presentations; that in a breach presentation the delivery is slower, and the dilation of the cervix is not regular as it is in a head presentation; that the cervix may be torn badly in a breach presentation; that doctors "take care" of bad lacerations, but if the cervix is a "little frayed" they can't do anything with it except let it heal; that the healing process takes longer than 6 or 8 weeks; that if the laceration becomes irritated, that is, if the cells become activated by the acid secretions of the vagina then an erosion takes place; that when he examined Mrs. Church 7 weeks after the birth of the baby she said she felt a little weak, and he gave her a tonic; and that he made a vaginal examination at that time and found no open lacerations or erosion of the cervix.

A doctor of medicine, who had practiced in this community since 1912, was called by plaintiffs and qualified as an expert in obstetrics. He was asked a hypothetical question based upon assumed facts, justified by and embodied in the evidence, concerning the medical treatment of Mrs. Church prior to and during the birth of the child. He testified that in his opinion Dr. Bloch did not use the ordinary care and skill of a practicing physician in this locality in the light of practices existing at that time; that a practitioner using ordinary care and skill in this locality, under the circumstances related in the hypothetical question, would have taken an x-ray, and upon finding the child in an inverted position, he should have done something to turn the child; that "lots" of times this may be accomplished by manipulation of the abdomen before the labor pains become severe, and if that cannot be done and the labor starts the doctor can reach up inside and either get hold of the feet or try to push the child back to bring the head down first. He also testified that an erosion is an ulcerated tear which stays open and doesn't heal up; that those severe tears should be repaired as soon as possible, and they try to repair them right after the delivery. On cross-examination he testified that 3 percent to 5 percent of births are breach births; that there are some physicians in good standing in this community who are of the opinion that babies should not be turned; that those doctors who entertain such an opinion represent a respectable minority of physicians in the community; that in this particular case if the doctor saw the patient about 13 days after the birth and again 8 weeks after the birth and made a vaginal examination that it probably would be good practice, but he thought they should be seen more often than that; that generally speaking, physicians usually make more than one or two

observations of the mother after the child is born and the mother has left the hospital.

[1, 2] The general rule is that the propriety or impropriety of particular medical treatment can be established only by expert medical testimony. Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 467, 12 P.2d 744, 13 P.2d 905. Respondents assert that since the expert medical witness, called in behalf of plaintiffs, testified that there is a respectable minority of physicians in good standing in the community who are of the opinion babies should not be turned, there was no negligence on the part of Dr. Bloch in not taking x-rays or attempting to turn the child. It was stated in the case of Sim v. Weeks, 7 Cal.App.2d 28, at page 37, 45 P.2d 350, at page 354: "A charge of negligence in a choice of treatment is refuted, as a matter of law, by showing that a respectable minority of expert physicians approved the method selected." It appears, from the expert medical testimony introduced by plaintiffs, that Dr. Bloch chose a recognized and approved method of practice in not taking x-rays or attempting to turn the child.

[3, 4] A question arises as to whether Dr. Bloch, having chosen a recognized and approved method of practice, used ordinary care in the performance of his treatment of Mrs. Church. In addition to selecting a recognized and approved method of treating a patient, a physician, in pursuing such method, is required to use that degree of care ordinarily exercised by reputable physicians practicing in the same locality. The evidence shows that Dr. Bloch did not arrive at the hospital to attend his patient until 15 minutes before the baby was born, and more than 9 hours after his secretary had been notified that the patient was being taken to the hospital; that he left immediately after the baby was born; that the next day, when he appeared at the door of her room and she told him she felt "terrible," he prescribed no treatment for her; that he did not see her again for 7 weeks, at which time he gave her a vaginal examination and told her she was coming along nicely; and that about 2 months later a vaginal examination by another doctor disclosed the presence of a severe erosion of the cervix which, in the opinion of the examining doctor, had been present several years. Although such evidence may indicate to a person who is not a member of the medical profession that Dr. Bloch failed to use ordinary care in treating Mrs. Church and that he was guilty of malpractice, the test or standard to be applied in determining whether he used the ordinary care required of him is the standard set by the care ordinarily exercised by others of the same profession in good standing in the same locality. Such standard can be ascertained only from expert medical testimony. There was no expert medical testimony, other than that based on the hypothetical question above referred to, that defendant did not exercise the degree of care ordinarily exercised by physicians of good standing practicing in the locality. That hypothetical question pertained only to the questions as to whether x-rays should be taken to determine the position of the baby, and whether the baby should be turned; and as to those questions the expert testimony indicated, as above stated, that defendant adopted an approved method. Appellants argue that the facts, disclosed by the evidence, show as a matter of common knowledge that defendant did not exercise ordinary care. It is true that where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightment is not essential for the determination of an obvious fact." Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604, 606. However, it cannot be said that as a matter of common knowledge the treatment accorded Mrs. Church was not within the standard required of physicians in that community. Certain evidence presented on behalf of plaintiffs indicates that Dr. Bloch was more interested in the amount of money he should receive than he was in the welfare of his patient, and that he intended to give her the minimum of medical attention in assertedly performing the professional duties required of him. There was testimony that about four days prior to the birth of the child he demanded that plaintiffs pay him $50, stating that

although he was under contract with the California Physicians Service it "was not paying off enough," and that plaintiffs would have to get a "quack" to deliver the baby if they did not "make arrangements to pay this $50." (At the time of the birth they had made no payment to him.) While that testimony does not indicate a commendable professional attitude, the jury could not have determined therefrom that he failed to use the degree of care required of him. Whether he exercised the requisite degree of care was a matter peculiarly within the knowledge of medical experts.

The judgments and orders granting the motions for nonsuits as to both defendants are affirmed.

SHINN, Acting P. J., and KINCAID, J. pro tem.



80 Cal.App.2d 574

BOARTS et al. v. IMPERIAL IRR. DIST.

Civ. 3640.

District Court of Appeal, Fourth District, California.

June 26, 1947.

Hearing Denied Aug. 21, 1947.

Adjoining landowners ⇐7

An irrigation district owed no duty to cut and destroy weeds naturally growing on banks of its drainage ditch and hence was not liable for damage to crops on adjacent land as result of weed seeds being blown thereon by prevailing winds, in absence of proof of district's negligence or existence of public nuisance.

Appeal from Superior Court, Imperial County; Kenneth E. Morrison, Judge.

Action by C. F. Boarts and another against the Imperial Irrigation District, a public corporation, to abate an alleged nuisance consisting of weeds growing on the banks of defendant's drainage ditch, and recover damages for injuries to plaintiffs' crops as the result of weed seeds being blown by prevailing winds onto plaintiffs' land. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Whitelaw & Whitelaw, of El Centro, for appellants.

Harry W. Horton and George R. Kirk, both of El Centro, for respondent.

MARKS Justice.

Plaintiffs brought this action to abate an alleged nuisance consisting of weeds growing on the banks of a drainage ditch owned by defendant, the seeds of which were blown by the prevailing winds onto plaintiffs' property causing damage to crops. They also sought recovery of damages alleged to have been suffered by them. Judgment was rendered for defendant and this appeal followed.

Plaintiffs were the owners of 80 acres of land near Westmoreland in Imperial County. A public road 50 feet wide ran north and south adjoining and east of the west line of their property. In July of 1926 they conveyed to defendant a right of way 30 feet wide along, adjoining and east of this roadway, "for the construction, maintenance and/or use of a surface drain ditch, telephone and/or electric power line or lines, as now exist or as may be constructed or enlarged."

The ditch constructed on this right of way was but part of a long drainage canal. It extended an unknown distance south of plaintiffs' property and about two and one-half miles north to a river. The purpose of the ditch was to carry off unused irrigating water from the lands of the neighboring owners. Plaintiffs maintained a drain leading from their land to this drainage canal to carry off such water.

The evidence indicates that there were about 1200 miles of such drainage canals in the Imperial Irrigation District all constructed and maintained in substantially the same manner as the one involved here. In addition there were about 1800 miles of irrigation canals. The evidence also shows

that the defendant kept the bottom of these canals free of weeds and other growth to permit the unobstructed flow of water, but did not keep the banks clean; that it was expending between one hundred and twenty-five, and one hundred and thirty thousand dollars annually on this work; that to clean the banks as well as the waterways would increase such expenditures to at least three times that amount; that the defendant has neither the employees, the equipment, nor the money to undertake the larger task.

The evidence shows there were arrow weed and other such natural growth on the banks of the canal which were permitted to seed; that the prevailing winds were from the west which carried the seeds onto plaintiffs' property where they germinated. It is not suggested that these weeds were planted by defendant or that they were anything but a natural growth. They were watered by seepage from plaintiffs' land during irrigations.

We are cited to no State law or County ordinance which would require an owner to destroy or stop the growth on his property of such weeds as we have here. The sole question for decision is whether or not, in the absence of statute or ordinance, an owner of property owes a duty to his neighbor of preventing seeds from weeds naturally growing on his land from maturing and being blown by the wind onto the neighbor's land. We have been cited to no California case deciding this question.

A general rule on the subject is stated in 1 American Jurisprudence at page 541, as follows: "Nor is there any liability to an adjoining owner for the spread of noxious vegetation, such as thistles, which, being a natural growth of the soil, the property owner is under no duty to cut."

The earliest case on the question, in point of time, to which we have been cited, or which our research has disclosed, is Giles v. Walker, L.R. 24 Quenn's Bench Div. 656. This case discloses that the defendant bought some timber land and cut the trees; that no thistles were growing on the land when he bought it; that it was covered by thistles after the trees were removed. Defendant did not cut the thistles and the wind carried the seed onto plaintiff's land where they rooted and grew. This furnished the basis for his action for damages. The court held that "there can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil."

The opinion in the English case was quoted and followed in the case of Langer v. Goode, 21 N.D. 462, 131 N.W. 258, Ann. Cas.1913D, 429, which was an action in which the plaintiff sought damages against defendant for permitting mustard to grow and mature on his property. There was a state law regulating the growth of mustard but it was held that as the board of county commissioners of the county in which the properties were located had not taken the necessary steps to make it effective in that county, the statute could not control the decision. It was further held that independent of statute there was no duty resting on the defendant to destroy the natural growth of mustard and thus prevent the seeds from being blown onto the plaintiff's property.

The cases of St. Louis Southwestern R. Co. of Texas v. Terhune, Tex.CivApp., 81 S.W. 74, and Vance v. Southern Kansas Ry. of Texas, 152 S.W. 743, 745, decided by the Court of Civil Appeals of Texas, involved similar situations. The case first cited was an action for damages resulting from the railway company permitting Johnson grass to grow along its right of way so that the seed was carried onto the adjoining property; and the other was to recover damages by reason of the railway company permitting Russian thistles to grow on its right of way from which seed spread to adjoining land.

The holdings in both cases is illustrated by the following quotation from the opinion in the Vance case: "As we understand the law, there was no cause of action in favor of contiguous landowners against a railroad permitting Russian thistles to grow and go to seed on its right of way prior to the passage of the act of 1901. The lawful use of one's own may cause damage to another, and yet no legal wrong has been done or liability incurred. The mere failure to destroy thistles and prevent their going to seed within itself is not actionable,

independent of the statute. Especially is this true if the thistle is indigenous to the soil. In order to make a railroad liable, there must have been some independent or active negligence on its part in conveying the seed upon the adjacent land to make it liable."

A somewhat similar line of reasoning appears and was approved in the case of Bliss v. Ball, 99 Mass. 597. The plaintiff maintained that the shade of trees on his neighbor's property made his house damp and unhealthy to his damage. The court disposed of plaintiff's argument as follows: "As against adjoining proprietors, the owner of a lot may plant shade trees upon it or cover it with a thick forest, and the injury done to them by the mere shade of the trees is damnum absque injuria. It is no violation of their property rights."

The case of Stewart v. Birchfield, 15 Cal.App. 378, 114 P. 999, 1000, may, by analogy, be important here. Plaintiff and defendant were adjoining landowners in Imperial County. Defendant cleared his land of brush and left it uncultivated and unirrigated so that the prevailing winds carried sand from it onto plaintiff's property where it was deposited in mounds. Plaintiff brought suit for damages, a demurrer to his complaint was sustained and a judgment of dismissal entered. In affirming the judgment it was said: "If the defendant had the right to remove brush or trees growing upon his property, which right he undoubtedly possessed as an incident to the ownership of the ground, then, unless he was guilty of some negligent act while removing the same, he would not be responsible in damages to plaintiff. He had the right not only to clear his ground, but to leave it unirrigated, if he saw fit, thereafter, even though his failure to so irrigate it might have produced the damage of which plaintiff complains. 'Every man may use his own land for all lawful purposes to which such lands are usually applied, without being answerable for the consequences, provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent land owner. It is not, therefore, necessarily negligence on the part of a land owner to make a use of his land which inevitably produces loss to his neighbor; for as he may willfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally. Sherman & Redfield on Negligence, § 700."

Plaintiffs rely on such cases as McIntosh v. Brimmer, 68 Cal.App. 770, 230 P. 203, and City of Turlock v. Bristow, 103 Cal. App. 750, 284 P. 962, to sustain their position. These cases are easily distinguishable from the instant case.

In the McIntosh case the defendant brought several thousand chickens onto his small place. Those chickens scratched in the dry dirt sending clouds of dust, some of it polluted, onto the vineyard of plaintiff causing him loss. It was held that this constituted a private nuisance which was ordered abated and plaintiff was awarded his damages. This is in accordance with the general rule stated in 39 Am.Juris. 343, as follows: "A person who brings on his land anything that was not naturally there, and that is likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie liable for all the damage which is the natural consequence of its escape."

City of Turlock v. Bristow, supra, involved an open ditch belonging to defendant which ran through the city of Turlock. The water became so polluted that it was dangerous to the public health. The right to abate such a public nuisance cannot be questioned.

In the case before us nothing was brought onto the land of defendant. The weeds were a natural growth. The wind carried the seeds to plaintiffs' property. No negligence of defendant appears and no public nuisance dangerous to the public, safety, health, or welfare was proved. As it seems to be established by the cases we have cited that no duty rested on defendant to cut or destroy the weeds, plaintiffs cannot recover.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

80 Cal.App.2d 742

GENERAL MACHINERY & SUPPLY CO. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION.

Civ. 13374.

District Court of Appeal, First District, Division 2, California.

July 3, 1947.

Taxation ⇐543(7)

In suit by employer to recover unemployment insurance contributions alleged to have been overpaid, evidence sustained finding that employer failed to sustain its burden of proving that it had not been notified by the commission of the filing of claims of certain former employees as required by the act. Gen.Laws, Act 8780d, § 41.1.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action under the Unemployment Insurance Act by the General Machinery & Supply Company, a corporation, against the California Employment Stabilization Commission to recover contributions allegedly overpaid by plaintiff. From a judgment for the defendant, the plaintiff appeals.

Judgment affirmed.

Fabian D. Brown, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent

NOURSE, Presiding Justice.

Plaintiff sued under section 41.1 of the Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d, to recover contributions alleged to have been overpaid for the period January 31, 1941, to June 30, 1944. Defendant had judgment.

Under the provisions of the Act plaintiff's reserve account had been decreased by payments therefrom prior to June 11, 1940, of compensation to former employees who were at the time out of employment. The complaint alleged that these payments were made "in error" and the suggestion is made that some of these former employees had either left voluntarily or been discharged for misconduct. Without any specific pleading in that regard evidence was taken tending to show that the employer had not been notified of the filing of the claims of these employees as required by the Act. No substantial evidence was taken that the claims were not valid when presented or that the employees were not rightly paid. The trial court made no specific finding on the question of notice. It found that the charges made against plaintiff's account were all properly made and that the plaintiff should suffer the deductions made on account of the awards to its employees.

The difference between the issue of the validity of the payments of the respective claims of the former employees and the issue of the validity of the procedure of the administrative agency adjudging those payments due is apparent. Plaintiff sued on the first issue only. No substantial evidence was offered in support of the pleading. It offered evidence on the second issue only and limits the appeal to that issue. On this issue the evidence was conflicting. Proof was made that the plaintiff protested the deductions before the agency under the provisions of the Act. The defendant pleaded in its answer the record of the proceedings before the commission on plaintiff's protest where the commission found that notice was duly given as required by the Act. At the trial before the court plaintiff produced evidence showing that on four separate dates from June 11, 1940, to May 7, 1941, it was notified that the commission had made these deductions on account of the claims paid to former employees. The plaintiff also offered the testimony of one of its employees that prior notices of the filing of the claims were not "received." Defendant offered the testimony of one of its employees that it was the practice of the office to mail such notices to the employer's established place of business. The records of the commission were not produced, but a former employee of the commission testified that during the period in question many notices were not mailed because of the press of business. There was no direct evidence that these

particular notices were or were not mailed to plaintiff.

It is conceded that due notice is a prerequisite to the taking of property; the question on this appeal is whether plaintiff successfully sustained its burden of proof against the presumptions that the notices were duly sent as required by the statute. If this were a proceeding in mandamus to review the hearing before the commission, we would have to hold on that record that due notice had been given because the commission took evidence on that issue and found against the petitioner.

This being an action to recover the deductions made, we must presume that official duty was properly performed and hence there is nothing in the case but a disputed question of fact in so far as it relates to the original notice of the employee's claims. If the trial court had found for defendant on that issue substantial evidence would be there to support the finding. We must presume in support of the judgment that the trial court concluded that plaintiff failed to maintain the burden of proof that sufficient notice had not been given to enable it to protect its rights.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



80 Cal.App.2d 249

KAUFMAN v. HANEY.

Civ. 7328.

District Court of Appeal, Third District, California.

June 10, 1947.

1. Brokers ⇐61(3)

A husband contracting with broker to sell apartment house was liable to broker for commission for procuring a purchaser ready, willing and able to pay the purchase price on the terms specified, notwithstanding that wife refused to join in the conveyance and that husband owned apartment house in joint tenancy with wife. Code Civ.Proc. § 2055.

2. Brokers ⇐61(3)

A broker procuring purchaser ready, willing and able to buy property in accordance with terms of commission contract signed by defendant could maintain action to recover commission after defendant's wife, who owned property in joint tenancy with husband, refused to sign necessary instruments to complete transaction, and the fact that purchasers, after vainly trying to complete purchase, finally drew down their deposit, did not release defendant from his obligation to pay commission or make action premature by not affording defendant a reasonable time to perfect his title before withdrawal of deposit.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by J. W. Kaufman against Milton P. Haney to recover a real estate broker's commission. From the judgment, the defendant appeals.

Affirmed.

Manwell & Manwell, of Marysville, for appellant.

Carlin & Fuidge, of Marysville, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and respondent brought this action as a real estate broker to recover from defendant a commission of $3,750. The complaint alleged that prior to September 8, 1945, defendant orally authorized plaintiff and employed him to procure a purchaser for real estate owned by the defendant; that on September 8, 1945 plaintiff procured two persons to jointly purchase the property for $75,000 and on that date, the defendant in writing agreed to sell the property at that price and to pay plaintiff a commission of five per cent or $3,750; that said purchasers were then and there willing, able and ready to complete the purchase; that defendant refused to sell the property to the purchasers; that by reason of the foregoing plaintiff has been damaged in the sum of $3,750.

The answer, after denying the said agreement, alleged that defendant and one Cordie Haney, his wife, were the owners of the property as joint tenants; that at the time mentioned in the complaint, defendant did not have power or authority to sell more than an undivided one-half interest; that said purchasers refused to purchase defendant's one-half interest which he was ready, willing and able to sell to them.

The trial court found in accordance with the allegations of the complaint, and this appeal is from the judgment for $3,750 entered in accordance with said findings.

Respondent is a licensed real estate broker, and appellant and his wife, Cordie Haney, are the owners, in joint tenancy of an apartment house in Marysville. Some months prior to September 8th respondent and appellant met on a street in Marysville at which time appellant informed respondent that he might be interested in a sale of the apartment building. He did not want to put the sale out on a written contract but assured respondent that he would be protected in his commission. On this and numerous other occasions appellant told respondent that his wife was unhappy in the apartment house, that she did not want to live there any more, that she was working too hard, that they were planning on building a private type of residence and that in order to keep her happy he had consented to her request to sell the property.

Some time later respondent interested a man named Yasbeck in the property at the price of $70,000, and Yasbeck and Kaufman, in company with appellant, viewed the property. At this time Mrs. Haney was in Arizona. Thereafter appellant told respondent that he had telephoned Mrs. Haney in Arizona, that she was delighted with the sale and wanted it closed. At a later date appellant informed respondent that he had looked into the income tax angle on the sale and decided he and his wife could not afford to sell it at the price Yasbeck was willing to pay. This terminated the Yasbeck deal.

Thereafter respondent procured Charles M. Burchell and Kenneth Dempsey to purchase the property at $75,000. Appellant had prior thereto informed respondent that this figure would be acceptable to his wife and him. The proposed purchasers and respondent met with appellant at the apartment building and the purchasers were shown the premises by appellant. The property and the price being agreeable to them, the contract for the purchase of the property, on the California Standard Agreement form, was prepared by respondent signed by him and the two purchasers, and in this agreement appellant likewise signed the agreement to pay to respondent five per cent of the sale price of $75,000.

The agreement was deposited with the Title Company, together with the check of the buyers in the sum of $2,000 as required by the contract. At this time Mrs. Haney was still in Arizona. At the time of the trial appellant, under section 2055 of the Code of Civil Procedure, testified that it definitely was understood that the same was conditioned on the approval of Mrs. Haney.

Respondent testified, that to the contrary, nothing was ever said by appellant, directly or indirectly, from which it could be inferred that the latter would have to consult his wife, and in this he was corroborated by both buyers.

Mrs. Haney returned to California shortly afterward and refused to consent to the sale or to sign the necessary instruments unless the price was increased or appellant would agree to divide his commission with her. When it appeared that the sale could not be consummated because of Mrs. Haney's refusal to join in the transaction, respondent commenced action against appellant to recover the commission agreed upon.

As grounds for a reversal of the judgment appellant urges: (1) That because the property was held in joint tenancy, appellant Haney was without authority to bind Mrs. Haney or make himself liable for the commission, and (2) that the action was pre-mature.

In an opinion filed by him the learned trial judge stated:

"The main issue presents primarily a question of law and that is whether or not one co-tenant can be held liable upon his agreement to pay a real estate broker's

commission where the sale is not consummated by reason of his co-tenant refusing to join in executing the deed.

"The authorities uniformly hold that where a husband contracts with a broker to sell real property and the broker procures a buyer ready, willing and able to pay the purchase price upon the terms specified, the broker has performed his part of the agreement and his claim to the commission may not be denied because the wife refuses to join in the conveyance. While the rule generally is conceded, the defendant urges that the property here involved, being held in joint tenancy, the rule is not applicable because of the limitations incident to such joint ownership. We find no authority sustaining that point insofar as the question of title is concerned. While it is true that one co-tenant cannot contract as to a co-tenant's interest but may convey his individual interest to a stranger who then becomes a tenant in common with the other owner, nevertheless, in none of the cases cited, or have we been able to find anywhere it appears that the question of title was deemed an element or even a necessary requisite to a recovery by a plaintiff in any such action.

"The evidence here discloses that the defendant undertook to negotiate a sale of the entire property through plaintiff, as broker, and agreed to sell at the price and upon the terms specified in the agreement, and further agreed therein to pay the plaintiff his commission, which is the subject of this suit. The action being between the plaintiff and the defendant only and not for specific performance, which, of course, could not prevail as to the joint tenant, must necessarily be determined upon the basis of the contract as executed. It is contended that the action is premature in that the defendant was not afforded a reasonable time to perfect the title before the deposit was withdrawn and has never refused to comply with the terms of the contract. This contention cannot be sustained by reason of what has already been said, i. e. to entitle plaintiff to recover his commission under such an agreement it is only necessary to show that pursuant to his employment he procured purchasers ready, willing and able to purchase the property at the price and upon the terms specified in the agreement. This he did as evidenced by the agreement itself. He, therefore, has nothing to do with title or ownership and his right to compensation, insofar as the contract is concerned, would not in any way depend upon the nature of the title. While there appears to be a conflict in the testimony as to whether or not the transaction was conditional upon approval of the joint tenant, the preponderance of the evidence as testified to by all of plaintiff's witnesses indicates that such was not the case."

The foregoing opinion of the trial judge is fully sustained by the record and by the authorities.

In the case of Traxler v. Katz, 116 Cal. App. 226, 2 P.2d 553, a husband had signed an agreement to pay a broker's commission but his wife had not signed. In affirming a judgment for the recovery of the commission from the husband, the court stated, 116 Cal.App. at page 230, 2 P.2d at page 554: "As shown above, the plaintiff held the written authorization of Mr. McLeran [defendant's testator] empowering him to negotiate the exchange. *If Mr. McLeran did not own the entire fee and if his wife later refused to join in executing a deed to Mr. Ehrlick, such facts did not constitute a defense.* 4 Cal.Jur. 596, 597. As the trade was not actually carried out, the defendant asserts it was not 'consummated' within the terms of the contract and Mr. Ehrlick never became liable and therefore she is not liable. Under the facts the point may not be sustained." (Italics ours.)

In Russell v. Ramm, 200 Cal. 348, at page 366, 254 P. 532, at page 539, the court said: "It follows that the fact that Ramm's wife refused to join her husband in the transfer of the properties to the Moores does not in the least affect or impair the right of the plaintiffs to the compensation which Ramm agreed to pay them for securing purchasers of the properties. *Indeed, it is the general rule that the refusal of the wife of the owner to join in the conveyance of the property to the proposed vendee does not, itself, in a case of this character, operate to deprive the broker of his right to compensation.* See

Justy v. Erro, 16 Cal.App. 519, 522, 117 P. 575, and cases therein cited; Farrington v. McClellan, 26 Cal.App. 375, 383, 146 P. 1051; Goodrich v. Turney, 44 Cal.App. 516, 186 P. 806; Johnson v. Krier, 59 Cal. App. 330, 333, 210 P. 966; Freeman v. Creelman, 60 Cal.App. 14, 22, 23, 212 P. 56." (Italics ours.)

In McDonald v. Bernard, 87 Cal.App. 717, at page 718, 262 P. 430, in which a judgment for a broker's commission was affirmed although defendant's wife recorded a declaration of homestead which defeated the deal, the court said:

"The rule of law involved is simple and well settled. The appellant knew of his wife's objection to the exchange when he employed the brokers to procure an acceptance from the owner of the other piece of property. It may be that he thought he could satisfy her objections if he had the exchange contract signed, or that he would complete the exchange without her consent, or that she might change her mind, but these are matters with which the brokers were not concerned. They were employed to procure the acceptance of the other owner, and they performed that service in strict accordance with their contract.

"When a broker is employed to procure the acceptance of a proposition to exchange specified properties, his right to compensation does not depend upon the validity of the title. Gonzales v. Broad, 57 Cal. 224, 226. The refusal of the wife to join her husband in a conveyance of community property does not affect the liability of the husband on his individual contract with a broker to procure a purchaser. Goodrich v. Turney, 44 Cal.App. 516, 520, 186 P. 806; Johnson v. Krier, 59 Cal.App. 330–333, 210 P. 966; Russell v. Ramm, 200 Cal. 348, 254 P. 532. These cases merely follow the general rule that a party may contract with a broker to procure a suitable purchaser for property which he does not own and his subsequent failure to perfect a title which would enable him to complete a sale does not affect his liability to the broker. Martin v. Ede, 103 Cal. 157–161, 37 P. 199, and cases cited." See also Purcell v. Firth, 175 Cal. 746, 167 P. 379; Levy v. Dusenbery, 32 Cal.App. 411, 163 P. 231; Sanchez v. Yorba, 8 Cal.App. 490, 97 P. 205.

[1] The foregoing authorities clearly show that the law in California is against the contention of appellant that because the property was held in joint tenancy he was without authority to make himself liable for the commission.

[2] Appellant's second contention that the action was premature is without merit. When respondent produced purchasers who were ready, willing and able to buy the property in accordance with the terms of the commission contract signed by appellant, he was entitled to his commission; and under the authorities hereinbefore set forth his right to the commission could not be defeated by the refusal of Mrs. Haney to sign the necessary instruments to complete the transaction. The fact that the buyers, after vainly trying to complete the purchase, finally drew down their deposit could not release appellant from his obligation to pay the commission.

In view of the foregoing the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



80 Cal.App.2d 550

In re HUGHES' ESTATE.
HUGHES v. HUGHES et al.
Civ. 15820.

District Court of Appeal, Second District, Division 3, California.
June 24, 1947.
Hearing Denied Aug. 21, 1947.

I. Divorce ⇐162

The purpose of statute authorizing court to enter final divorce judgment nunc pro tunc as of date when final judgment could have been given was to validate otherwise void marriages and thus relieve parties

to such marriages from stigma and other consequences of bigamous relationships into which they might innocently fall by reason of oversight or neglect to have final decree entered. Civ.Code, §§ 132, 133.

2. Divorce ⇐162

Mere entry of nunc pro tunc divorce judgment acts retroactively to restore parties to status of single persons and at same time gives them and their later-acquired spouses legal marriage status. Civ.Code, §§ 132, 133.

3. Statutes ⇐225

Statute giving court authority to enter final divorce judgment after death of either party and statute authorizing court to enter final divorce judgment nunc pro tunc as of date final judgment could have been given must be construed together. Civ. Code, §§ 132, 133.

4. Divorce ⇐162

Where divorced husband remarried one year and eighteen days subsequent to entry of interlocutory divorce decree but before entry of final decree, death of husband did not deprive court of power to enter nunc pro tunc judgment and such judgment validated the subsequent marriage. Civ.Code, §§ 132, 133

5. Divorce ⇐162

Statute giving court authority to enter a final divorce judgment after death of either party and statute authorizing entry of judgment nunc pro tunc as of date when final judgment could have been entered, construed together, authorize entry of a nunc pro tunc after death of either party and such judgment has effect of validating subsequent marriage. Civ.Code, §§ 132, 133.

6. Divorce ⇐162

Statute authorizing entry of final divorce judgment nunc pro tunc as of date when final judgment could have been entered seeks to accomplish a beneficent purpose and court should give a construction as broad as its purpose appears to be. Civ. Code, § 133.

7. Divorce ⇐172

Judgment in divorce action determining that petitioner and deceased were lawfully married was res judicata on question of validity of marriage, in petitioner's proceeding for widow's allowance against deceased's estate.

8. Divorce ⇐178

Wife's notice of appeal would not have been effective to bring in question an adjudication in her favor that she was lawfully married.

9. Appeal and error ⇐151(5)

A party may not appeal from a judgment or order made in his favor and if he does give notice of appeal from judgment which grants him relief, because it grants him too little, it will not be considered as an appeal from judgment in so far as it is in his favor.

10. Divorce ⇐286

A codefendant's notice of appeal from portion of divorce judgment which affected title to parcel of realty in which he was claiming an interest would not authorize reviewing court to disturb adjudication as to validity of marriage.

11. Divorce ⇐172

An interlocutory decree of divorce, unless vacated, is a final adjudication as to all matters therein decided and only question held in abeyance pending entry of final decree is final dissolution of marriage. Code Civ.Proc. § 473.

12. Divorce ⇐172

Where corespondent and a claimant to real property, asserted by wife to be community property, were parties to divorce action, they were bound by adjudication as to validity of marriage, especially where the corespondent and claimant appeared as creditors of deceased husband and the corespondent appeared also as beneficiary under deceased will, in opposition to petition for widow's allowance.

13. Judgment ⇐714(1)

A judgment necessarily affirming existence of any fact is conclusive upon parties or their privies whenever existence of that fact is again in issue between them, not only when subject matter is same, but when point comes incidentally in question in relation to a different matter in the same or any other court.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceedings in the matter of the estate of Aloysius Peter Hughes, wherein Euldene F. Hughes filed a petition for a widow's allowance which was opposed by Peter J. Hughes, by his guardian ad litem Stanley A. Tryce, legatee and Ethel Toney and James L. Hughes, creditors, and others. From a portion of the order which denied the petition, the petitioner appeals.

Portion of order appealed from reversed with directions.

Lee Combs, Wallace B. Scales and Robert W. McIntyre, all of Los Angeles, for appellant.

M. Lewis Lehman, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Euldene F. Hughes appeals from the portion of an order which denied her a widow's allowance in the estate of Aloysius Peter Hughes, the sole ground of the decision being that appellant was not legally married to the decedent. By the same order $200 a month was allowed for the support of Peter J. Hughes, son of appellant and decedent. The estate was found to have a net value of some $70,000 and a probable net annual income of between $5,000 and $6,000. While it was also found that appellant had an income of some $300 per month, her application was not denied upon that ground. The sole question is whether the evidence supports the finding that appellant is not the widow of decedent. Principal respondents on the appeal, to be referred to as respondents, are Ethel Toney, a creditor and a named beneficiary in the will of decedent, and James L. Hughes, also a creditor, both of whom filed objections to appellant's petition for family allowance.

The facts upon which the trial court based its decision that appellant is not the surviving widow are the following: A. P. Hughes, decedent, married Genevieve M. Albitz prior to 1926 and was divorced by her by interlocutory decree entered March 4, 1926, in Kern County. On August 19, 1944, A. P. Hughes caused a final decree of divorce to be entered, none having been theretofore signed or entered. He married appellant Euldene March 22, 1927, one year and 18 days subsequent to the entry of the interlocutory decree and died September 29, 1945. On February 8, 1946, upon affidavit and application of Euldene, the court entered a final decree in the suit of Genevieve M. Hughes v. Aloysius P. Hughes, on its own motion, and ordered that said final decree be entered nunc pro tunc as of the 4th day of March, 1927. The trial court held this latter decree to be void and likewise held to be void Euldene's marriage to decedent, upon the ground that it was celebrated before a final decree had been entered in the divorce action.

Prior to 1935 the procedure for entry of final judgments of divorce was governed by section 132 of the Civil Code. A marriage was dissolved only by and as of the date of entry of a final judgment and no provision was made for entry of such judgment nunc pro tunc. Section 132 provides that the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment but that such entry shall not validate any marriage contracted by either party before the entry of such final judgment or constitute any defense of any criminal prosecution made against either. Marriages contracted prior to the entry of final judgment were void and there was no procedure by which they could be validated. In 1935 section 133 was enacted. It expressly authorizes the court to enter final judgment nunc pro tunc as of the date when final judgment could have been given or made in the event that by mistake, negligence, or inadvertence none has been entered, or in the event one has been entered but by mistake, negligence or inadvertence has not been signed, filed or entered as soon as could have been done under the law if applied for. It further provides that upon the filing of such final judgment the parties shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment and that any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been

entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment.

It was held in Macedo v. Macedo, 29 Cal. App.2d 387, 84 P.2d 552, that section 133 was intended to be retroactive; that it is both remedial and curative; that it violates no constitutional restriction, and that the entry of a final decree nunc pro tunc as of the date when a final decree could first have been lawfully entered was effective, by virtue of the section, to validate a marriage contracted more than one year after the entry of an interlocutory decree and before the entry of a final decree.

[1-6] The nunc pro tunc judgment upon which appellant relies was effective to validate her marriage, unless the death of Mr. Hughes deprived the court of the power to enter it. Whether such power existed depends upon the effect to be given to sections 132 and 133. It has been held that an interlocutory judgment of divorce does not sever the marital relationship or deprive the surviving spouse of property rights derived from that relationship upon the death of the other spouse prior to the entry of a final decree (In re Estate of Dargie, 162 Cal. 51, 121 P. 320; In re Estate of Seiler, 164 Cal. 181, 128 P. 334, Ann.Cas.1914B, 1093; Gloyd v. Superior Court, 44 Cal.App. 39, 185 P. 995), and that the court is powerless by entry of a final decree after the death of one of the spouses to change the relationship which existed at the time of death or deprive the surviving spouse of rights of succession to the property of the deceased spouse. Gloyd v. Superior Court, supra; Gould v. Superior Court, 47 Cal.App. 197, 191 P. 56. It has also been held that a disposition of property rights by the interlocutory decree, whether or not based upon agreement, becomes conclusive upon the interlocutory decree's becoming final and is not vacated by the death of one of the parties. Klebora v. Klebora, 119 Cal.App. 613, 5 P.2d 965; Gould v. Superior Court, supra. It has been suggested that the purpose of section 132, in providing for entry of a final decree after the death of one of the spouses, was to enable the court to confirm by final decree disposition of property made by interlocutory decree. In re Estate of Seiler, supra; Gloyd v. Superior Court, supra. From these decisions respondents evolve a theory that a final decree is ineffectual for any purpose other than to terminate the marital relation or, if entered after the death of one of the parties, to confirm dispositions of property made by the interlocutory decree. Therefore, it is argued, if one of the parties has died, a final decree cannot operate to change the relationship that existed at the time of death. The decisions relied upon by respondents in so far as they limit the operation of a final decree of divorce merely gave effect to section 132 and are of no assistance. The argument of respondents ignores the effect of section 133, which was enacted for the purpose of avoiding conditions due to the inadequacy of section 132. The purpose was to validate otherwise void marriages and thus relieve the parties to such marriages from the stigma and other consequences of bigamous relationships into which they might innocently fall by reason of oversight or neglect to have a final decree entered. Mere entry of the nunc pro tunc judgment acts retroactively to restore them to the status of single persons and at the same time gives them and their later-acquired spouses legal married status. It is all strictly artificial, but so is the semi-divorced status occupied by the holders of an interlocutory decree. The purpose of the law is not satisfied by the death of one of the parties prior to the entry of a nunc pro tunc judgment. True, death severs the marital relationship, but it severs it only as of the date of death, while the statute is designed to accomplish more than this. A final judgment, in usual form, dissolves the marriage as of the date of entry of the judgment. That is sufficient where other rights are not involved. Section 133 was enacted for the protection of such other rights and provides that even though a marriage has been dissolved by a final judgment, a nunc pro tunc judgment may be entered thereafter to accomplish the further purpose of validating otherwise invalid marriages. Section 132 gives the court authority to enter a final judgment after the death of either party. The two sections must be read together. While before the adoption of section 133 a final judgment

entered after the death of either of the parties did not have the effect of validating an invalid marriage, the two sections read together now authorize the entry of a nunc pro tunc judgment after the death of either of the parties, and such judgment has the effect declared by section 133. Certainly if Mr. Hughes' first wife, Genevieve, had remarried before entry of a final judgment, the death of Mr. Hughes would not have deprived her of the right to have a nunc pro tunc judgment entered for the purpose of validating her marriage. To allow his death to deprive appellant of all rights under section 133 would unjustifiably and unreasonably limit the scope of that section. It seeks to accomplish a beneficent purpose and the court should give it a construction as broad as its purpose appears to be. We hold, therefore, that appellant's marriage to Mr. Hughes was validated by the nunc pro tunc judgment.

[7] Appellant's second ground of appeal is valid. The contention is that the question of the validity of the marriage was res judicata. Appellant instituted an action for divorce against Mr. Hughes in 1944, naming Ethel Toney and James L. Hughes as defendants, the former as corespondent and the latter as a claimant to an interest in real property which, it was alleged, was the community property of appellant and her husband. The defendants appeared, the action was tried, and by the judgment rendered in appellant's favor it was determined that she and Mr. Hughes had legally married in 1927. In the instant proceeding appellant relied upon the judgment as a final adjudication of the validity of the marriage. The judgment was proved, but the court refused to accord this effect to it, on the grounds that is was not a final judgment and that it was not binding upon respondents Ethel Toney and James L. Hughes.

[8-10] Euldene had given notice of appeal from the judgment but thereafter, and prior to the death of Mr. Hughes, had dismissed and abandoned her appeal as to him. Manifestly her notice of appeal would not have been effective to bring in question the adjudication that she was lawfully married, which was in her favor and was the primary basis of her action A party, may not appeal from a judgment or order made in his favor (In re Estate of Funkenstein, 170 Cal. 594, 150 P. 987; United Railroads of San Francisco v. Colgan, 153 Cal. 53, 94 P. 245; Maxwell Hardware Co. v. Foster, 207 Cal. 167, 277 P. 327; In re Estate of Crooks, 125 Cal. 459, 58 P. 89; Youle v. Thomas, 146 Cal. 537, 80 P. 714), and if he does give notice of appeal from a judgment which grants him relief, because it grants him too little, it will not be considered as an appeal from the judgment in so far as it is in his favor. Maxwell Hardware Co. v. Foster, supra. Ethel Toney did not appeal from the judgment in the divorce case. James L. Hughes gave notice of appeal, but only from the portion of the judgment which affected the title to a parcel of property in which he was claiming an interest. The appeal taken by Euldene, having been dismissed as to A. P. Hughes, and the limited appeal taken by James L. Hughes, invested the reviewing court with jurisdiction to determine matters in controversy between the two appellants, but these related only to claims to real property. Under neither appeal would the reviewing court have been authorized to disturb the adjudication of marriage. Any doubt as to the correctness of these views will be dispelled by reading the opinion which was rendered upon that appeal subsequent to the making of the order here appealed from. The judgment was modified by deletion of a provision which related to title to real property which was not in issue, and in all other respects was affirmed. Hughes v. Hughes, 74 Cal.App. 2d 327, 168 P.2d 429.

[11] An interlocutory decree of divorce, unless vacated on motion for new trial, motion under section 473, Code of Civil Procedure, or on appeal, is a final adjudication as to all matters therein decided. The only question held in abeyance pending the entry of a final decree is the final dissolution of the marriage. Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Abbott v. Superior Court, 69 Cal.App. 660, 232 P. 154; Borg v. Borg, 25 Cal.App.2d 25, 76 P.2d 218; Overell v. Superior Court, 29 Cal.App.2d 418, 84 P.2d 789; Parnham v. Parnham, 32 Cal.App.2d 93, 89 P.2d 189;

Gould v. Superior Court, 47 Cal.App. 197, 191 P. 56. The judgment was a final adjudication as to the marriage, for the reason that the pendency of the two appeals did not affect the finality of that adjudication. It was said in Re Estate of Lee, 200 Cal. 310, 314, 253 P. 145, 147: "A divorce proceeding, in so far as it relates to the marriage relation of the parties to the action and the termination of the marriage status, is a proceeding in rem In re [Estate of] Newman, 75 Cal. 213 [16 P. 887, 7 Am. St.Rep. 146]. Such an action is brought for the purpose of establishing judicially the matrimonial status of the parties, and, if it be found that a matrimonial relation exists, then for the purpose of a dissolution of that relation Gridley v. Boggs, 62 Cal. 190, 202; De la Montanya v. De la Montanya, 112 Cal. 101 [44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165]. As a judgment in rem it is binding upon all the world as to the determination of the marital status of the parties and is immune from collateral attack (People [ex rel. Fogg] v. Perris Irr. Dist., 132 Cal. 289 [64 P. 399, 773]; 15 Cal.Jur. 239), except on grounds specified by the Code (section 1916, Code Civ. Proc.), none of which is urged here. The judgment here under consideration was a conclusive determination of the status of the parties to said action as husband and wife from May 16, 1895, to the dissolution of that relation by the judgment of divorce on March 26, 1903."

[12, 13] It is unnecessary to consider whether Ethel Toney and James I. Hughes would have been bound by the adjudication of marriage if they had not been parties to the divorce action and not in privity with A. P. Hughes. See Blumenthal v. Blumenthal, 97 Cal.App. 558, 275 P. 987, relied upon by respondents. They were parties and the validity of the marriage was in issue as to them as, respectively, the corespondent and a claimant to real property, asserted by Euldene to be community property. Under settled principles they are bound by the judgment as parties litigant and for the further reason that in the instant proceeding both appear as creditors of A. P. Hughes, and Ethel Toney also as a beneficiary under his will. In re Estate of Lee, supra, is directly in point. "It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court." (Citing cases.) Denio v. City of Huntington Beach, 74 Cal.App.2d 424, 431, 168 P.2d 785, 788.

The order is reversed as to the portion appealed from. The court is directed to make a finding that Euldene F. Hughes is the widow of decedent and to determine the other issues raised by her petition and the objections thereto.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 378

CALDWELL v. CALDWELL et al.

Civ. 15557.

District Court of Appeal, Second District, Division 3, California.

June 17, 1947.

1. Deeds ⇐211(1, 4)

Evidence supported findings that grant deed executed by plaintiff and his wife conveying property to defendants, who were their children, reserving to plaintiff a life estate with right to use the property and to receive rents, income and profits therefrom, upon children executing a contract agreeing to support plaintiff's wife in event she should survive plaintiff, was not void on ground that it was result of undue influence, and that grant deed was not void as to plaintiff's wife on ground that she was an incompetent person at time she signed instrument.

2. Appeal and error ⇐1011(1)

Trial court's findings based upon conflicting testimony are conclusive.

3. Parent and child ⇐11

Evidence was insufficient to establish a prima facie case for an accounting by defendants to plaintiff, who was their father, for rents, income and profits realized from property after plaintiff and his wife had executed grant deed conveying property to defendants, reserving to plaintiff a life estate where plaintiff had full and free access to his own money, through bank accounts in his name and with full access to and control over books and records concerning receipts and expenditures of the property.

4. Appeal and error ⇐110
New trial ⇐1, 163(1)

The effect of trial court's minute order stating the "motion was argued, the court denies the motion for new trial by operation of law, in that the time for hearing set motion has expired" was a denial of the motion for new trial without further order of the court, and the order was reviewable on appeal. Code Civ.Proc. §§ 659, 660.

5. Appeal and error ⇐870(6)

An order denying a motion for new trial may be reviewed on appeal from the judgment even though denied by operation of law. Code Civ.Proc. §§ 659, 660.

6. New trial ⇐99

New trials on ground of newly discovered evidence are not favored and circumstance of the discovery of such new evidence so soon after an adverse judgment is so suspicious that courts require the strictest showing of diligence, and it must likewise appear that such evidence is new, material and not cumulative.

7. New trial ⇐99

Refusal to grant new trial for newly discovered evidence in suit to quiet title, to have grant deed conveying property set aside, and for an accounting was not an abuse of discretion, under circumstances.

Appeal from Superior Court, Los Angeles County; Martin De Vrias, Judge.

Suit by William G. Caldwell against Mildred J. Caldwell, Harry L. Caldwell and another, to quiet title to certain real and personal property, to have certain grant deed executed by plaintiff and his wife to defendants set aside, and for an accounting due plaintiff by named defendants for the rents, issues and profits of property so conveyed. From a judgment for named defendants, the plaintiff appeals.

Affirmed.

Joseph A. Ball and Louis N. Whealton, both of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

KINCAID, Justice pro tem.

Plaintiff appeals from a judgment in favor of his daughter and son as defendants, following a trial by the court without a jury.

Plaintiff sues individually and by his second amended complaint also joins his wife, Jennie, as a party defendant. She appears in propria persona by a guardian ad litem and by her answer admits all allegations of the complaint. She does not appeal from the resulting judgment. Plaintiff's pleading is in six counts, the first being to quiet title to certain real and personal property situate in Long Beach, California; the second alleges that on October 7, 1938, when plaintiff and Jennie signed a certain grant deed of property to their daughter and son, the defendants Mildred and Harry Caldwell, Jennie was an incompetent person and signed the instrument with no understanding of the nature or consequences of her act, and that the document was therefore void in so far as she was concerned; the third cause of action alleges the exercise of undue influence upon plaintiff and Jennie by their defendant children, as a result of which they were persuaded to sign said document; the fourth and fifth causes of action were dismissed by plaintiff at the time of trial, but a sixth cause of action claims an accounting due plaintiff by defendants Mildred and Harry for the rents, issues and profits of the property so conveyed. The trial court made its findings contrary to plaintiff's allegations and in favor of such defendants as to counts I, II,

and III, and granted a nonsuit on the cause for an accounting, count VI.

While the evidence is conflicting in many particulars, the following facts were adduced in support of the judgment: Plaintiff and his wife had over a long period of time acquired substantial property holdings in the city of Long Beach, the most important of which is the Caldwell Apartments; in 1934, at the request of plaintiff, the defendant Mildred moved to Long Beach to assist plaintiff in the management and operation of this property; defendant Harry visited his parents frequently and the family relationships as between the parties were close; as the resources of plaintiff and his wife grew and they became older, they took frequent vacation trips, leaving the management of their property more and more to Mildred; on several occasions plaintiff stated his desire and that of his wife to make a conveyance of their property to their children, reserving in some manner the use of the income therefrom so that they might be completely freed from responsibility in order to more enjoy their contemplated travels. In August, 1938, while plaintiff and his wife were preparing to go on an extensive trip, he suffered an illness described in the record as a "stroke" which partially paralyzed him on one side for a period of time; following this illness, plaintiff again broached the subject of the disposition of the property to his children, first with a business associate and later with them; after discussing ways and means of vesting title to the property in his children, while reserving for his lifetime the use of the property, and providing for the care of his wife in the event of his prior demise, he directed his daughter to consult with an old-time friend and attorney, E. C. Denio, for the purpose of having documents drawn to carry this plan into effect; various documents were submitted to plaintiff and changes were made therein at his direction, resulting in the execution by plaintiff and his wife, on October 7, 1938, of a grant deed covering the real and personal property which is the subject of this litigation to the defendants, as joint tenants with right of survivorship, reserving to plaintiff a life estate with the right to use said property and to have and receive the rents, income and profits therefrom during the term of his natural life; further clauses for the protection of the grantors were also inserted therein. On the same date defendants Mildred and Harry entered into an agreement with plaintiff to the effect that if their mother Jennie should survive plaintiff, they would fully care for and support her in a proper manner, would care for her burial upon her death, and would each make a last will and testament providing that in the even of their death the property should be charged with the support and maintenance of Jennie in accordance with the contract; such wills were made; executed copies of the contract were delivered to plaintiff and his wife and on January 21, 1941, a copy of the said grant deed, as recorded, was forwarded by Mr. Denio to plaintiff and received by him; about one year after the execution of the deed and the contract, plaintiff called at the office of Mr. Denio and talked with him about this transaction.

Substantial evidence further discloses that during the entire period in question plaintiff was keen mentally, alert, and was fully possessed of all of his mental faculties, as was his wife, Jennie, excepting that her mind began to deteriorate somewhat in 1941, through senility.

Several nurses were hired from time to time to care for the wants of plaintiff and his wife. Mildred continued to live in the apartment house with plaintiff and Jennie until March, 1944, during all of which time she managed the place for plaintiff and turned over the income therefrom to him. A harmonious relationship existed between plaintiff, his wife, and their defendant children, during all of the intervening period. An altercation then arose between plaintiff and Mildred concerning a particular female nurse who had been caring for plaintiff and his wife. Upon instructions from plaintiff, Mildred discharged this nurse, following which plaintiff wished to rehire her, to which Mildred objected. Plaintiff then ordered Mildred to leave the premises and demanded of his defendant children a return of

the property which he had previously deeded them. An intimate friend of plaintiff and his wife, Mrs. Osborne, testified that plaintiff hold her the circumstances of his demand for a return of the property, as follows: "A. Well, he spoke of Harry and Mildred, and we asked if the suit had really been filed and if they were going ahead with it, and he said yes, they were going ahead with it. And Mr. Osborne asked him what Harry and Mildred had done to cause him to take this action, and he went right on talking and didn't answer the question, and I waited for an opportunity and I said, 'Well, Mr. Caldwell, just what have Harry and Mildred done?' And he straightened up in his chair and he said, 'Why, they fired my nurse,' and that is the only excuse that was given. They fired his nurse."

[1, 2] Plaintiff argues the evidence establishes a confidential, fiduciary relationship to have existed between the parties at the time of the execution of the grant deed and the contract for support and that Mildred thereafter exercised the position of trustee for plaintiff and his wife in managing the property and collecting the income therefrom. Such being the case he contends the burden of proof rests on defendants to affirmatively show the transaction to have been fair and free from undue influence. The defendants have substantially met any such obligation of proof upon their part by showing, by competent evidence, the transaction to be one initiated by plaintiff after having expressed good and sufficient reasons therefor; that it was consummated after due deliberation, with independent advice and without undue activity on the part of defendants; that following its consummation it was confirmed by plaintiff's own statements to disinterested persons; the transaction is one natural, reasonable and fair under the circumstances; that plaintiff deprived himself of nothing other than the bare legal title to the property, having retained its possession at all times since, and that it was intended as a present and effective transaction inter vivos, the nature of which was at all times fully known to plaintiff. The evidence, taken as a whole, lends adequate support to the findings in defendants' favor covering the issues raised by the first, second and third causes of action of plaintiff's second amended complaint, and being based upon conflicting testimony, those findings are binding upon this court on appeal. Such being the case, it is unnecessary for us to consider the questions raised concerning statutes of limitation affecting the institution by plaintiff of these proceedings.

[3] Plaintiff further contends the court erred in granting defendants' motion for a nonsuit as to his sixth count, being the one involving the accounting. Weighing all of the evidence tending to sustain plaintiff's averments for an accounting, most favorably in his favor, such evidence still falls far short of proving this cause of action. The plaintiff at all times had full and free access to his own money, through bank accounts in his name and with full access to and control over the books and records concerning the receipts and expenditures of the property. At the request of plaintiff, Mildred paid all household and personal bills and plaintiff drew other sums for his needs, including those for vacation expenses for himself and wife. Plaintiff strongly relies on his testimony to the effect that he asked his son, Harry, to look over the books, and that Harry tried to look them over at one time but said he could not make anything of them; that this was in 1942 or 1943, but that plaintiff never did anything thereafter about the books. This evidence, when considered with the other evidence in the case is insufficient for a prima facie case for an accounting, and the nonsuit was properly granted.

[4, 5] The judgment having been entered, plaintiff in due time, on December 17, 1945, served and filed his notice of intention to move for a new trial. Solely by error of the clerk of the court this motion was set for hearing on the 61st day following the filing of such notice, rather than within 60 days as provided by section 660, Code of Civil Procedure. Defendants raised the objection that the court had lost jurisdiction to rule on the motion and the trial judge declined to rule thereon but caused a minute order to be en-

tered stating the "motion was argued, and the court denies the motion for a new trial by operation of law, in that the time for hearing said motion has expired." Section 660 further provides: "If such motion is not determined within said period of sixty (60) days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court." Defendants contend that, no hearing having been held for the consideration of plaintiff's written notice of intention to move for a new trial and no oral motion having actually been made, there is nothing for the trial judge to have passed upon and therefore the status of the case is as though no notice of intention to move for a new trial had ever been filed. Section 659, Code of Civil Procedure, provides, in part, however: "Said notice [of intention to move for a new trial] shall be deemed to be a motion for a new trial on all the grounds stated in the notice." Such being the case the notice itself is deemed to be the motion and no additional oral motion is necessary in order to give the court jurisdiction to act thereon. The effect of the court's minute order was a denial of the motion for a new trial without further order of the court, it not having been determined within the 60 day period. It is now well settled that an order denying a motion for a new trial may be reviewed on an appeal from the judgment even though denied by operation of law. Bramble v. McEwan, 1940, 40 Cal.App.2d 400, 416, 104 P.2d 1054.

Proceeding now to a consideration of the plaintiff's motion for a new trial the record discloses it to have been made on various statutory grounds including insufficiency of the evidence to justify the decision and that it is against law. Certain affidavits were filed in support of the motion. A reading of these affidavits indicates particular emphasis upon the claims that defendants Mildred and Harry failed to make an adequate and fair explanation of the transaction and therefore the evidence fails to support the judgment; that plaintiff was surprised at the time of trial by the adverse testimony of certain witnesses including Jennie B. Caldwell's attending physician who testified by deposition that he believed her to have been mentally competent and to have understood the legal consequences of her signing the deed and agreement on October 7, 1938, although plaintiff and his attorney had been led to believe such physician would testify to the contrary; that plaintiff was surprised by the provisions of the judgment concerning the furnishings of the apartment house because, subsequent to the filing of suit but prior to the trial a fire had occurred whereby some of such furnishings were destroyed and had been replaced by other articles; that by the judgment plaintiff might be liable for the payment of a gift tax to the federal government and defendants had made no offer to pay it; that he has discovered new material evidence consisting of the testimony of a nurse who attended Jennie Caldwell during the three month period following August 16, 1938, and that, if permitted to testify, she would state it to be her opinion that Jennie, while not insane at that time, was markedly senile, was of unsound mind though not without slight understanding and was not possessed of sufficient mental capacity to understand the nature or purpose of the deed and agreement in question.

[6, 7] A careful review of the affidavits and arguments supporting plaintiff's motion for a new trial, when considered in the light of the evidence as a whole, falls short of persuading us that a new trial should be had, or if one were had with the additional proposed evidence and with the element of surprise removed, that a different judgment would result. New trials on the ground of newly discovered evidence are not favored and the circumstance of the discovery of such new evidence so soon after an adverse judgment is so suspicious that courts require the very strictest showing of diligence. Dasso v. Bradbury, 1940, 39 Cal.App.2d 712, 716, 104 P.2d 128; Berkowitz v. The Kiener Co., 1940, 37 Cal.App.2d 419, 427, 99 P.2d 578. It must likewise appear that such evidence is new, material and not cumulative. Scott v. Flanagan 1936, 14 Cal.App.2d 105, 112, 57 P.2d 1382. These were all matters for determination by the trial judge and

his action thereon is subject to attack only for manifest abuse of discretion. No abuse of discretion has been shown.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.



80 Cal.App.2d 737

ROESMAN v. DE HART et al.

Civ. 13330.

District Court of Appeal, First District, Division 2, California.

July 3, 1947.

Hearing Denied Aug. 28, 1947.

1. Judgment ⇐776

The lien of a judgment attaches only to actual interest of judgment debtor.

2. Fraudulent conveyances ⇐174(3)

One who conveys property to another in fraud of creditors cannot recover the property from his fraudulent grantee.

3. Fraudulent conveyances ⇐174(5)

Where fraudulent grantee voluntarily reconveys property to fraudulent grantor, if rights of innocent third persons have not intervened, fraudulent grantor will become revested both in law and in equity with title previously conveyed to grantee, and grantee will be estopped from thereafter setting up claim to the property.

4. Fraudulent conveyances ⇐179(2)

Even if plaintiff was motivated by fraudulent purpose in having property conveyed to allegedly fraudulent grantee, after grantee's conveyance to another to hold in trust for plaintiff, plaintiff had superior right which court of equity would protect, against judgments subsequently recovered against allegedly fraudulent grantee.

Appeal from Superior Court, City and County of San Francisco; W. T. Belieu, Judge.

Action by Joseph P. Roesman against Rosemond T. De Hart, Anna G. Tracy, and others to quiet title to realty. From an adverse judgment, plaintiff appeals.

Reversed.

Elmer P. Delany, of San Francisco, for appellant.

Carl E. Day and Abraham Setzer, both of San Francisco, for respondents.

DOOLING, Justice.

The plaintiff appeals from a judgment refusing to quiet his title to a parcel of real property in San Francisco.

The property was originally owned by Mary Flecchia, a sister of the plaintiff. In 1927 Mary Flecchia conveyed the property to plaintiff. In 1932 Mary Flecchia and her husband borrowed $3000 from American Trust Company and to secure a promissory note in that amount plaintiff joined with Mary Flecchia and her husband in executing a deed of trust of the property. In 1937 this promissory note was in default. Plaintiff purchased the note from American Trust Company and through trustees substituted at his behest he caused the property to be sold at trustees' sale. The property was bid in by one Joe Allen. Allen was acting in the transaction solely on behalf of plaintiff and on January 25, 1938 Allen conveyed the property to Title Insurance and Guaranty Company at plaintiff's request. The trustees' deed to Allen and Allen's deed to the Title Company were both recorded on February 4, 1938. Contemporaneously with the delivery of Allen's deed to the Title Company Allen and the Title Company executed a "holding agreement" whereby the Title Company agreed to hold the property "for the account of the undersigned, and * * * to deal with or convey the said property to whomsoever may be designated by written instructions signed by Joseph P. Roesman * * *." In 1945, at plaintiff's designation, the Title Company conveyed the property to plaintiff.

[1] The defendants and respondents, DeHart and Tracy, are judgment creditors of Joe Allen. They recovered a judgment against Allen in 1940 which was reversed on appeal, and a second judgment in the

same action in 1943 which has become final. Taking either date the judgment was recovered at a time when the record title to the property here in question was no longer in Joe Allen but in Title Insurance and Guaranty Company, and the beneficial or equitable interest was in the plaintiff. Since the lien of a judgment attaches only to the actual interest of the judgment debtor (Davis v. Perry, 120 Cal.App. 670, 8 P. 2d 514; Spear v. Farwell, 5 Cal.App.2d 111, 42 P.2d 391), defendants would normally acquire no lien upon the property here in suit by virtue of their judgment against Allen.

The trial court however found that at the time of the trustees' sale to Allen Mary Flecchia was demanding that plaintiff reconvey the property to her and was also asserting certain money claims against plaintiff and that the taking of title in Allen was motivated by the fraudulent purpose of concealing from Mary Flecchia plaintiff's ownership of said property and to deprive Mary Flecchia of said property and prevent and discourage her from resorting to it to satisfy her money demands. The court concluded from these findings that plaintiff was barred by the clean hands doctrine from securing any relief in equity.

The findings are attacked by appellant as unsupported. The findings of bad faith depend entirely on inference. Mary Flecchia is dead and her surviving husband and the plaintiff both testified that plaintiff owed her nothing, that he had advanced to her $3000 or $4000 in addition to the $3000 paid by him to purchase the promissory note, none of which was ever repaid, and that plaintiff did not conceal his actual interest in the property after its purchase by Allen. An officer of the Title Company testified that "it is common practice for title companies to hold—we have thousands of pieces of property that we have no interest in at all." The chief basis of the finding of fraudulent intent is an action commenced by Mary Flecchia against plaintiff on June 16, 1937 and voluntarily dismissed by her on November 15, 1937, all before the trustees' sale to Allen. We need not decide whether the evidence is sufficient to support the inference of fraud, since we are satisfied that even under the facts as found the judgment should be reversed.

[2, 3] It is the general rule that one who conveys property to another in fraud of creditors cannot recover the property from his fraudulent grantee. 12 Cal.Jur. 1026. It is otherwise however if the fraudulent grantee voluntarily reconveys to the fraudulent grantor. The rule applicable in such cases was quoted by this court from 27 C.J. 658 in Williamson v. Kinney, 52 Cal.App.2d 98, 103, 125 P.2d 920, 923:

"While a fraudulent grantee is under no legal obligation to reconvey, it is said that he is under a moral obligation to do so, and all subsequent acts done by him in execution of this duty should be favorably considered in equity, the moral obligation being a valuable and sufficient consideration for a reconveyance. If in fulfillment of his moral obligation he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third person have intervened, the fraudulent grantor will become revested both in law and in equity with the title previously conveyed to his grantee; and the grantee will be estopped from thereafter setting up any claim to the property." See also 37 C.J.S., Fraudulent Conveyances, § 267.

The cases in support of this rule are collected in a note in 89 A.L.R. at page 1168.

[4] As between Allen and the plaintiff, even conceding that plaintiff was motivated by the fraudulent purpose found by the trial court, after Allen's conveyance to the Title Company to hold in trust for plaintiff, plaintiff under the rule above quoted had the superior right which a court of equity would enforce.

Since the lien of the judgment creditor attaches only to the rights of the judgment, debtor logic suggests that if plaintiff's rights in the property would prevail over Allen's they must prevail over those of Allen's judgment creditors. Such is the rule in a majority of the jurisdictions which have considered the question. The cases so holding are collected in the note in 89 A.L.R. above referred to at page 1173 under the following statement:

"While there is some real, or apparent, conflict as to the rights of the original

grantor in a fraudulent conveyance after a reconveyance by his grantee as against the latter's creditors, the weight of authority protects him under such circumstances. This statement is, of course, subject to the proviso that the creditors in question had obtained no valid lien upon the property prior to the reconveyance."

We supplement this statement with the following quotations from the cases, indicating the reason for the rule:

"Although the courts will not interfere and aid a fraudulent grantor to enforce the promise to reconvey on grounds of public policy,—that is, to discourage such transactions,—yet if the grantee, in compliance with such agreement, has reconveyed the property to the grantor, such reconveyance will be upheld. Courts of equity recognize that there is a moral obligation resting upon the fraudulent grantee to execute the trust which he has undertaken, and, although they will not enforce its execution, they will uphold it when performed." Biccochi v. Casey-Swasey Co., 91 Tex. 259, 42 S.W. 963, 965, 66 Am. St.Rep. 875.

"In Wait, Fraud. Conv. § 398, it is said: 'Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith; and, until the creditors of the vendee acquire actual liens upon the property, they have no legal or equitable claims in respect to it higher than or superior to those of the grantor.' (Citing cases.) There being, then, a moral obligation of the highest type resting upon the son to convey to the father, the discharge of that obligation furnishes ample consideration for such conveyance, and the conveyance, if received in good faith, works no legal fraud upon any party whose rights to the property conveyed are not in law superior to the rights of the father." Lockren v. Rustan, 9 N.D. 43, 81 N.W. 60, 62.

"The vendor is merely trustee of the property for the vendee, the real owner thereof, and equity withholds its aid to enforce a reconveyance. Not through want of consideration, but as a penalty to repress and prevent frauds. It does not deny the true ownership, but, because of his unclean hands, it refuses to the owner its aid to regain his property. Having regained his property without its aid before the rights of others have attached thereto, it will protect him in it. Creditors who have not given credit on the strength of the property lose nothing thereby, as their debtor never had any real ownership in the property." Farmers' Bank v. Gould, 48 W.Va. 99, 35 S.E. 878, 86 Am.St.Rep. 24.

The precise question has not come before the California courts. Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.2d 83, is not in point since the fraudulent grantee's creditor in that case had secured an attachment lien upon the property before its reconveyance to the fraudulent grantor, as noted by the court, 122 Cal.App. on page 248, 10 P.2d on page 85. We are satisfied to follow the majority rule as established in other jurisdictions. To do otherwise would be to give the respondents an unexpected windfall based upon an allegedly fraudulent title that passed from their debtor long before their judgment was secured.

Judgment reversed.

We concur:

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

80 Cal.App.2d 666

In re HALBERT'S ESTATE. HALBERT v. HALBERT.

Civ. 15716, 15717.

District Court of Appeal, Second District, Division 2, California.

July 1, 1947.

Rehearing Denied July 22, 1947.

Hearing Denied Aug. 28, 1947.

1. Wills ⇐55(1)

Testimony of attorney who had served testator and had become familiar with his habits of thought and conduct and who declined to prepare testator's will was entitled to serious consideration as to proof of testator's incompetency.

2. Wills ⇐55(1)

Evidence was sufficient to sustain verdict that testator lacked testamentary capacity.

3. Wills ⇐55(3)

To justify the finding that a will was product of insane delusion, evidence must show that the delusion bore directly on and influenced creation of terms of document.

4. Wills ⇐55(3)

Evidence warranted finding that will was product of testator's insane delusion.

5. Appeal and error ⇐1001(1)

Appellate court cannot substitute its finding for verdict when there is substantial evidence in support of the verdict.

6. Appeal and error ⇐996

Merely because contradictory inferences can be drawn from evidence, reviewing court is not at liberty to substitute findings contrary to those of jury.

7. Wills ⇐54(1)

Whether a letter written by testator whose competency on a certain date was under investigation was too remote was question largely addressed to discretion of trial court.

8. Wills ⇐54(1)

Letters written by testator in May, June and July, 1944, were admissible over objection of remoteness on issue of general mental degeneration of testator at time he executed will in December, 1943, and letter of September, 1937, was admissible as an appropriate index to his intellectual clarity and to the sum total of his desires before disease had undermined him.

9. Evidence ⇐558(5)

If litigant was dissatisfied with hypothetical question because litigant's proof was not included in the question, she could, on cross-examination, have amended the question to present the picture as her evidence would paint it.

10. Wills ⇐130

Holographic will of deceased which directed the disposition of his body and of his estate and which was to operate in event of and by reason of his death was properly admitted to probate. Civ.Code, § 1149.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceedings in the matter of the estate of Oliver I. Halbert, also known as Oliver Isaac Halbert, deceased, wherein Maude N. Halbert filed petition for probate of a will which was contested by Nettie M. Halbert. From an order denying probate of a formally executed will and from an order admitting to probate the holographic will of the deceased, Maude N. Halbert appeals.

Affirmed.

Ernest A. Tolin, of Los Angeles, for petitioner and respondent.

William Dellamore and E. W. Miller, both of Los Angeles, for contestant and appellant.

MOORE, Presiding Justice.

Two appeals are involved: one (15717) from an order denying probate of a formally executed will; the other (15716) from an order admitting to probate the holographic will of decedent. The former was based upon the verdict of a jury that the testator was of unsound mind at the time of executing the formal will on December 14, 1943; the latter was entered by the court without a contest as to the testator's competency. Inasmuch as the verdict on the contest was the fruitage of some documents and of the testimony of many witnesses, of conflicting opinions and of observations which justified contrary inferences, the task imposed upon this court

is to determine whether the evidence adopted by the jury was sufficient to warrant a verdict of the testator's incompetency. The proponent of the will was a sister of decedent; the contestant was his wife. They are referred to herein as appellant and respondent respectively.

The testator died in his 64th year of a cerebral hemorrhage, February 19, 1945, fourteen months after the date of the will. He had long suffered a psychosis with cerebral arteriosclerosis, a form of insanity due to hardening of the arteries of the brain. He and respondent were married in 1912. Life was not altogether a pleasant dream for them as three decades glided on, but no incurable clash preceded the year 1943. His habits had been those of the average man. For many years he engaged in the real estate and insurance business. In 1941 he suffered a spell of pneumonia, requiring hospitalization. He had imbibed much liquor prior to his illness. Thereafter he drank more and was frequently inebriated. His daily habits were changed. He became more easily and violently angered; appeared before his wife's company only partially clad in his pajamas; told obscene stories; threw dishes and food upon the floor; became abusive. He walked frequently out into the hills clothed in pajamas, holloaed and paraded around; visited friends when partially nude. He became incoherent and rambling. His eyes became slate grey and protruded.

Having inherited from her aunt at Akron, Ohio, in 1930 four chairs and a sewing table respondent kept them in her Glendale home. She decided to sell them and discussed the matter with decedent. He advised her to advertise them and a rug for sale. Instead, respondent sold them on July 6, 1943, to her longtime friend, Mrs. Killackey. When on the following morning decedent missed one of the chairs from his room he called his wife to account, beat and bruised her, threatened to kill her until the neighbors had called the police and she had made her escape. She returned ten days later. Again he took up the quarrel, saying, "I am going to kill you. * * * I haven't long to live, I am going to kill you and kill myself." He grabbed her hair, bounced her up and down on the bed, backed her downstairs and said, "Call up that woman and tell her to get those things back here just as fast as she can or you are dead." This despite the fact that Mrs. Killackey resided some 11 miles away. After he had waited and watched awhile at the window for the furniture to be returned he knocked respondent down, got a bread knife and said he would cut her throat and insides out. In their scramble for advantage she escaped, screaming for the neighbors who once more called in the police.

Respondent was never afraid of her husband prior to these beatings, as a result of which she left their home and sued for divorce. Thereafter he began to harass her by telephoning to her many times daily. Sometimes he wished to see her, at other times he called her to threaten her that he would come down and "clean all of them out of the house" if she did not get them out; or he would chant: "four chairs, a table and a rug." As a result of the divorce proceeding she was restored to the possession of the home on November 18, 1943.

November 3, 1943, decedent mailed to respondent a sheet of paper on which was inscribed, "There was 4 chairs, 1 sewing table, 1 rug." November 12, 1943, he sent her by mail a letter which began "4 chairs, 1 sewing table, 1 rug" and concluded: "4 chairs, 1 sewing table, 1 rug, less you forget. I never will, Mrs. Halbert." November 14, 1943, he wrote her, "The last hour of your life you will be thinking of a sewing table, 4 chairs and a rug." November 27, 1943, he wrote her "Thanksgiving day. I do not have 4 chairs nor a table and neither a rug." On December 3 he wrote her a note about "a lot of expense, a lot of heartache, a lot of misery, a hell of a future," and on the reverse side were drawings of the chairs, the sewing table and the rug, with descriptive words. In numerous other missives to respondent between the date of the will and June 6, 1944, decedent repeated his phase with such religious accuracy and severity as to arouse in the mind of a reasonable person the suspicion of his sanity. Some of his letters contained drawings of the articles. In the fall of 1943 he wrote letters to Alice Fortier at respondent's home declaring that never for

a minute had his thoughts been free of those coveted things. Also, he wrote six or eight letters to Mrs. Killackey, each of which contained nothing more than the same lament. During the same period he suffered the illusion that he was a veteran of World War I. He exhibited a scar and stated to a subscribing witness to his will that he had been wounded in a bayonet charge by a German. He told a client that he had been gassed and shell-shocked in France. His mind wandered and his speech was incoherent. His incoherency of speech had developed during the past three years. After respondent left him in July, 1943, he let the water run through an outside faucet so constantly that she had it turned off. He then began to take water in a five-gallon bottle from Tujunga to his home, a distance of over 11 miles. The house became foul for lack of water in the toilet and the kitchen sink was full of mouldy food. For lighting he used borrowed coaloil lamps.

From nothing more than the unusual behavior of decedent during the year preceding and the year following the execution of the writing of December 14, 1943, the jury would not have committed gross error by finding him legally incompetent to execute a will. If he thought that his wife's legacies should have been controlled by him, and that he might beat her and drive her from her home because his wishes with respect to her separate belongings had been frustrated by her, it was not an illogical inference that he did not know his relation to his wife or his relatives, the nature of his property or the objects of his bounty.

But in addition to the details of his conduct as recited by a number of witnesses who had known him well, followed by their opinion that he was incompetent, there was other evidence of decedent's incapacity. Attorney Levy had acted as his counsel in 1942. Between the 7th and 10th of December, 1943, at respondent's request, he interviewed decedent as a mutual friend of both with a view of effecting a reconciliation. At that interview the attorney formed the opinion that decedent was then so incompetent as to be incapable of having in mind "the situation of his estate and property and the natural objects of his bounty and his family relations," and the following week declined to prepare a will for decedent. Also, during the last four years of his life decedent was attended by Dr. Nelson, instructor in internal medicine and clinical pathology in a medical college at Los Angeles who had been educated in psychiatry but was not a specialist. He observed that decedent had suffered from heart trouble, high blood pressure, asthma and arteriosclerosis, and testified that the latter ailment can exist in the anterior brain and that there it causes deficient circulation, loss of memory, slovenliness, "lack of finer judgment of situations in life with relationship to his wife and home and his friends and situations alike." Its existence in decedent's brain was evidenced by thickening of the retinal artery. Based upon his own observations and other proven facts, the doctor was of the opinion that decedent did not on December 14, 1943, have a clear understanding of the nature of his estate and property and of his family relations and of the objects of his bounty. Dr. Thompson, an expert alienist, testified to the same opinion.

[1, 2] Such evidences as those recited are sufficient, if believed, to establish testamentary incapacity. The testimony of an attorney who had served a testator and had become familiar with his habits of thought and conduct and who declined to prepare his will is entitled to serious consideration as proof of the testator's incompetency. See Estate of Hansen, 38 Cal.App.2d 99, 115, 100 P.2d 776. The jury was therefore not unreasonable in believing the witnesses of respondent and in drawing inferences from decedent's writings unfavorable to his competency and in rejecting the proof of appellant. Estate of Russell, 189 Cal. 759, 763, 210 P. 249. Decedent's delusion of having shrapnel in his body and a scar resulting from a bayonet wound in a war in a foreign land which he had never seen; his asserting the right to take from his wife her belongings to the extent of beating her on account of it and persecuting her daily with telephone calls and letters concerning it; his living in filth and stench rather than to have the city water turned on at his home; his altered way in telling obscene stories to his wife—these facts in-

dicate that he did not possess general testamentary capacity, did not understand the meaning of a will, recollect the property he undertook to transfer or the persons to whom he desired to make bequests, and that he did not comprehend his relation to his relatives, the natural objects of his bounty. Estate of Russell, supra, 189 Cal. at page 770, 210 P. 249; Estate of Pessagno, 58 Cal.App.2d 390, 394, 136 P.2d 644 et seq.

Appellant contends that "none" of the isolated acts of decedent would influence the making of a valid will. She lists them as follows: intoxication, obscene stories, throwing dishes around when mad, visiting his neighbor's home in his pajamas, holloaing down a hill, the letter of November 12, supra. The evidence does not show that such events were isolated. Commencing with the day following respondent's sale of her furniture and rug decedent's intellectual processes seem to have crumbled. He had prior to the pneumonia been at times inconsiderate but following that illness his decay was certain. In the summer of 1943 his unseemly behavior became constant. Some irritating act occurred almost daily and they all indicated a new development. Such a marked change in his habits of thought evinced his mental unsoundness. In re Carpenter, 79 Cal. 382, 387, 21 P. 835. It was not one risque story he told but many; not one throwing of dishes from the table but such occurrence was often; not the one trip to a neighbor's home while meagerly clothed but the proof was that he repeated sauntering through his home almost uncovered before his wife's guests. He did not write merely the letter of November 12 about the rug, table and chairs but many missives, most of which said nothing but "4 chairs, a sewing table and a rug." Of course, if the jury had adopted appellant's proof it would have sustained the judgment. But such was not the fortune of the trial. The implied finding of decedent's general testamentary incapacity must stand despite the proof that he was still able in the fall of 1943 to transact his business of operating a real estate office. One's ability to do the mechanics of his trade may continue in some degree even though he may be generally incompetent to write a will.

[3, 4] Moreover, the evidence warrants the finding that decedent suffered an insane delusion. Prior to respondent's disposal of the rug, table and chairs, he not only asserted no interest in or claim thereto but actually advised her as to the procedure whereby to effect a more successful sale. But, what happened when the poor man discovered their absence from the home? He was seized with a violent passion for their restoration. His discomfiture by reason of their sale was an obsession. He never hesitated for a moment to consider that the articles were legacies to his wife from a former generation and that he had no moral or legal right (Civil Code, sec. 162) to them. He preferred to wreck his home rather than that she should enjoy her right of disposing of a few trivial objects in which he had not the slightest interest and for the deprivation of which at an earlier period in his life he would not have uttered a word of protest. Such behavior can be ascribed to no cause other than to the "spontaneous generation of a diseased mind." Estate of Russell, supra, 189 Cal. at pages 769, 771, 210 P. at page 255. It is true that to justify a finding that a will was the product of an insane delusion the evidence must show that the delusion bore directly upon and influenced the creation of the terms of the document. Estate of Finkler, 3 Cal.2d 584, 595, 46 P. 2d 149; Estate of Pessagno, 58 Cal.App.2d at page 393, 136 P.2d 644. Such is what the evidence adopted by the jury shows. While decedent had lived with respondent in the matrimonial relationship for over 30 years, yet during the period in which he executed the will he experienced a feeling of loathing and hatred for her. His violent animus was engendered by respondent's disposal of the sewing table and associate articles. It was therefore the product of his insane delusion.

[5, 6] On both the issue of decedent's general incapacity to execute a will and of his insane delusion the verdict of the jury is final. The appellate court cannot substitute its finding for that of the trial court when there is substantial evidence in support of the verdict. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183; Estate of Clark, 55 Cal.App.2d 85, 88,

129 P.2d 969; In re Chamberlain's Estate, 44 Cal.App.2d 193, 198, 112 P.2d 53, 934; Estate of Pessagno, 58 Cal.App.2d at page 392, 136 P.2d 644. Merely because contradictory inferences can be drawn from the evidence the reviewing court is not at liberty to substitute findings contrary to those of the jury Poe v. Lawrence, 60 Cal.App. 2d 125, 131, 140 P.2d 136. Two physicians, three neighbors, one workman, one client and one lawyer testified to decedent's acts and they opined that such behavior evidenced his general incompetency. The tenor of all the evidence warrants the finding that decedent labored under an insane delusion.

[7, 8] Appellant assigns as prejudicial error the court's rulings in admitting 26 exhibits offered by respondent. In the main they consist of letters written by decedent, some of which have been quoted above. The general objection only was lodged against the majority of such documents. To others was added the objection of remoteness. Whether a letter written by a person whose incompetency on a certain date is under investigation is too remote is a question largely addressed to the discretion of the trial court. The letters of decedent herein written in May, June and July, 1944, were especially applicable on the issue of general mental degeneration. Also they indicated that the dark shadow of an imaginary wrong continued to perplex the mind of decedent. His letter of September 22, 1937, was an appropriate index to his intellectual clarity and to the sum total of his desires before disease had undermined him.

[9] Criticism is made of the court's overruling the objections to the hypothetical questions propounded to the physicians called by respondent "because they did not contain evidence of the defense." When such witnesses testified appellant had not begun to introduce her proof. If she was dissatisfied with the question because her proof was not included in the hypothetical question she could, on cross-examination, have amended the question to present the picture of the testator as her evidence would paint it. No prejudicial error appears in any ruling upon the admissibility of evidence.

[10] The order of the court below in admitting the holographic will of decedent was not erroneous. The instrument reads as follows:

"March 17/27

This is to certify that my Wife is not to blame in any way for what I am about to do. All of my Earthly possessions are to go to Nettie. I want my body cremated. Please do not notify my folks for at least 2 weeks.

G. I. Halbert"

It answers the legal requirements of a valid will. It directs the disposition of his body and of his estate and was to operate in event of and by reason of his death. Nichols v. Emery, 109 Cal. 323, 329, 41 P. 1089, 50 Am.St.Rep. 43. It was not a gift causa mortis. See Civil Code, sec. 1149. Nothing was delivered by him to respondent at the time. When the document was written his thoughts were directed to events after death. The suggestion that there was another "Nettie" in Tujunga to whom he might have had reference is too far-fetched to require serious consideration.

The judgments in both proceedings are affirmed.

McCOMB and WILSON, JJ., concur.



JOHNDROW v. THOMAS et al.*

Civ. 15799.

District Court of Appeal, Second District, Division 2, California.

July 1, 1947.

Hearing Denied Aug. 28, 1947.

1. Trusts ⇐372(3)

In suit to enforce a trust with respect to one-half interest in lots 83 and 256 and in personal property, for dissolution of an alleged partnership, for an accounting and for title to and possession of plaintiff's alleged half interest in property, evidence justified denial of recovery with exception

* Subsequent opinion 187 P.2d 681.

to lot 83 with respect to which plaintiff established a one half interest.

2. Trusts ⇐372(3)

Evidence warranted denial of recovery to plaintiff of one half interest in lot number 256 on theory that defendants were holding such interest as trustee for plaintiff, where lot was purchased with defendants' money and title was only taken out in joint names of plaintiff and defendants for purpose of using as collateral another lot in which plaintiff owned interest and where plaintiff thereafter voluntarily conveyed his interest in lot number 256 to defendants.

3. Trial ⇐397(1)

Where plaintiff denied allegation of defendants that he executed a deed conveying realty but did not question validity of deed and trial court found that property in question now solely stood in the names of defendants, contention that no finding was made upon issue raised by denial was without merit.

4. Appeal and error ⇐1169(7)

Where judgment contained definite findings upon all material issues raised by the pleadings, that writer of opinion in two instances inadvertently included as true allegations which had already been determined to be untrue was no ground for reversal.

5. Appeal and error ⇐882(17)

An unsuccessful party in the trial court may not knowingly permit inadvertent inconsistencies in the findings to become engrossed and thereafter demand a reversal of the judgment by reason of such inconsistencies.

6. Appeal and error ⇐301

Where appellant failed to propose amendments to findings prior to trial court's signing them, he could not contend on appeal that findings were inconsistent, where he failed to present alleged inconsistency on his motion for new trial so that trial court might correct alleged errors while matter was before it.

7. Appeal and error ⇐1122(2)

Where by disregarding as surplusage findings which were engrossed by adoption, trial court's decision upon all material issues would disclose no inconsistency, appellate court in interests of justice was authorized to make findings either contrary to or in addition to those made by trial court. Code Civ.Proc. § 956a; Const. art. 6, §§ 4½, 4¾.

8. Evidence ⇐419(2)

Permitting defendant to testify that plaintiff's name was included in the escrow and in deed to a lot because it was necessary to use as collateral another lot in which the plaintiff owned a one-half interest in making the purchase of the first lot was not error as an attempt to vary the terms of the deed but the evidence was admissible to explain the source of the consideration and the nature and the interest of the grantees.

9. Deeds ⇐200

Evidence of all circumstances of preparation, execution and delivery of a deed is material to question of delivery and hence may be introduced in evidence.

10. Army and navy ⇐24

Trial court did not abuse its discretion in denying a continuance of the trial on plaintiff's motion for purpose of securing a rebuttal evidence where plaintiff by exercise of reasonable diligence could have produced such evidence prior to presentation of motion, notwithstanding plaintiff had been a member of the armed forces.

11. Army and navy ⇐34

Although courts religiously observe statutory rights of litigants serving in armed forces to such delays as are thereby authorized, procedure may not in other respects be modified as to operate to advantage of a soldier and to disadvantage of his adversary.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Albert B. Johndrow against Walter J. Thomas and others to enforce a trust and for other relief. From an adverse judgment, plaintiff appeals.

Modified and as modified affirmed.

Eugene L. Wolver, of Los Angeles, for appellant.

Reuben Rosensweig, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant sued to enforce a trust with respect to one-half interest in certain real and personal property for the dissolution of a partnership between himself and respondents, for an accounting of the assets and profits of the partnership, and for title to and possession of his half interest in the property. Recovery was denied him. As grounds for reversal appellant assigns: (1) want of evidential support for the findings; (2) failure to find upon all material issues; (3) inconsistency of the findings; (4) errors in rulings upon the admissibility of evidence; (5) abuse of discretion in denying appellant's motion for a continuance.

[1] The findings are generously supported by the proof offered by respondents. Appellant having long lived with them in the relationship of son and parents, joined them in the purchase of two parcels of realty by contributing one half of the sums paid on account of one parcel and by the use of it in the purchase by respondents of another, both of which occurred prior to November, 1942. At that time he entered the army. The property purchased by all three was lot 83, tract 6084, a vacant lot on Hobart street in Los Angeles. The parcel purchased by respondents only for a home was an improved lot, number 256, tract 6084, on La Salle street. Titles to both properties were taken in the names of appellant and respondents as joint tenants. At the time of appellant's enlistment $275 was due upon the note given for lot 83. At the same time $1,300 had been paid by respondents on lot 256, the purchase price of which was $5,300, payable in monthly installments. No controversy appears to have arisen with respect to lot 83, but while appellant alleged and testified that he joined in the purchase of lot 256, respondents denied his contribution to that investment and Mr. Thomas testified that appellant paid nothing on account thereof and that the name of appellant was included in the escrow and inserted in the deed of lot 256 solely because it was necessary to use lot 83 as collateral in making the purchase of lot 256 and appellant was a part owner of the former lot. Appellant alleged and testified that at respondents' request he joined them in purchasing bedroom and kitchen furniture, paintings and stands. But this was denied, and Mr. Thomas testified that he and his wife bought practically all of the furniture, rugs and kitchen equipment; that the installment contract for such items named them as vendees; that the bedroom set and kitchen equipment were paid for by Mr. Thomas' checks: all of which was corroborated by the merchant and the contracts for the movables in question. The items purchased by appellant were removed by him at the time he quit the Thomas home in January, 1943. While appellant denied that he had ever conveyed the properties to respondents, Mr. Thomas testified that when appellant left the home it was without conversation or reason; that when he subsequently returned accompanied by his brother to announce his entry into the military service appellant stated that he desired to give the witness "a deed for his property rights"; that the witness thereupon had such instrument prepared and accompanied appellant to the office of John L. Currie, a notary public, who took the grantor's acknowledgment; that he caused the deed to be recorded but that it was never returned to him from the recorder's office. The notary positively identified appellant in a group photograph as one who had called at his office with Mr. Thomas, signed the deed and acknowledged the signature.

[2] The proof is sufficient to support the findings that lot 83 was purchased in the joint names of appellant and respondents with the intention that one half of the purchase price should be paid by appellant; that lot 256 was purchased solely by respondents and that appellant's name was included in the title thereof by reason of the use of lot 83 as security for a loan to respondents and not because plaintiff had any interest in lot 256; that the deed of such lot to respondents was voluntarily executed and delivered by appellant. Further comment upon the sufficiency of the evidence to support the findings would be superogatory. See Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183;

Herberts Laurel-Ventura, Inc., v. Laurel Ventura Holding Corporation, 58 Cal.App. 2d 684, 690, 138 P.2d 43.

[3] Appellant's contention that no finding was made upon the issue raised by his denial of respondents' declaration that on January 1, 1943, appellant by deed conveyed his interest in lot 83 to respondents and voluntarily conveyed his interest in lot 256 solely for the purpose of clearing title thereto is answered by the finding "that the property now solely stands in the names of Walter J. Thomas and Rose M. Thomas." The validity of appellant's deed to respondents was not questioned by his denial, but only whether he had ever executed such deed. The testimony of both the notary and Mr. Thomas satisfied the court that the deed was executed and delivered.

[4] There is no such inconsistency in the findings as would warrant a reversal. The occasion for such criticism arose out of some carelessness in drafting the court's decision. The complaint is set up in three counts. Reducing the volume of the verbiage count one in substance alleges that plaintiff had long lived in the home of defendants as their son; they agreed to buy a lot together for their home; they first bought lot 83, then agreed to buy a ready-built home and purchased lot 256; that plaintiff paid one half the price thereof; while defendants assert title to both lots their claims are without right. Count two alleges that a partnership was formed to purchase real and personal property and that it acquired the two lots and some furniture; that the three contributed equally to the capital but defendants took possession of the assets and records of the partnership to the exclusion of plaintiff. Count three alleges that the parties purchased furniture for the new home and that one half of the cost thereof was paid by plaintiff; that defendants hold it as trustees for plaintiff. In making the findings on count one the court found the facts alleged in paragraphs 1 to 4 to be true. In finding on the second count it found as true the allegations of paragraphs 1 to 4. But paragraph 1 of the second count adopts the allegations of paragraph 11 of the first count which had already been found to be untrue. In finding on the third count it is said in finding I that the allegations of paragraphs 1, 2, 3 and 4 of the third count of the complaint are true. But paragraph 1 of the third count adopts paragraphs 6 and 8 of the first count which had already been found to be untrue in the findings on count one.

Notwithstanding such inconsistencies the decision contains such definite and distinct findings upon all material issues raised by the pleadings that it would be a perversion of justice to reverse the judgment merely because in executing the mechanics of preparing the findings the workman in the two instances obviously inadvertently included as true allegations which had already been determined to be untrue. By striking from the findings certain statements that are inconsistent with the evidence adopted by the court and with other positive findings the determination derived by the court will remain and it will support the judgment. Such procedure is to be commended rather than to delay the finality of litigation by a controversy over words, words, words.

[5-7] Had proper diligence been exerted by appellant this issue would have been settled in the court below. The unsuccessful party in the trial court may not knowingly permit such inadvertent inconsistencies as those in the instant findings to become engrossed, that he may thereafter demand a reversal of the judgment by reason of such inconsistencies. Such conduct is on a parity with the studied silence of the barrister who allows improper remarks of adversary counsel to pass unchallenged that he may urge them on appeal as prejudicial error. The very purpose of requiring findings to be served and filed five days prior to the signing is to enable the losing party to assist in causing the decision to express the true intention of the trial judge, and where the appellant has failed to propose amendments to the findings prior to the court's signing them he is in no position to raise on appeal the contention that the findings are inconsistent. Moore v. Craig, 5 Cal. App.2d 283, 286, 42 P.2d 647; Sweet v. Hamilothoris, 84 Cal.App. 775, 782, 258 P. 652. If he fails to take such action he should present the error on his motion for a new trial, to the end that the trial court may correct such errors while the matter

is before it. By disregarding as surplusage the findings which were engrossed by adoption (Morgan v. Walker, 217 Cal. 607, 610, 20 P.2d 660) the court's decision upon all of the material issues will disclose no inconsistency. Such action is consonant with section 956a, Code of Civil Procedure, and with section 4¾ of Article VI of the Constitution whereby in the interest of justice the appellate court is authorized to make findings either contrary, or in addition to those made by the trial court. Also, section 4½, same article, forbids a reversal for "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence * * * [there has been] a miscarriage of justice." See Code Civ.Proc. sec. 956a; Tupman v. Haberkern, 208 Cal. 256, 264, 265, 280 P. 970.

[8, 9] Appellant assigns as error the court's ruling in allowing respondent Thomas, over objection, to testify that appellant's name was included in the escrow and in the deed to lot 256 because it was necessary to use as collateral lot 83, in which appellant owned one-half interest, in making the purchase of lot 256. By such testimony there was no attempt to vary the terms of the deed but to explain the source of the consideration and the nature and interest of the grantees. Evidence of all the circumstances of the preparation, execution and delivery of a deed is material to the question of delivery. Van Core v. Bodner, 77 Cal.App.2d 842, 176 P.2d 784.

[10, 11] The court did not abuse its discretion in denying a continuance of the trial. Appellant's obvious purpose was to obtain his time card from the office of his employer in order to overcome the testimony of Mr. Thomas and the notary to the effect that appellant acknowledged the deed on January 7, 1943. His argument is that "a reasonable continuance should have been granted so that his counsel may have contacted him and he be given an opportunity to communicate with his counsel concerning rebuttal, and if advisable, present such rebuttal."

The authorities cited by appellant (Pacific Gas & Electric Company v. Taylor, 52 Cal.App. 307, 198 P. 651; Eckert v. Graham, 131 Cal.App. 718, 22 P.2d 44; Robinson v. El Centro Grain Company, 133 Cal. App. 567, 24 P.2d 554) do not authorize the reversal of an order denying the continuance of a case which has been brought to trial on the application of the complaining party. The evidence to be obtained by the continuance could by the exercise of reasonable diligence have been produced prior to the presentation of the motion. He contends that the continuance should have been granted "solely by reason of his service as a member of the armed forces." The courts have religiously observed the statutory rights of litigants serving in the armed forces to such delays as are thereby authorized. But neither such statute nor any decision suggests that in other respects the procedure is so modified as to operate to the advantage of a soldier and to the disadvantage of his adversary. Having alleged in his complaint the claim of respondents that the titles of the lots stood in their names only, appellant hastened the commencement of the trial upon the very ground that he was a member of the armed forces. Under the circumstances it cannot be said that the trial court abused its discretion in denying the continuance.

It is therefore ordered that the decision be modified by striking the findings on counts two and three and by substituting in lieu thereof the following: "As to counts two and three of the complaint, the court finds that all the allegations thereof not specifically found to be true by the foregoing findings on the first count are untrue. It appearing from the exhibits that the unimproved lot purchased by the parties is lot 83 instead of lot 84, it is ordered that from conclusion V the number 84 be and it is stricken and that the number 83 be and it is substituted in lieu thereof."

It further appearing that the words "Hobart street lot" in the last line of paragraph VI of the judgment is not a correct description of the property intended there to be specified, and that no provision is made for a reconveyance of appellant's interest in the parcel in the event of the failure of respondents to reconvey such interest, it is ordered that paragraph VI of the judgment be and it is stricken and that the following be and is substituted therefor:

"VI. That defendants Walter J. Thomas and Rose M. Thomas are hereby directed to convey to plaintiff by a good and sufficient deed an undivided one-half interest in lot 83, tract 6084, as per map recorded in book 101, pages 53-57 of Maps in the office of the county recorder of Los Angeles county; and in the event of the failure of defendants to execute and deliver such deed within 30 days after this judgment becomes final the county clerk is hereby appointed as commissioner of this court to prepare, execute and deliver such deed pursuant to this judgment."

As thus modified the judgment is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.



80 Cal.App.2d 723

RHODES v. RHODES.

Civ. 15593.

District Court of Appeal, Second District, Division 3, California.

July 2, 1947.

1. Domicile ⇐4(2)

A change of residence occasioned by exercise of duties in connection with governmental civilian employment, irrespective of length of time, does not bring about a change of domicile in absence of clear proof of a concurrent intention to abandon the old domicile and acquire a new one. Government Code, § 244.

2. Divorce ⇐124

Wife's testimony that her husband was a federal government employee, that they were obliged to leave their California domicile temporarily because of husband's transfer to an assignment outside of state, and that thereafter wife accepted a government position in Washington, D. C., while husband was in armed forces, but that at no time did either of parties intend to effect a change of domicile, presented a case of bona fide domicile of wife in California for purpose of securing divorce upon proper corroboration of her testimony. Government Code, § 244.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Annette J. Rhodes against Elmer C. Rhodes for a divorce. From a judgment denying plaintiff a divorce, the plaintiff appeals.

Reversed for further proceedings.

Lyle W. Rucker, of Los Angeles, for appellant.

No appearance for respondent.

SHINN, Acting Presiding Justice.

In a default action for divorce a judgment was entered denying plaintiff a divorce, upon the ground that she had not been a resident of the State of California for one year prior to the institution of the action. She appeals from the judgment. After plaintiff had testified, in answer to questions by her attorney, that she married defendant in Pasadena, California, February 20, 1931, and separated from him in August, 1944; that there were no children, and no community property; and that she had resided in the County of Los Angeles, State of California, for more than one year immediately preceding the filing of her action, she was interrogated by the court concerning her residence. In response to the court's questions she testified that she had come to Pasadena in 1919 and thereafter resided there with her mother; that she married defendant in Pasadena in 1931 and resided with her husband in the home of her mother, paying the latter for the accommodations of herself and husband until 1939; that Mr. Rhodes was employed by the Internal Revenue Alcohol Tax Bureau and in 1939 was given a special assignment in Atlanta, Georgia; that she went with him to Atlanta and lived there or thereabouts for about three years while Mr. Rhodes carried on his work for the Internal Revenue Bureau. He was "moved around all the time" and a part of the time the parties lived in Macon. Mr. Rhodes then entered the military service and was

transferred to a dozen different points during the following two years. Mrs. Rhodes then went to Washington, D. C. and for a period of some two years held a position as employee of a United States Senator from Mississippi. While the parties were living in Pasadena they accumulated household goods of their own and when they left California their goods were stored and remained in storage until Mrs. Rhodes returned to Pasadena in January, 1945. During all this time Mrs. Rhodes maintained her registration as a voter and voted in Pasadena. She visited her husband at numerous places while he was in the service and before taking a position in Washington she returned to Pasadena and stayed with her mother on annual visits of about 7 weeks duration. Her action for divorce was filed some two months after her return to Pasadena from Washington. Plaintiff testified that her husband was subject to transfer at any time; that Pasadena was always considered their home and that they had never established a permanent residence or intended to remain at any of the several places where her husband was temporarily stationed. Mrs. Rhodes' mother during all this time maintained the home in Pasadena where Mr. and Mrs. Rhodes had lived prior to Mr. Rhodes' assignment to a Georgia office of the Internal Revenue Tax Bureau. Plaintiff also testified that the position which she held in Washington was merely a temporary one which she intended to hold during the period of her husband's service in the armed forces.

The views of the trial court as to the plaintiff's testimony were first stated as follows: "I am in grave doubt, Mr. Rucker, that this woman *was* residing in this county for three months and in the State for one year immediately preceding the commencement of the action. When you take a job and work for a couple of years, as she was, three thousand miles away, that is a usual indication of residence. Where, as her husband did, he works for three years in Atlanta, Georgia, that is usually the best indication of residence." While the matter was under discussion the court stated, "I am sorry, Mr. Rucker, I can't agree with you. I will have to deny the divorce solely on the ground of lack of residence—jurisdiction. * * * I am satisfied that the facts do not establish residence." The decree was denied upon that ground. It appears from the record that at the very outset of the trial plaintiff's attorney announced to the court that he had a witness present from Washington, D. C. who might testify and "perhaps satisfy the Court" concerning the defendant, but as a result of the court's pronouncement plaintiff was given no opportunity to produce evidence in addition to her own testimony, and it is apparent, from the discussion which took place that the attorney was taken by surprise by the sudden ruling of the court in denying the divorce.

[1] In so ruling, the trial court disregarded a firmly established and salutary rule of law applying to proof of residence of government employees. It has been uniformly held that a change of residence occasioned by the exercise of duties in connection with governmental civilian employment, irrespective of the length of time, does not bring about a change of domicile in the absence of clear proof of a concurrent intention to abandon the old domicile and acquire a new one. The principle was forcefully stated by Mr. Justice Rutledge in Sweeney v. District of Columbia, 72 App.D.C. 30, 113 F.2d 25, 129 A.L.R. 1370, where the Court of Appeals of the District of Columbia reviewed a finding of the Board of Tax Appeals that petitioner Sweeney had acquired a domicile in Washington, D. C. through residence there for a period of twenty years as a government employee. In reversing this finding and holding that Sweeney had retained his domicile in Massachusetts, the court said (at page 32 of 113 F.2d): "Accordingly we think that one who comes to the District and remains to render service to the Government which requires his presence here, may retain his domicile in the state from which he comes until the service terminates unless he gives *clear evidence* of his intention to forego his state allegiance. This conclusion, we think, is supported by sound policy, the clear weight of judicial authority, many instances of Congressional recognition in principle, and the long-established custom and practice of other officials and departments. Whether the

principle is stated in terms of a presumption of continuity of state domicilation during the Federal employment or of privilege derived from the dual form of government is perhaps a matter of more theoretical than practical consequence. The privilege of course could be waived. The presumption would require strong evidence to overcome it. In either case the state domicile could not be overthrown by *mere proof of long residence* during performance or *ambiguous showing of intention to change.* The considerations which we have held controlling require that evidence of intention to change be *clear and unequivocal,* whether its effect be waiver of privilege or to overcome a presumption." (Emphasis added.)

It would serve no useful purpose to review the many cases which have held that affirmative proof is required to show that one who is absent from the state of his domicile by reason of public employment has abandoned that domicile and established a new one. While many of the cases concern employees residing in the District of Columbia, the same principle is applicable to governmental employees, such as defendant in the instant case, who are subject to reassignment and transfer to places away from their established domicile. For a collection of cases to this effect, see 106 A.L.R. 6 and 129 A.L.R. 1382 et seq.

In Section 244 of the Government Code is found codified the well-established rule of this and other jurisdictions that a residence can be changed only by the union of act and intent and that mere temporary absence from one's domicile for the purpose of engaging in employment, however long, will not effect a change of domicile where the intention is to be absent for that purpose alone and upon the termination of such employment to return to the former established domicile. See In re Estate of Peters, 124 Cal.App. 75, 77, 12 P.2d 118; 28 C.J.S., Domicile, § 13, p. 32.

[2] The right to establish and maintain legal residence in the place of one's choice is one of the valuable attributes of citizenship. Major privileges and benefits which flow from legal residence in one jurisdiction may not be enjoyed in others. Some of these relate to the disposition of estates by will, to the ownership and descent of real property, to rights and privileges in probate administration, to taxes upon income, to the benefits of social security laws, to the right to hold public office, and the right of suffrage. These and kindred rights dependent upon residence have been recognized as being of major importance in many different situations and especially to governmental employees involuntarily moved away from their own established places of domicile. Such rights are not to be swept aside lightly. The right asserted by plaintiff here to sue for divorce might appear to be of minor importance, but in other situations which we have suggested denial of rights dependent on proof of residence might prove disastrous. There is no exceptional rule of law in divorce matters with respect to acquiring or losing legal residence. No greater quantum of proof of residence is required than in other cases, except in the matter of corroboration. Both plaintiff and defendant were clearly within the category of government employees and the principles pertaining thereto. They were obliged to leave their established California domicile temporarily because of the transfer of defendant by the Internal Revenue Bureau to an assignment outside of the state. It is clear that there was nothing permanent in that assignment, and that defendant was at all times subject to be retransferred to some other district. It is equally clear that plaintiff's employment and her residence in Washington, as well, were likewise merely temporary. Plaintiff and defendant had never had an established domicile except in Pasadena, with plaintiff's mothers; their absence from California was involuntary; they had no settled business or home in Atlanta or Macon or any other of the places where they resided; they never had occasion to remove their household belongings from storage in Pasadena, and their absence from the state was not from choice. Plaintiff testified as to their intention to return to Pasadena when their employment would permit and her credibility was not questioned by the court in the discussion which took place. We find nothing whatever in the record

to indicate that Mr. and Mrs. Rhodes ever abandoned their California residence or intended to establish a permanent residence elsewhere. Plaintiff's evidence presented a case of a bona fide domicile in Pasadena. The ruling was upon a point of law, namely, the sufficiency of the plaintiff's testimony, given full credit, to establish legal residence in California. The court erred in denying her a decree of divorce upon her testimony alone.

The case should be reversed for further proceedings. We do not, of course, hold that the trial court is obliged to find, without further evidence, that plaintiff, at the time of the institution of the action, was and had been a bona fide resident of Los Angeles County for more than one year. Her testimony upon that point would require corroboration, and it will be for the court to say upon the entire evidence whether the fact has been established.

The judgment is reversed.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 728

CITY OF LOS ANGELES v. HOWARD.

Civ. 15648.

District Court of Appeal, Second District, Division 3, California.

July 2, 1947.

1. Workmen's compensation ⇐2193

An employer may sue a decedent's estate for money expended by employer under Labor Code for medical attention and compensation because of employee's injuries proximately caused by decedent's negligence during his lifetime. Labor Code, §§ 3201 et seq., 3852; Probate Code, § 574.

2. Workmen's compensation ⇐2202

The provision of Labor Code that employer, paying or obligated to pay compensation for employee's injury or death caused by third person, may sue such person for amount paid or due and any additional damages for which employer is liable, created new cause of action entirely separate from injured employee's common-law right of action for damages. Labor Code, § 3852.

3. Workmen's compensation ⇐2193

A city's payment of money for medical attention furnished and compensation due its employee, injured as result of third person's negligence, caused property injury to city within statute authorizing action against representative of any decedent who wasted, destroyed, took, carried away, or converted to his own use plaintiff's "property," so as to entitle city to sue administratrix of deceased tort-feasor's estate for monies so expended. Labor Code, §§ 3201 et seq., 3852; Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge pro tem.

Action by the City of Los Angeles against Mattie V. Howard, as administratrix of the estate of Louis M. Howard, deceased, to recover amounts paid by plaintiff for medical attention furnished and compensation due an employee thereof because of personal injuries received as the result of deceased's negligence during his lifetime. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Edwin F. Shinn, Deputy City Atty., all of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

The complaint herein alleges that an employee of plaintiff, while acting within the course and scope of his employment, received bodily injuries which were proxi-

mately caused by the negligence of Louis M. Howard, since deceased; that plaintiff, as a result of such injuries, furnished medical attention and paid compensation to its said employee pursuant to the provisions of division 4 of the Labor Code of the State of California, in the sum of $3,652; that plaintiff subsequently filed a claim for the repayment to it of such sum with Mattie V. Howard, as administratrix of the estate of said tort-feasor, which claim was rejected in full.

Appeal is taken by plaintiff from a judgment of dismissal entered after defendants' oral general demurrer was sustained without leave to amend upon the ground that plaintiff's cause of action abated upon the death of the tort-feasor.

[1] The sole question presented for determination herein is whether an employer may maintain an action against the estate of a deceased person to recover the money he has expended under the provisions of division 4 of the Labor Code because of injury to or death of his employee, proximately caused by the negligence of such person during his lifetime? Our answer to this query is in the affirmative.

[2] The cause of action alleged in plaintiff's complaint differs from the injured employee's common-law action for damages. The legislature, by the enactment of section 3852 of the Labor Code, created a new cause of action for the employer entirely separate and distinct from the right of action of the employee. Limited Mutual Comp. Ins. Co. v. Billings, 74 Cal.App.2d 881, 882, 169 P.2d 673.

Section 3852 of the Labor Code (Div. 4, Pt. 1, Ch. 5) provides: "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

It being thus clearly apparent that the plaintiff herein would have had a good and sufficient cause of action against the decedent during his lifetime for recovery of the moneys so expended, our next problem is as to whether such cause of action survives his death and may be prosecuted against his estate.

[3] Section 574, Probate Code, provides, in part: "[A]ny person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person." In the recent case of Hunt v. Authier, 28 Cal.2d 288, 295, 169 P.2d 913, our Supreme Court has declared that the substitution by the legislature of the all-inclusive word "property" for the term "goods and chattels" shows an intent to recognize every property right or interest as "property" and to place no restrictions or limitations on the type of property for the injury to which compensation may be recovered from the estate of the wrongdoer and to make no distinction as to the method by which such destruction or injury is effected.

The payment by plaintiff of money for medical attention and compensation to its injured employee pursuant to the obligation imposed upon it by the provisions of the Labor Code caused a property injury to plaintiff within the meaning of section 574, Probate Code. Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605; Hunt v. Authier, supra, 28 Cal.2d at page 296, 169 P. 2d 913. Plaintiff's complaint against the administratrix of the estate of the tort-feasor for recovery of the moneys so expended stated a proper cause of action and the demurrer of defendant should have been overruled.

The judgment is reversed with directions to the trial court to make an order

overruling the oral general demurrer of defendant.

SHINN, Acting P. J., and WOOD, J., concur.



TANNHAUSER v. ADAMS.*

Civ. 3644.

District Court of Appeal, Fourth District, California.

July 1, 1947.

Hearing Granted Aug. 28, 1947.

1. Limitation of actions ⇐6(10)

Legislature has power to enact a statute shortening or lengthening time within which an action may be brought as long as a reasonable time is left after effective date of statute, within which to commence the action.

2. Taxation ⇐37, 805(1)

The statute providing a one-year limitation for proceeding based on alleged invalidity or irregularity of deed to the State for taxes or of proceedings leading up to deed is not a curative act but is valid as a statute of limitation and repose and the limitation period provided for therein is reasonable. Revenue and Taxation Code, § 3521.

3. Taxation ⇐37, 805(1)

The statute providing for one-year limitation period for a proceeding based on alleged invalidity or irregularity of any tax proceeding, after date of execution of tax collector's deed, is not a curative act but is valid as a statute of limitation and repose, and the limitation period provided for therein is reasonable. Revenue and Taxation Code, §§ 3725, 3726.

4. Taxation ⇐805(1)

An action commenced over 6½ years after recording of tax deed to State and over 4 years after execution of tax deed from State to defendant, to quiet plaintiff record owner's title on ground of invalidity of tax deeds was barred by one-year statute of limitation, where deeds were valid on their faces and defendant had been in actual possession of land since date of his tax deed and had paid all taxes levied and assessed on the land, and defect alleged was not a jurisdictional one. Revenue and Taxation Code, §§ 3521, 3725, 3726.

5. Evidence ⇐83(4)

In action to set aside tax deeds, where it was shown that delinquent lists were published and that taxes were delinquent prior to tax sale, it would be presumed, in absence of evidence to the contrary, that collector's official duty had been regularly performed and that delinquent lists and notices required by law to be published were published as required. Code Civ.Proc. § 1963, subd. 15.

6. Constitutional law ⇐285

Where delinquent tax lists and notices of taxes due were published, taxpayer could not complain that he was denied due process of law on ground that tax collector failed to mail notice of sale by registered mail to his last-known post office address as required by statute, since publication was notice. Pol.Code, § 3771a; Code Civ. Proc. § 1963, subd. 15.

7. Taxation ⇐688

Invalidity of tax deeds on ground that tax collector failed to mail notice of sale by registered mail to taxpayer at his last known post office address was cured by validating acts, where failure to mail notice was not a jurisdictional defect, in that delinquent list and notices required by tax statute were published. Pol.Code, § 3771a; Code Civ.Proc. § 1963, subd. 15; St.1943, p. 1993; St.1945, p. 2176.

8. Constitutional law ⇐193

Only those acts or omissions that legislature is restrained by constitutional legislation from sanctioning in advance, often characterized as jurisdictional, cannot be validated by curative statute.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

* Subsequent opinion 187 P.2d 716.

Action by W. Tannhauser against E. O. Adams to quiet title to land. From an adverse judgment, plaintiff appeals.

Affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Stickney & Stickney, Edward Strop and Virgil S. Kipp, all of San Diego, for respondent.

GRIFFIN, Justice.

Action to quiet title. Plaintiff and appellant brought this action on December 27, 1945, as the record owner of the property here involved, against defendant and respondent, the holder of a tax deed issued by the tax collector of San Diego County to the State of California, on July 1st, 1938, and recorded on August 5, 1938, and a tax deed from the State to defendant dated January 14, 1941, and recorded on January 20, 1941.

The land in controversy was sold to the State September 1st, 1938, for delinquent taxes for the year 1932.

There are two points in controversy. The first is whether plaintiff's action is barred by sections 3521, 3725 and 3726 of the Revenue and Taxation Code, and the second is whether the failure of the Tax Collector to mail a notice by registered mail to the party to whom the land was last assessed, at his last known post office address, as required by section 3771a of the Political Code, in force July 1st, 1938, the date of said sale, was cured by the validating acts of 1943 and 1945. Stats.1943, p. 1993, chap. 458; Stats.1945, p. 2176, Chap. 1134.

Defendant set up the bar of the statute of limitations in his answer and made timely objections to the introduction of any evidence by plaintiff attempting to attack the validity of the tax deeds to and from the State, or any of the proceedings leading up to their issuance, on the ground that this right had been closed to plaintiff by said sections and by the validating and curative acts. The trial court held in favor of defendant's contention and gave judgment accordingly.

Plaintiff's action was commenced over 6½ years after the recording of the tax deed to the State and over 3½ years after June 1st, 1941, the last limitation set forth in section 3521 of the Revenue and Taxation Code, which provides as follows:

"A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

"Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section."

This provision was effective May 19, 1941. Stats.1941, p. 1426, Chap. 290, secs. 7 and 8, and operative June 1, 1941. See note 1, sec. 124, Revenue and Taxation Code.

As to the deed from the State, plaintiff's action was commenced over four years after the execution of the tax deed from the State to defendant. Sections 3725 and 3726 of the Revenue and Taxation Code provide:

"3725. A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed.

"3726. A defense based on the alleged invalidity or irregularity of any proceeding instituted under this chapter can be maintained only in a proceeding commenced within one year after the date of execution of the tax collector's deed."

These last two sections are based on and are a continuation of repealed sections 3897, subdivision 8 and section 3836.2 of the Political Code. Stats.1933, p. 2588, chap. 1012, in effect October 25, 1933; Stats.1935, p. 1441, chap. 396, in effect Sept. 15, 1935; and Stats.1939, p. 1921, chap. 529, in effect September 19, 1939. These cited sections were all in effect at the time plaintiff's action was commenced and they shortened and limited the time in which an action involving the validity of tax deeds could be commenced or maintained. Plaintiff's right to commence an

action attacking the tax deed to the State expired June 1, 1942, one year after the last limitation in section 3521. Plaintiff's right to commence an action attacking the tax deed from the State to the defendant expired January 14, 1942, one year after the date of the execution of said tax deed. Plaintiff's action which was commenced February 27, 1945, was therefore too late if these sections are applicable to the facts established.

[1] The legislature had the power to enact a statute shortening or lengthening the time within which an action may be brought as long as a reasonable time is left after the effective date of the statute, within which to commence the action. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 275, 138 P.2d 673, 147 A.L.R. 1111; Title Guarantee and Trust Company v. Woody, 63 Cal.App.2d 209, 146 P.2d 252.

[2, 3] Section 3897, subd. 8 of the Political Code first provided a six-months limitation, which was later changed to one year. In construing this section with its six months provision, and holding it applicable, this court, in the case of Title Guarantee and Trust Company v. Woody, supra, held that Political Code section 3897, as it formerly read, was applicable to the State's sale of tax deeded property, even though the original tax proceedings were invalid, and an action to contest the validity of the proceedings not commenced within the time limited by subdivision 8 thereof was barred. It was also there held that subdivision 8 of that section was not a curative act but a statute of limitation and respose, and the period of limitation thus provided was a reasonable one. The wording of sections 3725 and 3726 is analogous to section 3521 of the Revenue and Taxation Code, and the construction placed on section 3897 of the Political Code in the Woody decision would be equally applicable to the construction to be placed on section 3521, which refers to the deed to the State.

In Rand v. Bossen, 27 Cal.2d 61, 162 P.2d 457, the Supreme Court held that Political Code section 3480g, declaring that no proceeding to contest the validity of any credit on or payment of a reclamation district assessment may be commenced unless within six months from the effective date of the statute or the date of such credit or payment, fixes a reasonable time limit, and that attacks on the tax deeds to and from the State based upon those grounds are barred by these statutes of limitation.

61 Corpus Juris, p. 1427 et seq., secs. 2034b, 2035c, 2036(5), and 2037b, and the cases thereunder, are cited, which, in effect, hold that if a tax deed is void on its face, the statute of limitations will not run in favor of the holder thereof; and the statute of limitations will cure any mere irregularity or informality in the levy or assessment, but will not prevent an attack on the tax title when the irregularity is so defective as not to confer any jurisdiction on the officers to proceed with the sale.

[4] The tax deeds here involved are valid on their face and the evidence in this case shows that plaintiff was never in actual possession of the property but that the respondent has been in actual possession since the date of his tax deed and has paid all taxes levied and assessed on said land. The authorities are at variance as to whether the statute of limitations will cure a jurisdictional defect.

In Meigs v. Roberts, Comptroller, 162 N.Y. 371, 56 N.E. 838, 76 Am.St.Rep. 322, in discussing a provision of the law of that state making tax deeds which had been on record two years prior to the passage of the act conclusive evidence of the regularity of the sale and all proceedings prior thereto, if not assailed by direct proceeding within six months after the taking effect of the law, the court held that according to the intent and effect of such a provision, it was a statute of limitation, and said that there may be, in legal proceedings, defects which are not mere informalities or irregularities but are so vital in their character as to be beyond the help of retrospective legislation; that such defects are called jurisdictional, and that statutes of limitation will bar any right, however high the source from which it may be deduced, provided that reasonable time is given a party to enforce his right. Citing cases. See, also, Turner v. People of State of New York, 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed.

392. In view of the conclusion hereinafter reached that the defect alleged did not constitute a jurisdictional one, it becomes unnecessary to here determine that point.

[5] The published delinquent list for the 1937 taxes, published in June, 1938, and the addenda sale notice of land sold to the State five years previous, which was attached thereto, was offered in evidence. The evidence shows that the taxes were delinquent for the years 1933, 1934, 1935, and 1936. There being no evidence to the contrary, it will be presumed that official duty has been regularly performed and that the delinquent lists, and notices required by law to be published, were published as required. Section 1963, subd. 15, Code Civ. Proc.; Jacoby v. Wolff, 198 Cal. 667, 247 P. 195.

[6] The published delinquent lists and those notices of taxes due were all notices to the taxpayer that his property was delinquent and that the taxes were due from 1932 to 1937 inclusive. Such publication is notice to the taxpayer in tax proceedings and satisfies the due process of law provision of our Constitution. Merchants' Trust Co. v. Wright, 161 Cal. 149, 118 P. 517; 24 Cal.Jur. p. 326, sec. 300.

As far as the mailing of additional notices of sale prior to the sales to and from the State, or the mailing of any additional notices at all is concerned, such notices could have been done away with or not required by the legislature in the first instance without doing violence to due process. The first statutory requirement for giving additional notice of sale by mail after five years delinquency was the amendment in 1913 of section 3771 of the Political Code. Stats.1913, p. 556, chap. 299. The requirement of mailing additional notices of sale by the State is first found in section 3897 of the Political Code. Prior to 1913, the only notice to the delinquent taxpayer of sale to the State required by statute was the publication of the annual delinquent list and the notice thereto attached and, prior to 1905, the only notice required of sale by the State, was the published notice of sale. Since the owner had received due notice by publication of the fact that his taxes were delinquent and the property had been sold to the State for such delinquency, it could not be held that there was a violation of due process or that the failure to give any other notice of the intended sale would be a jurisdictional defect. Fox v. Wright, 152 Cal. 59, 61, 91 P. 1005; Warden v. Broome, 9 Cal.App. 172, 175, 98 P. 252; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936.

[7, 8] The application of the statute of limitations was raised in the case of Griffith Co. v. Belchez, 76 Cal.App.2d 155, 172 P.2d 511. The decisions seem to settle the point that the application in this case of the statute of limitations provided for in sections 3521, 3725 and 3726 of the Revenue and Taxation Code is a bar to the present attack on the tax deeds to and from the State. Since the defect in the failure of the tax collector to mail a registered notice to the plaintiff at his last-known post office address is not a jurisdictional irregularity and since the additional notice required by the legislature is non-essential as a due process notice to the taxpayer, the legislature could have omitted, in the first instance, as they had in former years, the necessity of such additional notice, and accordingly it had the power to validate the failure to give such additional registered mail notice by curative acts. Merchants' Trust Co. v. Wright, supra, 161 Cal. at page 151, 118 P. 517; Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Wall v. State of California, 73 Cal.App.2d 838, 167 P.2d 740; Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567. It is only those acts or omissions that the legislature is restrained by constitutional legislation from sanctioning in advance, often characterized as jurisdictional, that cannot be validated by curative statute. Chase v. Trout, 146 Cal. 350, 80 P. 81; Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531.

The judgment in the present action can therefore be supported under either theory.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

80 Cal.App.2d 601

DOKE et ux. v. PACIFIC CRANE & RIGGING, Inc., et al.
Civ. 15576.

District Court of Appeal, Second District, Division 3, California.
June 30, 1947.

Hearing Denied Aug. 28, 1947.

1. Negligence ⇐121(2)

To authorize application of doctrine of "res ipsa loquitur", accident must be of a kind which ordinarily does not occur in absence of someone's negligence, it must be caused by an agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Appeal and error ⇐927(3)

In reviewing judgment rendered on motion for nonsuit, court must assume that all evidence received in favor of plaintiff relevant to issues is true, and all presumptions, inferences, and doubtful questions must be construed most favorably to plaintiff.

3. Negligence ⇐121(2)

The hypothesis of doctrine of res ipsa loquitur is that ordinarily the one injured is not in a position to know more than that by some unusual movement of instrumentality he was injured; whereas, the one who operates instrumentality should know and be able to explain precise cause of accident.

4. Negligence ⇐121(3)

In action against owner and operators of crane for death of spark arrester manufacturer's employee upon whom arrester fell while employee was giving signals as to where to place arrester on incinerater, evidence relating to control of crane and hoisting equipment and arrester was sufficient to authorize application of doctrine of res ipsa loquitur as to owner and operators, notwithstanding some agency over which crane company and such employees had no control could have caused the accident.

5. Negligence ⇐121(2)

The application of res ipsa loquitur doctrine depends on circumstances of individual case.

6. Negligence ⇐121(2)

The introduction of evidence as to how accident happened and cause thereof does not necessarily prevent application of res ipsa loquitur doctrine.

7. Negligence ⇐121(3)

In action against owner and operators of crane for death of deceased due to fall of spark arrester being lifted to top of incinerator, inference of negligence on part of owner and operators was not dispelled by testimony concerning events preceding and following accident, where plaintiffs introduced no evidence tending to show or explain why the arrester fell.

8. Evidence ⇐514(1)

In action against owner and operators of crane for death of deceased due to fall of spark arrester being lifted to top of incinerator, expert testimony as to how crane would have reacted if weight had become detached from the hook should have been admitted, notwithstanding that plaintiffs' evidence, that had been received, warranted application of res ipsa loquitur doctrine.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by James B. Doke, Sr., and Rosa M. Doke, husband and wife, against Pacific Crane & Rigging, Inc., a corporation, Nick George Phillips, and Charles Davis for damages for the wrongful death of plaintiffs' son. From a judgment of nonsuit, the plaintiffs appeal.

Reversed.

A. V. Falcone, of Los Angeles, for appellants.

Bauder, Veatch and W. I. Gilbert, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs, husband and wife, appeal from the judgment of nonsuit in this action for damages for the wrongful death of their son. The trial proceeded before a jury,

and, after 8 witnesses had testified on behalf of plaintiffs, counsel for plaintiffs stated to the court that he had concluded plaintiffs' case except for one expert witness who was unable to be present until the next day. He then made an offer of proof as to what the testimony of the witness would be. The court sustained defendants' objection to that offer of proof, and the defendants then made a motion for a nonsuit upon the ground that the evidence was insufficient to sustain any cause of action within the purview of the pleadings.

It appears from the evidence that the Lockheed Aircraft Company (hereinafter referred to as Lockheed) had caused to be constructed on its premises a metal incinerator approximately 30 feet high and 12 feet in diameter, on top of which a spark arrester was to be installed. The Acme Blower Pipe Company (hereinafter referred to as Acme) was in the business of making spark arresters, and had been engaged by Lockheed to manufacture one and install it on the top of the incinerator. After the spark arrester had been completed, Acme engaged the defendant Pacific Crane & Rigging, Inc. (hereinafter referred to as the defendant), to send a crane, and men to operate it, to the Lockheed premises for the purpose of lifting and placing the spark arrester on top of the incinerator. The spark arrester was made of sheet metal, was oval in shape, 3 to 4 feet high, 12 to 13 feet in diameter and weighed about 1¼ tons. Before it was moved from the Acme premises, Acme employees made a "sling," or device, to be attached as a kind of bail over the top of the arrester for the purpose of lifting it to the top of the incinerator. The sling was made by fastening an end of a steel chain through a loop at the end of a wire rope, and by fastening the other end of the chain to one side of the arrester, and the other end of the wire rope to the opposite side of the arrester. About ⅔ of the sling was made of chain, and ⅓ of the wire rope. The day the installation was to be made, May 26, 1944, the defendant sent a Universal truck crane (a crane mounted on an automobile truck), and 2 employees, defendants Phillips and Davis, to the Lockheed plant. Phillips was to operate the crane, and Davis was to oil it and drive the truck. The crane had a 50-foot boom (a projecting arm made of steel from which the hoisting tackle was suspended) which extended in front of the operator's cab. There were two cable drums at the base of the boom, and two 10-inch "shives" (wheels with grooves for cables) at the upper end of the boom. A ⅝-inch steel wire cable extended from one of the drums, up the boom, through one of the 10-inch shives, then swung down to a loading block. The loading block contained one large wheel, similar to the shives, and the cable passed through the block, around the wheel and then back to the upper end of the boom and through another shive, then down again through the loading block and, apparently, up again through a shive in the upper end of the boom, down the boom, and around the other cable drum at the base of the boom. A "U" shaped hook, 6 to 8 inches in length, hung from the loading block, and objects to be lifted were attached to that hook. The boom was operated by 2 hand levers, one of which raised and lowered the boom, and the other swung the boom from side to side. A lever controlled the winding up and releasing of the cable which was on the drums. The crane was put into operation by means of clutch gears. A foot brake was used in stopping the operation of the crane, and it also controlled the speed with which an object was lowered. The brake consisted of a band around a drum. Pressure on the brake tightened the band around the drum and stopped the movement of the cable up the boom and down to the object, and stopped the movement of the object. To lower the object the operator released, or "eased off," on the brake. The spark arrester had been hauled to the Lockheed plant on a truck. Decedent, James B. Doke, Jr., an employee of Acme who was a sheet metal worker, had been sent to Lockheed to complete the installation of the spark arrester after it was in place on top of the incinerator. He climbed upon the truck which held the arrester, and Phillips, who was sitting upon a seat in the cab of the crane truck facing the boom, swung the boom over the truck and above the arrester. Decedent attached the hook, which was suspended on cables

from the boom, to the sling on the arrester. Phillips then lifted the arrester 7 or 8 inches above the bed of the truck to test its balance. It was not properly balanced, and Phillips lowered it on to the bed of the truck. Decedent moved the hook to a different position on the sling, and Phillips again lifted the arrester from the bed of the truck. This was repeated 4 or 5 times before the arrester appeared to be in balance. It was then lowered to the ground, to the left of Phillips and a distance of 20 or 30 feet from the incinerator. It was then lifted from the ground to a height of about 4 feet and held stationary while one Ruffner, an employee of Acme, at the direction of Phillips tied a hemp rope to the arrester. The rope was then held by Ruffner to prevent the arrester from turning around in the air. About this time the decedent ascended a steel ladder, which extended to the top of the incinerator and was welded to its side, to give signals to Phillips as to where to place the arrester on the incinerator. The arrester was lifted to a height of approximately 34 feet to a position above the incinerator. Phillips, following a signal by decedent, then began to lower it slowly toward the top of the incinerator. He had lowered it a few feet when decedent signaled for him to halt, and Phillips stopped the arrester about 1½ feet above the top of the incinerator. The arrester remained stationary in this position for 15 to 20 seconds when suddenly it dropped with a loud noise, in place, on top of the incinerator. Decedent, who was at the top of the ladder, fell to the ground and was killed. The complaint alleged, and defendants admit by their answer, that the arrester struck and killed decedent when it fell.

There was testimony by one Wood, an employee of Lockheed, who was called as a witness on behalf of plaintiffs, to the effect that he was present and watched the arrester being lifted above the incinerator; that as it was being lowered the arrester stopped for a moment and then dropped; that the movement in lowering the arrester was jerky; that the arrester struck decedent when it fell and knocked him from the ladder; that immediately after it fell the sling on the arrester was still looped over the hook; that the boom of the crane was at approximately a 45 degree angle after the arrester fell, but it did not snap or shake; that a Lockheed fireman climbed the ladder about half an hour after the accident, and took the sling off the top of the arrester and threw it to the ground; that he thought the man was the fire captain, and his name could be ascertained by consulting the personnel department of Lockheed.

Another employee of Lockheed, one Caster, who was called as a witness on behalf of plaintiffs, testified that he witnessed the operation from the time the hemp guide rope was attached to the arrester; that the arrester was lowered toward the incinerator in "sort" of a jerky manner; that when the arrester fell it struck decedent and knocked him off the ladder; that he could not help but see that neither the crane nor the hook made any motion upward when the arrester fell; that after the accident he moved about the scene, and observed the arrester from the shipping platform which is about 41 feet high and a distance of about 75 feet from the incinerator; that the arrester was level on the incinerator after it fell and the sling was still attached to the hook; that he saw someone, who he thought was a fireman for Lockheed, climb the ladder after the accident and throw something to the ground.

Martin Colvin, general counsel for the defendant company, was called under Section 2055 of the Code of Civil Procedure, and testified that the operation of a crane is the exclusive function of the operator, but that the customer directs the work to be performed.

Defendant Phillips, who was also called under Section 2055 of the Code of Civil Procedure, testified that it was his duty to operate the crane; that no one had anything to do with operating the crane but the witness, and no one told him how to operate it; that the hemp guide rope did not affect the operation of the crane but made it easier to lift the arrester by preventing it from twirling; that the crane was "issued" to him and he operated the same crane all the time; that he inspected his own crane, and the only inspection made of it around the day of the accident

was made by him; that he inspects his crane while he is operating it, and he would know whether a brake would hold or would not, and whether a cable was worn; that the length of the boom determines the weight the crane can lift; that the lifting capacity of his crane, the way it was hooked up on the day of the accident, was 6 tons; that he did not inspect the hook-up of the crane to the arrester; that he had no secondary or safety line; that he told one of the Acme men to tie the hemp rope to the arrester to keep it from "twirling," but he did not know where it was attached or how it was hooked up; that it took 2 or 3 minutes to lift the arrester and swing it over the top of the incinerator; that there was no slack in the cable, which held the arrester, and it was taut at all times; that he had his brake set and the "piece" locked; that when the arrester fell it did not tip but fell straight down; that he could not see from where he was "if the sling broke or the hook broke, or what caused the piece to fall"; that he could not see what happened from his seat on the crane; that he believed some part of Acme's hook-up came loose; that he did not examine the arrester or sling either before or after the accident; and that the last time he saw the sling it was in the office of the defendant company. He also testified that there was no time he did not see what happened from his seat on the crane; that he "was in good vision"—and "had a good view"; that the sling came unhooked or broke "or whatever happened," and he could see the "cable and the chain coming through the hook"; that the chain and wire rope had not broken, but one end "had to" come loose for "the chain had slipped right through the hook."

[1] Appellants contend that the evidence presents a proper case for the application of the doctrine of res ipsa loquitur. In the case of Ybarra v. Spangard, 25 Cal.2d 486, at page 489, 154 P.2d 687, 689, 162 A.L.R. 1258, the court stated: "The doctrine of res ipsa loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295." It appears, and it is conceded apparently by the parties, that the evidence is sufficient to meet the requirements of conditions (1) and (3). The substance of defendants' argument is that the evidence is insufficient to meet the requirements of condition (2) in that exclusive control by defendants over the instrumentality causing the accident was not shown.

[2, 3] "Where a judgment is rendered upon a motion for nonsuit, the court must assume that all evidence received in favor of the plaintiff relevant to the issues is true. All presumptions, inferences and doubtful questions must be construed most favorably to the plaintiff." Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724, 725. As stated above, defendant Phillips testified that the crane, which included its equipment, was at all times under his exclusive control, and that he operated it with no supervision as to its operation from anyone. It was stated in the case of Alexander v. Wong Yick, 25 Cal.App. 2d 265, at page 269, 77 P.2d 476, at page 478: "The reason for the application of the doctrine of res ipsa loquitur, and the very hypothesis of the doctrine, it that 'ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident.' 19 Cal.Jur. pp. 706, 707." Defendants assert that control was divided since employees of Acme made and attached the sling to the arrester, and then hooked the arrester to the "U" shaped hook hanging from the boom of the crane. The record discloses that Phillips not only had exclusive control of the crane and its hoisting equipment, but that he also had exclusive control of the arrester prior to and at the time of the accident. He alone, by means of clutches, levers and a brake, put the boom into motion, released the cable, lifted, lowered and swung the arrester to different positions. He was in exclusive control of the mechanical power used in

moving the arrester. He was in complete control of the mechanism which regulated movements of the arrester—whether fast or slow, smooth or jerky. He was sitting on a seat facing the arrester and the boom, and he testified that there was no time he did not see what happened. He was in a better position than anyone else to ascertain and explain the cause of the accident. Furthermore, he operated the same crane "all the time," was the only one who inspected it, and, it appears, he made no inspections of it except at such times as he was engaged in operating the same. There was no safety or secondary cable on the hook. There was further evidence that the sling was still attached to the hook after the arrester had fallen, and that when the arrester fell it did not tilt, but was level and fell into position.

[4] The evidence is sufficient to create an inference of negligence on the part of defendants, and plaintiffs should not be deprived of the benefit of the doctrine merely because some agency over which defendants had no control could have caused the accident. In the case of Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 18 P.2d 429, an action brought under the Jones Act, 46 U.S.C.A. § 688, plaintiff was a seaman who was injured when an anchor chain which he was stowing in a locker room of the ship suddenly ceased coming in, reversed its course, and threw him from the chain pile. The chain was being hoisted by means of a steam driven winch, and lowered into the locker room through a pipe. When the chain ceased coming in, certain safety devices, one of which was on the winch, failed to stop its reverse course. Defendant therein contended that the doctrine of res ipsa loquitur did not apply as the accident was due to the intervention of agencies over which it had no control, and that the direct cause of the reversal of the anchor chain was the fouling of the anchor in a rocky reef, coupled with the heavy swell of the sea. It was held in that case that the doctrine is not limited to cases where the nature of the accident not only supports the inference of defendant's negligence but also excludes all others; and that where either of two inferences may be reasonably drawn from the facts it still remains a question of fact for the jury. The court stated, at page 416 of 128 Cal.App., at page 434 of 18 P.2d: "It has been held in several cases involving the doctrine in question that the inference of negligence may arise regardless of the fact that the injury might have been caused by some other agency; and that, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury was the negligence of the defendant, the question is one to be determined by the jury from all the evidence in the case. * * * While the doctrine does not shift the burden of proof, it still being incumbent upon the plaintiff to prove defendant's negligence by a preponderance of evidence [citing authority], the inference arising from the accident cannot be disregarded [citing authority] * * *."

[5] The application of the doctrine depends upon the circumstances of the individual case. In the case of Ybarra v. Spangard, supra, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, which was a malpractice case where an unconscious patient, while on the operating table for an appendectomy, sustained injuries to his shoulder, defendants contended that the doctrine of res ipsa loquitur could not apply because there were several defendants and several instrumentalities, and there was no showing as to what instrumentality caused the injury or as to the particular defendant in control of it at the time of the injury. The court held that each of the defendants who had any control over the plaintiff's body, or over the instrumentalities which might have caused the injury, may properly be called upon to meet the inference of negligence by giving an explanation of his conduct. As to the condition of exclusive control, the court stated, at page 493 of 25 Cal.2d., at page 691 of 154 P.2d, 162 A.L.R. 1258: "An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of res ipsa loquitur would otherwise be defeated. Thus, the test has become one of right of control rather than actual

control. * * * Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle."

[6, 7] Defendants further assert that the doctrine of res ipsa loquitur does not apply "since every act of the parties was testified to." The complaint contained only general allegations of negligence, and there was no attempt to prove the cause of the accident. Furthermore, it has been held that the introduction of evidence as to how the accident happened, and the cause thereof, does not necessarily prevent the application of the doctrine. Aleet v. Union Pac. R. R. Co., 25 Cal.2d 605, 620, 155 P. 2d 42, 158 A.L.R. 1008. However, in the instant case no evidence was introduced by plaintiffs tending to show or explain why the arrester fell, and the inference of negligence on the part of defendants was not dispelled by testimony concerning the events preceding and following the accident.

[8] Although plaintiffs contended that the doctrine of res ipsa loquitur was applicable under the evidence then before the court, they offered certain expert testimony in addition thereto. As stated above, after 8 witnesses had testified on behalf of plaintiffs, counsel for plaintiffs stated to the court that he had finished plaintiffs' case except for one expert witness who was unable to be present until the next day. That witness had 21 years' experience in operating cranes, and was then operating the same type of crane as that involved here. Plaintiffs offered to prove that the witness would testify, in answer to a hypothetical question based upon assumed facts within the limits of the evidence, that if the weight which was being lifted had slipped off the hook, the crane and crane cable would have swung back violently and would have shaken the entire frame and equipment, including the cab; and that the jerky motions indicated that the brake was defective, glazed or greasy, or that the operator was negligent in the application and release of foot pressure upon the brake. Defendants' objection to that offer, which was sustained by the court, was made upon the ground that it was incompetent, irrelevant, immaterial, speculative and conjectural, and that the offer concerning the proposed testimony of negligent foot pressure was assuming facts not in evidence. Even though the evidence that had been received warranted the application of the doctrine of res ipsa loquitur, the objection to the offered testimony should not have been sustained. An opinion of the witness that the operator was negligent would not have been admissible but expert testimony as to how the crane would have reacted if the weight had become detached from the hook would have been most material. As shown above, there was evidence, including testimony by defendant Phillips, that there was no rebound of the crane, cable or loading block after the arrester fell. Furthermore, there was testimony by Phillips (who, as above stated, testified he did not see what happened), that the "chain had slipped right through the hook," and one end of the sling "had to" come loose to cause the arrester to fall. Such expert testimony was material evidence to be considered by the jury in determining whether the fault was in the brake or the operation of it.

The judgment of nonsuit is reversed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.



80 Cal.App.2d 592

JONES v. REAL ESTATE COMMISSIONER.

Civ. 3639.

District Court of Appeal, Fourth District, California.

June 27, 1947.

Rehearing Denied July 17, 1947.

Brokers ⇐3

Evidence was insufficient to support real estate commissioner's finding that broker violated statute by knowingly making false representations in sale of property which were relied upon by purchasers, so

as to justify revocation of broker's license. Business and Professions Code, § 10177(f).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Petition by Siegel Daniel Jones against the Real Estate Commissioner of the State of California for a writ of mandate to compel respondent to reinstate broker's license of petitioner for the year 1944–45 and to renew it for the year 1945–46, and for declaratory relief by way of interpretation of the ambiguities in respondent's order of revocation. From a judgment denying the petition, the petitioner appeals.

Reversed with directions.

O. E. Mark, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone and Ruth Bernfeld, Deputy Attys. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying a petition for a writ of mandate.

The appellant was, and for many years had been, a licensed real estate broker. He was the equitable owner of three lots in San Diego, on which were several small houses. He agreed to sell a part of one lot, with a house thereon, to two purchasers through an escrow agreement made with a title company on May 4, 1944.

There was a delay in closing the escrow and transferring title to the purchasers and on February 9, 1945, the respondent notified the appellant to appear and show cause why his broker's license should not be suspended or revoked. The charges specified were that the appellant had represented to these purchasers that he was the owner of the property, that the property was free of incumbrance except for a loan which could be paid off at any time, and that he could and would pay off this loan within a few days and could and would transfer title to these purchasers upon payment by them of $1425; that these representations and promises were false and known by him to be false; and that although the purchasers had paid the $1425 in reliance upon these representations and promises the appellant had failed and refused to furnish a grant deed. It was charged that these misrepresentations constituted a violation of section 10177 (f) of the "Real Estate Law," and further charged that by offering to sell or lease portions of these three lots without notifying the commissioner the appellant had also violated section 11010.

The hearing on these charges was begun on February 28, 1945, and was continued to April 10, 1945. In the meantime, and on March 17, 1945, the escrow was closed and the property here in question was conveyed by grant deed to the purchasers. On May 31, 1945, the respondent made his findings and order. It was found that the facts as set forth in the charges were true, and that by reason thereof the appellant had violated sections 10177 (f) and 11010 of Division 4 of the Business and Professions Code. The order was that the appellant's license "for the year 1944–45 be and the same is hereby revoked; that said Order is made without prejudice to the filing of an application by respondent for a real estate broker license for the year 1945–46."

On June 13, 1945, relying upon the "without prejudice" clause of this order, the appellant applied for the regular annual renewal of his license and paid the renewal fee. On August 3, 1945, he was notified by the commissioner that he would be considered as an original applicant, and that it would be necessary for him to file such an application and to pay an additional $15 as an examination fee.

On August 20, 1945, he filed in the superior court a petition for a writ of mandate seeking to compel the respondent to reinstate his broker's license for the year 1944–45 and to renew the same for the year 1945–46, with a further prayer for declaratory relief by way of an interpretation of the ambiguities in the respondent's order of revocation. After a trial, the court found that there was evidence which was sufficient to support the findings, conclusions and order of the respondent in revoking the appellant's license, that the appellant was guilty of violating section 10177 (f) of the Business and Professions Code, that he was not guilty of violating section 11010 of that code, and that the charge of violation of the latter section had been abandoned by the respondent. (The aban-

donment of the charge of violating section 11010, and the court's finding with respect to that charge, were caused by the ruling in People v. Embassy Realty Associates, 73 Cal.App.2d 901, 167 P.2d 797, which was decided while the proceeding before the Superior Court was pending.) A judgment was entered accordingly and this appeal followed.

Appellant's main contention is that there is no evidence which may be regarded as sufficiently substantial to support the commissioner's findings and conclusions, upon which the order solely rests, to the effect that he violated section 10177 (f) by knowingly making false representations, in the sale of this property, which were relied upon by these two purchasers. We think this contention must be sustained. In fairness to the respondent, it should be said that it seems probable from the record that the order in question would not have been made except for the fact that the commissioner then thought that the subdivision provisions of section 11010 had also been violated, which later turned out to be an erroneous conclusion.

A brief statement as to how this appellant acquired an interest in the three lots, a part of which was sold to these purchasers, is necessary for an understanding of the problem here presented. In 1938, Western Loan and Building Company entered into a contract with a Mr. and Mrs. Nelson for the sale of these three lots upon monthly payments covering the balance due. In 1940, the Nelsons put a grant deed of this property to one Bonham in escrow with a title company in San Diego, with instructions that on payment to them of $1100 the deed was to be delivered to "S. D. Jones or order," but not until a deed could be procured from Western Loan and Building Company and their demand satisfied. The appellant placed $1100 in this escrow on November 15, 1940, and the Nelsons were paid in full for their interest in the property. The Nelsons had also given an assignment of their contract to the appellant, although it later turned out that it was not in proper form to satisfy the Western Loan and Building Company. In the spring of 1941, Bonham, for some reason, refused to go on with the purchase of the property and dropped out, leaving the appellant, who had paid the Nelsons in full, obliged to continue as vendee under the contract. This he did, making the payments regularly. In 1942, the appellant contacted Western Loan and Building Company with reference to paying off "the loan" and the loan company agreed that it would accept the balance due.

In 1944, the appellant agreed to sell a part of the property, with one house, to the two purchasers above referred to. These purchasers agreed to pay $2850 for the property, paying $1425 cash and giving a trust deed for the balance to the appellant. This involved paying off the Western Loan and Building Company and getting a deed from it. The purchasers wanted the deal put through an escrow with the title company and this was done, the escrow agreements being dated May 4, 1944. The escrow agreement signed by the two purchasers provided that the $1425 paid by them into escrow could be used when title to the property they were buying could be shown to be vested in them, subject to the trust deed they were giving. The date on which the escrow should be completed was left blank, and the escrow agreement contained a further provision requiring the escrow agent to complete the escrow "at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of all instruments deposited by me."

A delay of some months occurred in closing the escrow. There was no difficulty with Western Loan and Building Company. It wanted its money, which it had agreed to accept, and it accepted it and furnished a deed which enabled title to be vested in the two purchasers. Some delay was caused by the refusal of the Nelsons to correct their signatures and something in the form of the assignment they had previously given to the appellant. In order to correct this the appellant filed suit against the Nelsons in November, 1944, which was promptly settled and a proper conveyance was given by the Nelsons. It appears that most of the delay was caused by an employee of the title company handling the escrow, who allowed weeks to go by without sending for required papers, who assertedly waited for information when the information had

already been furnished, and who was also hampered by illness. It clearly appears that if the escrow agent had acted with any degree of promptness after the matter with the Nelsons was straightened out, the deed from Western Loan and Building Company would have been secured long before these charges were brought against the appellant by the respondent. Finally, on March 3, 1945, the appellant secured a change of the escrow to another title company, whereupon a deed was secured from Western Loan and Building Company and a clear title given to the purchasers within two weeks.

It is in the light of this general situation that the specific charges, upon which the revocation of this license is based, must be considered. It was charged and found by the respondent that in selling this property to these two purchasers the appellant knowingly and falsely represented to them (1) that he was then the owner of the property; (2) that the property was free from incumbrance except for a loan which could be paid off at any time; (3) and that he could and would pay off this loan within a few days, and could and would transfer title to these purchasers on payment by them of the sum of $1425. It was further found that the purchasers paid this amount in reliance upon these representations and promises, which were false and known by the appellant to be false. In support of the findings, on the original hearing and by the court, the respondent contends that it appears from the facts above stated that the appellant was not the legal owner of the property, and that the incumbrance thereon was not a "loan" but was in the form of a contract of purchase and sale; that the appellant could not have legally compelled the Western Loan and Building Company to accept the full amount of the unpaid purchase price; that on May 4, 1944, the Western Loan and Building Company had not yet approved the assignment from the Nelsons to the appellant; and that the two purchasers testified that the appellant told them that he was the owner of the property, that there was a loan on the property which he could pay off right away, and that it would take thirty to sixty days and not over sixty days to bring the title down. And further, that he told them "If we wanted to pay this half he would go ahead and clear up the loan on it and give us our deed", and that they went into the escrow in reliance on these representations and promises.

The evidence is clearly insufficient to sustain the first charge that the appellant knowingly and falsely claimed to be the owner of this property. He had bought the interest of the Nelsons as vendees in the contract of sale and had paid the Nelsons in full. He had an assignment of their interest, and had assumed the burden of the contract and kept up the payments for several years. The fact that he later discovered that there was a slight flaw in the form of his assignment, and had to secure a corrected assignment, is not material. The Western Loan and Building Company had accepted payments from the appellant for years, and it never objected to the fact of an assignment to him of the Nelsons' interest, but merely wanted to be sure the form was sufficient to protect it in giving a deed to the appellant. Not only was he the equitable owner, and what is ordinarily considered the actual owner, during all of the time here in question, but there is nothing in the evidence which even tends to support the charge that he knew at the time that he was not such an owner, or that he knowingly made a false claim to ownership.

The charge that the appellant, in talking to the two purchasers, wrongfully and unfairly spoke of the incumbrance as a loan when in fact it was a contract of purchase and sale is technical in the extreme. The contract of purchase, in which the appellant succeeded to the rights of the vendees, came from a loan company and it is more than probable that the loan company's title was originally derived through a loan. In any event, the officers of that company spoke of it as a loan and expressed a desire to have it liquidated. The loan company had previously told the appellant that they would accept the full amount due, and had intimated that they would be glad to have it at any time. There is not sufficient evidence of known falsity or unfair dealing in that representation, if made, to justify a revocation of this license.

With respect to the claimed representations that the appellant could and would pay this loan within a few days, that he could and would transfer title upon payment of the $1425, and that it would take from thirty to sixty days to bring down the title and complete the transaction, a number of things should be said. There is not a particle of evidence to indicate that he did not fully believe that he could pay off this incumbrance within a few days, and none to indicate that he did not intend to do so. He had been told by the loan company that it was willing to take the balance due, the loan company did take it as soon as the papers were prepared, and he was at all times trying to get the deal closed and the loan paid. It conclusively appears that the purchasers agreed to pay $1425 down in order to enable the appellant to pay the entire balance to Western Loan, since this was necessary in order to secure a deed to the part they were buying. The charge that he represented that he would transfer title to these purchasers upon payment of $1425 is not intended strictly in that form, as it clearly appears that it was agreed that the deal should go through escrow, and then upon the giving of a trust deed securing the balance. The charge that the appellant represented that title could be brought down and the escrow completed in from thirty to sixty days is an expression of opinion rather than a representation as to a fact. There is no evidence to indicate that the appellant knew in advance that this could not be done or that he even falsely expressed such an opinion. It clearly appears that he thought this could be done, that the delay was caused by matters which the appellant could not well have anticipated, that most of it was not his fault, and that at all times he desired to get this deal closed and was trying to do so. He certainly cannot be charged with advance knowledge that it would be necessary to change title companies, in order to get a simple thing done. Moreover, the purchasers' testimony that they implicitly relied on his representation that the deal could be closed within thirty to sixty days is not to be taken seriously in view of their own signed contract. The escrow agreement which they signed on May 4, 1944, not only left blank the date when the escrow was to be completed but instructed the escrow agent that in the event "the conditions of this escrow have not been complied with at the expiration of the time provided for herein" the escrow agent was instructed to complete the same "at the earliest possible date thereafter," unless written demand to the contrary was made. Not only had these purchasers agreed in writing to such an extension as was here required to complete this transfer but when the purchasers, who had taken possession of the house and who were refusing to pay their share of the taxes and of the water, complained to the appellant that the transfer of title was taking too long he offered to return their money and abandon the deal, which offer they refused.

Not only is the evidence here insufficient to show such dishonesty or unfair dealing as is contemplated by section 10177 (f) of this code, but it clearly appears that the real complaint which gave rise to these charges was the delay of several months in completing this escrow. Not only does it appear that there was no intent on the part of the appellant to cause this delay and that its happening or probability was not known to him in advance but the two purchasers had, in the written escrow agreement, agreed in effect that the time for closing the escrow could be extended beyond the thirty or sixty days it is claimed the appellant represented as sufficient, and this extension was actually in force until after these charges were filed and until the escrow was actually completed and title passed, which was some six weeks before the order of revocation was made.

It further appears that even on the original theory, when the matter of the subdivision of these three lots was still in the case and was regarded as a violation of section 11010, the respondent regarded the supposed dereliction of the appellant as being slight, as shown by the order made. With the matter of the subdivision section out of the case a further deficiency appears. Not only is the order, as made, rather ambiguous as shown by the fact that it took the respondent's office some seven weeks to determine what kind of an application for license the appellant was entitled to

make, but that order is to a considerable extent inconsistent in itself in that it seems to find that the same facts were sufficient to show the dishonesty or unfair dealing which would warrant the denial of an application, under section 10177 (f), while at the same time finding and ordering that these facts were not sufficient to warrant the denial of such an application which the appellant was invited to make within a few days.

The work of respondent's office is too important and its results too valuable to allow that work to be discredited and perhaps permanently injured by permitting such an order, on such evidence, to stand as representing the real intentions or policy of that department in the conduct of the important duty with which it is charged. The beneficial effects of this legislation will best be preserved if the needed power of revocation is used only in reasonably justifiable cases and if occasional errors, whether arising from inadvertence or from excessive zeal, are corrected before it is too late.

The judgment is reversed with directions to issue the writ as prayed for.

MARKS and GRIFFIN, JJ., concur.



80 Cal.App.2d 610

MEARS et al. v. JEFFRY et al.

KELLIHER v. MEARS et al.

Civ. 7321 (San Joaquin); Civ. 7353 (Stanislaus).

District Court of Appeal, Third District, California.
June 30, 1947.

1. Abatement and revival ⇐40

A plea that action is premature is dilatory in nature and must be pleaded specially in order to be available as a defense.

2. Partition ⇐38

Superior courts have general jurisdiction to try partition cases.

3. Appeal and error ⇐193(9)

A defect in complaint which is of such a serious character as to show that plaintiff could never at any time obtain any judgment upon the cause of action alleged may be taken advantage of for the first time in appellate court, but objection which would only defeat the present right to recover must be made by motion or otherwise before the court of original jurisdiction during term at which the judgment was obtained.

4. Appeal and error ⇐173(10)

Objection that partition action was prematurely filed because decree of partial distribution in estate of a decedent through which all of the parties to action derived their title to the realty had not yet been entered did not affect court's jurisdiction of action and was waived by failure to raise the question in lower court.

5. Appeal and error ⇐171(1)

The theory upon which a case is tried must be adhered to on appeal, and an issue not presented by the pleadings cannot be considered upon appeal.

6. Appeal and error ⇐882(3)

Where partition actions in different counties involving the same realty and motions to abate them were tried on the theory that the only question was which action was filed first, defendant in one action who was plaintiff in the other could not contend for the first time on appeal that action in which he was made a party defendant should have been abated because it was prematurely filed.

7. Executors and administrators ⇐315(5) Wills ⇐721

Title to assets of estate of a deceased is not conveyed by a decree of distribution but vests in the parties entitled thereto under the will upon death of testator, subject to the possession of personal representative of deceased during administration and control of probate court for purposes of administration, sale, or other disposition under Probate Code in order to pay debts,

expenses of administration, etc. Probate Code, §§ 28, 29, 300.

8 Courts ⇐475(2)

The control of probate court over assets of estate of a decedent for purposes of administration is not exclusive so as to preclude acquisition of jurisdiction by another court in proper action. Probate Code, §§ 28, 29, 300.

9. Descent and distribution ⇐90(1)
Wills ⇐747

An heir or devisee may before distribution to him of real property of a decedent maintain an action to quiet his title thereto against anyone except administrator or executor and may convey or encumber his interest, and the interest of such heir or devisee may be impressed with a lien to secure obligation for support, and is subject to attachment and to execution and judgment liens, though estate is still in process of administration. Probate Code, §§ 28, 29, 300.

10. Executors and administrators ⇐315(2)

Failure to enter a decree of distribution in the estate of a decedent, even if such a decree is ineffective until entered, will not affect rights not dependent thereon. Probate Code, § 1221; Code Civ.Proc. § 664.

11. Appeal and error ⇐909(4)

Entry of decree of distribution in estate of decedent through which parties to partition actions derived their title to the realty before such partition actions were filed may be assumed in support of judgment of partition, if necessary.

12. Appeal and error ⇐909(4)

Entry of a decree of partial distribution in the estate of a decedent made and filed by superior court may be presumed, since under statute official duty is presumed to have been performed. Code Civ.Proc. § 1963, subd. 15; Probate Code, § 1221.

13. Appeal and error ⇐882(18), 1032(1)

Judgments ordering partition of realty according to interests of the parties and abating a later action for the same relief commenced by appellant in another county should not be reversed on ground that actions were prematurely commenced before entry of decree of partial distribution in estate of decedent through which parties derived their title to the realty, where appellant stipulated that such partition might be ordered, sought the same relief by his own action, and failed to show that he was injured by the judgments.

14. Appeal and error ⇐1032(1)

An appeal must show injury as well as error in order to justify a reversal.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Actions for partition of realty commenced in the superior courts for San Joaquin and Stanislaus counties, respectively, by Cecelia K. Mears and another against Renaldo J. Jeffry and others, and by Alban E. Kelliher, as trustee for Eugene Alexander Kelliher, against Cecelia K. Mears and others. From an interlocutory decree in the San Joaquin county case denying abatement and ordering partition, and from an interlocutory decree abating the Stanislaus county action until final determination of San Joaquin county case, Alban Kelliher, as trustee for Eugene Kelliher, appeals.

Both decrees affirmed.

T. B. Scott, of Modesto, and Forrest E. Macomber, of Stockton, for appellant.

Stephen M. Dietrich, of Rutherford, Jacobs, Cavalero & Dietrich, and Renaldo J. Jeffry, all of Stockton, for respondents.

ADAMS, Presiding Justice.

On October 22, 1945, the Superior Court of Stanislaus County made and filed a decree of partial distribution in the Estate of Catherine F. Kelliher, deceased, in which decree there was distributed to Cecelia K. Mears, Mae K. Van Etten, Alban E. Kelliher, and Bank of America National Trust and Savings Association as trustee for Raymond B. Kelliher, an undivided one-sixth interest each, and to Renaldo Jeffry an undivided two-sixths interest in certain real estate located in Stanislaus and San Joaquin counties, devised to them by decedent. On the same day Cecelia K. Mears and Mae K. Van Etten filed in the Superior Court of San Joaquin County a complaint in partition, naming as defendants

therein Renaldo J. Jeffry, Bank of America National Trust and Savings Association as trustee for Raymond B. Kelliher, and Alban E. Kelliher, as trustee for Eugene Kelliher, and praying for the partition of certain of the properties which had been distributed under the decree of partial distribution aforesaid, some of said lands being in San Joaquin County, and some in Stanislaus County. On the same day Alban Kelliher, as trustee for Eugene Kelliher, filed a similar action for partition in Stanislaus County, naming as defendants therein Cecelia Mears, Mae Van Etten, Renaldo Jeffry, and Bank of America National Trust and Savings Association as trustee for Raymond B. Kelliher, the two actions being substantially the same and seeking the same end.

All of the defendants in the San Joaquin County action, except Alban E. Kelliher, as trustee for Eugene Kelliher, answered. The latter, on November 2, 1945, filed a special appearance, "for the purpose of objecting to the jurisdiction of the court over the subject matter of the action and for no other purpose." On the same date he filed a notice of motion to abate or dismiss said action on the ground of the pendency of the action in Stanislaus County, alleging in his notice of motion that that action involved the same parties and the same cause of action, but that the Stanislaus County court had first acquired jurisdiction over the subject matter of said action and the parties thereto. This motion was denied without prejudice on November 10, 1945. Thereafter, on January 4, 1946, Alban E. Kelliher, as trustee, answered the complaint, alleging, among other things, that each of the plaintiffs and defendants named "derived their title to the real property constituting the basis of this action solely through the Estate of Catherine F. Kelliher, which Estate is pending in the Superior Court of the State of California, in and for the County of Stanislaus, * * * and in particular through a Decree of Partial Distribution made and entered in said action on October 22, 1945." He alleged the filing of his action in Stanislaus County, and further stated that the parties to and the subject matters of said actions were identical, with the exception of one parcel excluded from plaintiffs' complaint, and that said actions prayed for identical relief, to wit: partition; but that the superior court of the County of Stanislaus "has had jurisdiction of the subject matter of said actions ever since the 11th day of January, 1944." His plea was for an abatement of the San Joaquin County action until the Stanislaus County action could be heard and determined.

On the day set for trial this appellant renewed his motion for abatement of the action. Testimony was taken in relation to this motion and plea, which showed that appellant's complaint in Stanislaus County was filed at 10:41 a. m. of October 22, 1945. It was stipulated that the San Joaquin County action was filed on the same day at 10:39 a. m. It was also stipulated that the rule is that where two courts are equally entitled to jurisdiction over the subject matter the court first acquiring jurisdiction has the right to proceed. Appellant's motion was again denied, and the cause was thereafter tried by the court. At its conclusion findings were filed in which the court found that the property involved could be partitioned without prejudice to the owners, and that the San Joaquin County action ws filed prior to the filing of the Stanislaus County action. An interlocutory decree was thereupon entered denying abatement, ordering partition, and appointing referees to effect such partition. From that decree Alban E. Kelliher, as trustee for Eugene Kelliher, alone has appealed, urging as grounds for reversal that the action for partition was filed prematurely because, at the time same was filed, the decree of partial distribution had not been *entered,* and that the Probate Court of Stanislaus County had exclusive jurisdiction of the property order partitioned.

In the meantime, in the Stanislaus County action, all of the defendants had filed answers to plaintiff's complaint and had set up therein a plea to abate same by reason of the pendency of the San Joaquin County action. A trial of the special issue of another action pending was had in the Stanislaus County court in May, 1946, and resulted in findings by that court that the San Joaquin County action had been first filed, that all of the defendants therein had

answered, that said action had been partially tried and the issue raised by plaintiff Alban Kelliher as trustee for Eugene Kelliher there decided against him; that prior to the filing of said action the court in the probate proceeding had made and filed with the clerk of Stanislaus County its decree of partial distribution distributing to the parties in said action the real property involved; and that prior to the filing of this action the San Joaquin County court had acquired exclusive jurisdiction of the subject matter and exclusive jurisdiction to partition the property involved, except parcel No. 4(g). An interlocutory decree was thereupon made and entered abating the Stanislaus County action, except as to parcel No. 4(g), until the final determination of the San Joaquin County action. In that proceeding no contention was made that either action was filed prematurely or that either court lacked jurisdiction for that reason. The only point raised was which action had been filed first, counsel for appellant stating that the question of time of filing "is all there is to it." And the hearing in the Stanislaus County court on the issue of abatement was had after the trial in the San Joaquin County action and the filing of the appeal from its interlocutory decree.

From that judgment appeal has also been taken by Alban Kelliher as trustee for Eugene Kelliher, the grounds for reversal urged being the same as those urged on the appeal from the interlocutory decree in the San Joaquin County action.

Appellant has not filed separate briefs in the two actions, and they were argued as one case, it being conceded by all parties that a decision in the one will be conclusive as to the other.

As hereinbefore stated, appellant's first contention here is that the action in San Joaquin County was filed prior to *entry* by the clerk of the probate court of the order and decree of partial distribution in the estate of Kelliher, and was therefore premature. In this contention appellant takes an anomalous position, for the record shows that his action in Stanislaus County was filed only two minutes after the filing of the San Joaquin County action. There is no evidence in the record before us as to when the decree of partial distribution was in fact entered by the clerk of the court in the minute-book. Therefore, if the San Joaquin County action was premature, the action in Stanislaus County was premature. And presumptions as to regularity are equally applicable to the two actions.

Furthermore, appellant did not plead in his answer in the San Joaquin County action, or raise by motion his present contention that such action was prematurely filed. His contention below was that the San Joaquin County court was without jurisdiction because the Stanislaus County court had first acquired jurisdiction. And in said answer he also alleged, as hereinbefore set forth, that all of the parties, both plaintiffs and defendants, derived their title to the real property through the estate of Catherine F. Kelliher, and in particular "through a Decree of Partial Distribution made and *entered* in said action" on October 22, 1945. (Italics added.) And in his own original complaint in the Stanislaus County action, and his amended complaint filed February 5, 1946, just before trial of the San Joaquin County action, he alleged that the respective parties were owners in fee simple of their undivided interests in the various parcels of real property described; and he made no mention whatever of the decree of partial distribution which he now contends must have been signed, filed and *entered* before the courts in which said actions were filed could acquire jurisdiction.

[1-3] The rule is well established that a plea that an action is premature is dilatory in its nature and must be pleaded specially in order to be available as a defense. Verbeck v. Clymer, 202 Cal. 557, 562, 261 P. 1017; Realty Rebuilding Co. v. Rea, 184 Cal. 565, 573, 194 P. 1024; Lagorio v. Yerxa, 96 Cal.App. 111, 114, 273 P. 856. Nor can appellant avoid the application of the foregoing rule by urging that a lack of jurisdiction cannot be waived by failure to raise the question in the lower court by plea in abatement or similar procedure. It is elementary that superior courts have general jurisdiction to try partition cases; and here both courts acquired jurisdiction of the parties. In Seches v. Bard, 215 Cal. 79, at pages 81, 82, 8 P.2d 835, at page 836, where it was contended on appeal that an

action was premature as to certain notes sued upon, the court said:

"The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived. In the early case of Hentsch v. Porter, 10 Cal. 555, at page 561, the rule is stated as follows:

" 'Where the objection, if true, would only defeat the *present right to recover,* the defendant, though not compelled to demur or answer, *should be obliged to make the objection, by motion or otherwise, before the Court of original jurisdiction,* during the term at which the judgment was obtained. But where the defect in the complaint is of such a serious character as to show that the plaintiff could never, at *any* time, obtain *any* judgment upon the cause of action alleged, then the defendant should be allowed to make the objection for the first time in the Appellate Court.' " (Italics by the Supreme Court.)

[4] It is not and could not be contended by appellant that plaintiffs in these actions could never at any time obtain any judgment upon the causes of action pleaded. The courts in which they were filed have general jurisdiction to try actions in partition. If, in fact, they were filed prior to the entry of the decree of partial distribution, they were, at most, merely filed prematurely, and such fact would merely have defeated the *present* right to recover, and was not of such a character as to show that plaintiffs could never, at any time, obtain a judgment upon the causes of action alleged. It must therefore be held that any objection that the actions were prematurely filed was waived by appellant's failure to raise the question in the lower court. Also see Green v. Sherritt, 17 Cal.App.2d 732, 737, 738, 62 P.2d 769; Williams v. Schalk Chemical Co., 11 Cal.App.2d 396, 399, 53 P.2d 1015; Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 128 Cal.App. 265, 282, 16 P.2d 1040.

[5] Not only did appellant fail to plead that the actions were prematurely filed, but the cases were heard in the lower courts upon a different theory specifically expressed by appellant. In Munfrey v. Cleary, 75 Cal.App.2d 779, 171 P.2d 750, we held, on the authority of numerous cited cases, that as a general rule an issue not presented by the pleadings cannot be considered upon appeal; and in Ernst v. Searle, 218 Cal. 233, 240, 241, 22 P.2d 715, 718, the Supreme Court said: "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. 2 Cal.Jur., § 68, p. 237." Also see Hayward Lumber & Investment Co. v. Ford, 64 Cal.App.2d 346, 354, 148 P.2d 689.

[6] The San Joaquin County action was tried, and the motion to abate in the Stanislaus County action was decided, on the theory that the only question was which action was filed first. Appellant must adhere to that theory before this court.

[7] Appellant argues that it was not incumbent upon him to plead that the actions were premature because, until the decree of distribution had been entered the probate court had exclusive jurisdiction over the property; that this follows from section 1221 of the Probate Code, and the provision of section 664 of the Code of Civil Procedure that in no case is a judgment effectual for any purpose until entered. In this appellant uses the word jurisdiction loosely. It may be stated first that it has been held in numerous cases that section 664, supra, does not apply to orders and decrees in probate proceedings. See Carroll v. Carroll, 16 Cal.2d 761, 768, 769, 108 P.2d 420. And while section 1221, supra, does require decrees of distribution to be entered at length in the minute-book of the court, it does not provide that such decrees are ineffectual for any purpose until entered. And even if it did, that would not preclude the acquisition of *jurisdiction* by the courts in the partition actions unless it could be said that such jurisdiction was wholly dependent upon the decree. It is elementary that a decree of distribution does not convey title to the assets of an estate. Title to such property vests in the parties entitled thereto under a will, upon

the death of the testator, subject, of course, to the *possession* of the personal representative of decedent during administration, and the *control* of the probate court for the purposes of administration, sale or other disposition under the specified provisions of the code, in order to pay debts, expenses of administration, etc. See Prob.Code, sections 28, 29, 300; Estate of Kalt, 16 Cal.2d 807, 811, 108 P.2d 401, 133 A.L.R. 1424; Reed v. Hayward, 23 Cal.2d 336, 340, 342, 144 P.2d 561; Estate of Platt, 21 Cal.2d 343, 347, 131 P.2d 825; Lichtenberg v. Burdell, 101 Cal.App. 20, 36, 281 P. 518; 26 Cal.Jur. 1020, sec. 303.

[8, 9] But such *control* by the probate court is not the equivalent of *exclusive jurisdiction* over the property to the exclusion of other courts in proper actions. For instance, an heir or devisee may, prior to distribution to him of real property of a decedent, maintain an action to quiet his title thereto against anyone except the administrator or executor, and the interest of such heir or devisee may be impressed with a lien to secure an obligation for support, even though the estate is still in process of administration; he may also convey or encumber his interest; and his interest in property is subject to attachment and to execution and judgment liens. See Reed v. Hayward, supra, and authorities there cited 23 Cal.2d at page 342, 144 P.2d 561.

It is therefore obvious that the control, or so-called jurisdiction, of the probate court over the assets of an estate, is not exclusive, nor does the decree of distribution do more than confirm in the devisees or legatees the title which has already vested under a will, and evidence the release of such property from the control of the probate court and the conditions to which it was subject as an asset of the estate. The allegations of the account and petition for distribution of the property in question show that the possession of the property by the executor of the will of Catherine F. Kelliher, and any further control of the property by the probate court for the statutory purposes aforesaid, were unnecessary. The signing and filing of the decree by the probate court evidenced its accord. The record shows that appellant was, in fact, that executor.

[10] Therefore, even if a decree of distribution were held to be "ineffective for any purpose" within the provision of section 664, supra, until entered, it would be equally true that failure to enter it would not affect rights not dependent upon such decree.

[11] While it is not necessary to determine in this case whether a decree of distribution is or is not effectual for any purpose until entered at length in the minute-book of the court, we note that the trial court in the San Joaquin County action found that the decree of partial distribution was signed by the probate judge, and filed on the 22nd day of October, 1945; and the evidence indicates that it was signed and filed before either of the actions was filed. Also it may be assumed in support of the judgment, if necessary, that it was entered prior to the filing of such actions.

In Andrews v. Metzner, 83 Cal.App. 764, 257 P. 203, a similar situation was presented. There two actions seeking partition of real property were filed within an hour, the parties and the property involved therein were the same, the parties to the action first filed sought and were granted an order abating the later one, and on appeal it was contended that the first action was premature because filed before the decree of distribution had been filed in the clerk's office. The evidence showed that the decree was signed by the judge in open court and handed to the courtroom clerk with the intention that it should become a part of the official record. This was held sufficient, it being presumed that the clerk and his deputy regularly performed their duty and filed same; and such filing was deemed sufficient, within the portion of Code of Civil Procedure, section 1704, which now constitutes section 1221 of the Probate Code. No question as to whether or not said decree had been entered in the minute-book before the filing of the partition suit was raised, it being assumed, apparently, as it was in the cases before us, either that the filing of the signed decree was sufficient to give it effect, or that it had been entered.

[12, 13] It is obvious that in the cases before us plaintiffs were engaged in a race to get their respective complaints filed.

Attorneys for all of them were present in court when the decree of partial distribution was signed, and all apparently assumed that the court's signing and filing of the decree were sufficient to justify the filing of their suits. However, even if the actions were filed before the entry of the decree in the minute-book, we fail to see that appellant has been injured by the judgments from which he appeals. He concedes that by his action in Stanislaus County he sought the same end that has been reached in the San Joaquin County action; he does not contend that the decree of distribution was never entered, or that the interlocutory judgment of partition from which he appeals has resulted in any injustice to him. There is no contention that the findings of the trial court are not sustained by the evidence, or that the judgment is not sustained by the findings; and the San Joaquin County court, in its findings, recited that the plaintiffs and defendants, in open court, consented and stipulated that partition might be made between the parties according to their respective interests—which is not denied by appellant. Presumptively, the decree, if not entered prior to the filing of these actions, has long since been entered, since official duty is presumed to have been performed (Code Civ.Proc., sec. 1963(15); and if either case were retried appellant would accomplish no more than that for which he prayed and to which he stipulated, to wit, that the property be partitioned in accordance with the respective interests of the parties. He does not contend that the partitioning of the property may not be done as fairly and efficiently in the one action as in the other; and, according to the record, his counsel participated in the selection of the commissioners to partition the land, and agreed to those appointed, two of whom were from Stanislaus County and were suggested by appellant's counsel. The San Joaquin County court has accomplished just what appellant wanted done, and, under such circumstances he is in no position to complain. See Owens v. Noble, 77 Cal.App.2d 209, 175 P.2d 241, and cases there cited.

Appellant in his brief prays that this court reverse the judgments in both actions and order that the San Joaquin County action be abated and the trial proceed in the Stanislaus County action, *or* that we hold that both actions were prematurely filed, reverse both judgments, and order that both actions be dismissed.

[14] It is well established that an appeal must show injury as well as error, in order to justify a reversal. Carroll v. Carroll, supra, 16 Cal.2d at page 771, 108 P.2d 420; Davies v. Ramsdell, 40 Cal.App. 432, 433, 183 P. 702. Appellant has shown neither.

Both judgments are affirmed.

PEEK and THOMPSON, JJ., concur.



80 Cal.App.2d 583

GOODMAN v. GLOBAL INDUSTRIES.

Civ. 13287.

District Court of Appeal, First District, Division 2, California.

June 27, 1947.

1. Corporations ⇐376

The statute prohibiting the purchase by corporation of "any" of its shares with enumerated exceptions was designed to prohibit any purchase by a corporation of its own shares whether by conditional sales contract or otherwise except under conditions prescribed within the statute's own four corners. Civ.Code, § 342.

2. Corporations ⇐82

An action by a subscriber to corporate stock to obtain a refund on return of the stock in pursuance to an alleged contract with the corporation could not be maintained without proof that an earned surplus existed out of which stockholders might be paid, and proof that there was no reasonable ground to believe that the corporation could not satisfy its debts and liabilities, and an allegation that corporation had cash assets of $40,000 and liabilities not ex-

ceeding $5,000 was not an allegation of earned surplus, where court found at time of trial, corporate liabilities were in excess of its assets. Civ.Code, §§ 341(5, 6), 342(8).

3. Corporations ⇐82

In action by stock subscriber to recover refund of amount paid for stock on tender of the stock to the corporation, in pursuance to a contract, where action could not be maintained unless corporation had an earned surplus, whether the corporation had required surplus was required to be determined at the time of trial, and not when the action was brought. Civ.Code, §§ 341(5, 6), 342(8).

Appeal from Superior Court, Alamdea County; Leon E. Gray, Judge.

Action by George Goodman against Global Industries for failure on part of defendant to return money paid for certificates of stock upon plaintiff's offer to return the issued certificates of stock. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

James H. Boyer, of Oakland, for appellant.

Walter E. Hettman and Simeon E. Sheffey, both of San Francisco, for respondent.

GOODELL, Justice.

The appellant sued in seven counts on behalf of himself and six of his assignors for $6,750 and interest.

On December 21, 1944, when appellant negotiated with respondent, he was given the following letter:

"Mr. George Goodman and
Bill Sousa and
Jack Mayfield

In re: Global Industries Stock subscriptions and payments thereon

Gentlemen:

This is to certify that I am the comptroller of Global Industries, a California corporation, and that the funds you are turning over to Global Industries * * * will be credited on the books of the corporation for stock subscriptions receivable and that any person you have given a receipt for money included in the above sum and request same returned to them will be refunded by Global Industries immediately.

Yours very truly,
Lester O. Wisler
Comptroller, Global Industries

Written with the advice and consent of the president of Global Industries."

The complaint alleges that the letter was given to induce appellant and his associates to subscribe for stock in the corporation and that they would not have paid in the money but for such promise. In each count it is alleged that in February, 1945, an offer was made to return the respective certificates of stock which had been issued, and a demand for the return of the money paid, which offers and demands were refused.

In each count it is alleged that respondent was incorporated on January 5, 1944 "and has not, at any time been, and is not now, engaged in the transaction of any lawful business" also, that it owns and controls cash assets in excess of $40,000 and that its total liabilities, exclusive of money unpaid by appellant and his associates, do not exceed $5,000.

The court made findings in favor of the defendant corporation and from a judgment entered thereon this appeal was taken on the judgment roll alone.

The only question presented for decision is whether the case falls within the provisions of section 342 of the Civil Code. That section was enacted in 1931 as part of the new general corporation law, and amended in 1933. This discussion will be simplified by a review of the law leading up to its enactment.

"It was formerly, that is prior to 1929, the rule in California that a corporation was not authorized to purchase its own shares, with some minor exceptions such as collecting a debt or saving itself from loss". "Drafting a Modern Corporation Law" by Henry Winthrop Ballantine, 19 Cal.Law. Rev. 465, 479.

The authorities held that contracts for the retaking by a corporation of its own shares were illegal and void as in violation of section 309 of the Civil Code which prohibited directors from dividing, withdrawing or paying to the stockholders any

part of the capital stock, or from reducing or increasing the capital stock except as provided in the section. Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 661, 34 P. 444; Vercoutere v. Golden State Land Co., 116 Cal. 410, 48 P. 375.

In 1913 the case of Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 P. 582, 583, 44 L.R.A.,N.S., 156, Ann.Cas.1914B, 1013, was decided, wherein the court pointed out that the plaintiff was "seeking to enforce a part of an entire contract under which the stock was originally issued to him" and held that "The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. * * * The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms". For these reasons, and because the contract "was of the well-recognized class, known as a contract of 'sale or return' * * *." The court held (in line with Dickinson v. Zubiate Mining Co., 11 Cal.App. 656, 106 P. 123) that the corporation was bound to take back its shares.

The Schulte case therefore reaffirmed this exception to the rule laid down by the earlier cases.

It is the appellant's position that the transaction now in litigation was a *conditional sale* only, and that this case, for the reasons given in the Schulte decision, is not subject to the provisions of section 342 of the Civil Code.

The rule based on section 309 (to which the Dickinson and Schulte cases were exceptions) was the result of case law and not of legislation. There was no statute on the subject which prescribed limitations or conditions (as does section 342) respecting the acquisition by a corporation of its own shares. The "minor exceptions" of which Professor Ballantine speaks in his article in 19 Cal.Law Rev. 465, 479, were not found in the code, but had been written into the law by judicial decision (he there cites Ralston v. Bank of California, 112 Cal. 208, 44 P. 476 and Mancini v. Patrizi, 87 Cal.App. 435, 262 P. 375).

In 1929, however, the legislature (Stats. 1929, P. 1270) wrote into the enumeration of corporate powers contained in section 354 of the Civil Code, subdivision 7: "To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments; *provided, that a corporation shall not, in issuing shares or taking subscriptions therefor, agree to repurchase such shares, or give to the subscriber a right to surrender or resell the same to the corporation;* * * *." (Emphasis added.)

This amendment remained on the statute books for two years only. In 1931 when the new general corporation law was enacted the "Powers of Corporations" were put into what has since been section 341 of the Civil Code. In 1933 subdivision 5 thereof was amended to read as follows: "(5) To purchase or otherwise acquire its own bonds, debentures or other evidences of its indebtedness or obligations, *and subject to the provisions of this title, to purchase or otherwise acquire its own shares*". (Emphasis added.)

Thus for the first time the power of a corporation to acquire its own shares was declared in positive terms. The lawmakers were careful, however, to surround it with limitations. This they did in section 342. That section opens with the declaration that "A corporation may not purchase directly or indirectly any shares issued by it or by any corporation by which it is controlled, except as follows". The first seven subdivisions enumerate recognized instances where purchase is permitted. Appellant's case falls within none of them. Subdivision 8 then provides for all other cases as follows:

"(8) Subject to any limitations contained in its articles, *out of earned surplus*.

"Shares may be acquired either out of stated capital or from any surplus under subdivisions (1) to (5) inclusive of this section. Purchases from *earned surplus* under subdivision (8) of this section are not limited to cases authorized under other subdivisions of this section. * * *

"A corporation shall not purchase * * * shares of any class under this section in any case when there is reasonable ground

for believing that the corporation is unable, or, by such purchase * * * will be rendered unable, to satisfy its debts and liabilities when they fall due, except such debts and liabilities as have been otherwise adequately provided for. * * *" (Emphasis added.)

[1] The contract sued on is essentially the same as that in the Schulte case. We are satisfied, nevertheless, that it falls squarely within the provisions of section 342. The words "directly or indirectly" indicate the intention to comprehend and include all types of repurchases however devised, and when the section is read in its entirety it is clear (see 6a Cal.Jur. p. 405, sec. 228), that it was designed to prohibit *any* purchase by a corporation of its own shares *except under conditions prescribed within the section's own four corners.* In the second Report of the Committee on Revision, quoted at 6a Cal.Jur. 405, they say: "This section is aimed to change the unfortunate exception recognized in Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 P. 582, 44 L.R.A.,N.S., 156, Ann. Cas.1914B, 1013. * * * that a corporation may agree to give a subscriber the option of returning the shares and withdrawing his contribution to capital at his option. This is quite different from giving the corporation the option to redeem. If such an obligation were to be allowed, the enforcement of it should be made subject to the rights of creditors and of other shareholders, and it should be carried on the books and on all financial statements as a contingent liability. An agreement by which the subscriber is to be released from liability on his subscription may operate as a fraud upon other subscribers and upon creditors". Again, at 6a Cal.Jur. p. 448, sec. 259, the rule of the Schulte case is discussed as follows: "Former doctrine as to repurchase agreements. Prior to 1931 there was an established doctrine that an agreement to repurchase which was a part of the consideration of the sale by the corporation was binding; and the present laws were undoubtedly intended to do away with that doctrine."

The subject is fully discussed in California Corporation Laws (1938 Ed.) by Ballantine and Sterling at p. 172 et seq. Professor Ballantine was the Draftsman of the General Corporation Law of 1931, of which sections 341 and 342 are important parts. At p. 173, section 189, of that work it is said, "It is the theory of this section [342, subd. 8] that as a general rule the purchase by a corporation of its own shares should not be allowed except out of earned surplus which would be available for distribution as cash dividends. The withdrawal of assets by a shareholder upon a sale or surrender of his shares has the same effect upon creditors as the payment of a dividend". The authors then give the instances where corporations may purchase their own shares, namely, "the collection or compromise of a claim; forfeiture of shares; compensation of dissenting shareholders; agreements with employees; elimination of fractional shares; purchase of redeemable preferred shares and conversion of shares" which instances are crystalized into the first seven subdivisions of section 342.

[2] It follows that an action such as this cannot be successfully maintained without proof that the case meets the conditions prescribed by subdivision 8 of section 342, namely, (1) that an earned surplus exists out of which the stockholder may be paid, and (2) that there is no reasonable ground to believe that the corporation cannot satisfy its debts and liabilities. With respect to these conditions the court found that the corporation on the "21st day of December, 1944, and at all times subsequent thereto, has not had any earned or paid-in surplus, or net profit, and that said * * * corporation cannot purchase * * * said shares * * * or refund the purchase money * * * because by such purchase, * * * said * * * corporation would be rendered unable to satisfy its debts and liabilities when they fall due, and that such repurchase and refund would result in a reduction of the capital of said * * * corporation, which would violate the rights of creditors and other stockholders, * * *."

Indeed there is no allegation in the complaint touching earned surplus. See Bates v. Daley's Incorporated, 5 Cal. App.2d 95, 104, 42 P.2d 706.

It is true there is an allegation that the corporation had cash assets of $40,000 and liabilities not exceeding $5,000, but that is not an allegation of an earned surplus. The court found the latter allegation to be true as of the filing of suit, but it also found that at the time of trial "and a long time prior thereto, defendant corporation, as shown by financial statements and other evidence in the operation of its business, had lost large sums of money and its liabilities to creditors at said time and times were in excess of its assets, * * *; that such refunding would thereby reduce the assets of said defendant * * * in violation of Section 342 * * *."

[3] Appellant contends that his rights should be determined as of the time when suit was filed, supporting that contention by authorities on the general point as to which there can be no question. In other words appellant claims that the corporation's financial condition when action is brought, rather than at the time of trial, should control. In view of the fact that appellant neither alleged nor proved the existence of an earned surplus *at any time*, the question is immaterial. However, on this point Ballantine and Sterling, in their work cited above, at p. 174 have this to say: "Under Section 342 Civil Code a corporation may bind itself to repurchase its shares, but only out of earned surplus, or from employees, or by way of conversion or in case of shares subject to redemption. If the earned surplus from which purchase is allowed to be made under Section 342(8), Civil Code, shrinks to a deficit at the time of performance, the agreement becomes unenforceable against the corporation. A corporation may make a contract to purchase its own shares at a time when it has an earned surplus justifying it, but if, before the time the seller gets around to the performance of the contract, the surplus has vanished by losses or shrinkage in values of assets, the purchase cannot be completed."

Subdivision 6 of section 341, Civil Code, gives to corporations the power "To assume any obligations, enter into any contracts or do any acts incidental to the transaction of its business or to *the issue or sale of its securities*, or expedient for the attainment of its corporate purposes." (Emphasis added.) Appellant contends that because his contract is one of *conditional sale* only, his case comes within that provision, and not within section 342. We have already expressed the opinion that 342 covers *all* cases of repurchase. Above and beyond that is the fact that subdivision 5 of section 341 reads: *"subject to the provision of this title, to purchase or otherwise acquire its own shares."* There you have a specific reference to the acquisition of a corporation's own shares, and the "provisions of this title" are found in the next succeeding section, 342. As we have seen those provisions comprehensively cover the subject, and would seem to override any such general expression as that found in subd. 6 of section 341.

Whether the contract herein be called a conditional sale contract or a "contract of 'sale or return,'" (Schulte case, page 164 Cal. at page 469, 129 P. at page 584, 44 L.R.A.,N.S., 156 Ann.Cas.1914B, 1013) or an option, the fact remains that it was a contract whereby the corporation attempted to bind itself to take back its own stock if the stockholders became dissatisfied with their investment, and to return to them their money. Appellant concedes that "had defendant refunded said moneys, as it had agreed to do, it would have been entitled to the return of any * * * certificates of stock" it had issued. We have conceded that appellant's case is substantially the same as Schulte's case, but we have also seen that the enactment of section 342 disposed of the rule of the Schulte case, which, after all, was an exception to the general rule. The finding of the trial court that the case falls within section 342 of the Civil Code was correct.

The judgment is affirmed.

NOURSE, P. J., and DOOLING J., concur.

80 Cal.App.2d 468

YATES et al. v. DUNDAS.

Civ. 15640.

District Court of Appeal, Second District, Division 1, California.

June 19, 1947.

1. Gifts ⇐57, 62(2, 6)

To constitute a "gift causa mortis", donor must confer upon donee, at time of the gift, a present title and property in the thing given, and, if thing given is capable of corporeal delivery, there must be an actual or symbolical delivery of it, or, if it is not so capable, the means of obtaining control and possession of the thing must be given. Civ.Code, § 1147.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Causa Mortis".

2. Gifts ⇐82(1)

Gifts causa mortis are not regarded in law with favor, since they are in contravention of general rules prescribed for testamentary disposition of property, and therefore should be established by clear and convincing proof of requisites of such a gift.

3. Gifts ⇐57

A written instrument executed by decedent shortly prior to his death, which stated that he wanted plaintiffs to have certain shares in water company owned by him and held on deposit with an escrow holder pursuant to permit of state commissioner of corporations "as they accrue to me", and that "this agreement is void and of no effect, so long as I remain in the capacity above stated, but becomes effective in case anything should happen to me", did not purport to take effect in praesenti, and hence did not evidence a valid "gift causa mortis".

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Helen E. Yates and others against M. Estella Dundas, special administratrix with general powers of the estate of C. A. Dundas, deceased, to quiet title to 12,250 shares of stock of Best Drinking Water Company. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

P. E. Cavaney, of Los Angeles, for appellants.

Hugh Kelley, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiffs have appealed from an adverse judgment in an action whereby they seek to quiet title to 12,250 shares of stock of Best Drinking Water Company. Their claim is based upon an asserted gift causa mortis evidenced by a written instrument executed by C. A. Dundas, now deceased, shortly prior to his death.

C. A. Dundas, who during his lifetime was president of The Best Drinking Water Company, a Nevada corporation doing business in Los Angeles, California, died on May 8, 1945. On April 30, 1945, while confined in a hospital with a serious illness, he executed in triplicate and delivered to each of the plaintiffs the following instrument:

"Agreement

"To Whom It May Concern:

"This is to certify that I, C. A. Dundas, as President of the Best Drinking Water Company, located at 308 North Oxford Avenue in the City and County of Los Angeles, State of California, do hereby wish to make the following considerations known, in case my capacity, as stated above, should be vacated, by an act of God, or by my death.

"This Company holds a permit issued by the Commissioner of Corporations of the State of California, on January 26th, 1945, and later amended on March 9th, 1945, said Permit number is 58218 S.F. In paragraph number three (3) of said permit there is a clause which states that shares of the Company stock will accure to me, and in consideration of services rendered previously to this time I hereby state that I want the persons whose names and addresses appear immediately below to have the number of shares of stock appearing immediately in front of their names, on an even basis as they accure to me until they satisfy amounts stated below.

"10,000 (Ten Thousand) Shares to: Mrs. Helen E. Yates, 693 Shatto Place, Los Angeles 5, California.

"2,500 shares (Two Thousand Five Hundred) Shares to: Richard P. and Allene Chitwood, 4067½ Oakwood Avenue, Los Angeles 4, California.

"This agreement is void and of no effect, as long as I remain the capacity above stated, but becomes effective in case anything should happen to me.

"Done this 30th day of April 1945 in the City and County of Los Angeles, State of California, in the capacity above set forth.

"C. A. Dundas

"President, Best Drinking Water Company."

By their complaints plaintiff alleged that the foregoing instrument was executed and delivered by C. A. Dundas "with knowledge of the danger and nearness of his death," and that Dundas "said that he was making a gift of said stock mentioned in said agreement in consideration of services rendered previously to April 30, 1945, by the plaintiffs to said C. A. Dundas, and that said acts were all done with the intent and purpose of thereby giving, granting and transferring to plaintiffs all his right, title and interest in and to said stock made in view of death with the intent that it shall fully take effect in case of the death of the said giver, * * *." By her answer the defendant administratrix in effect denied that a gift had been accomplished and alleged that the estate of decedent was the owner of all stock that had been issued, and all rights to issuance of additional shares held in escrow pending performance of the conditions of the permits issued by the Commissioner of Corporations, and further, that "only 1358 shares of said stock have been issued or approved to be issued to the estate of said decedent under the terms of said permit, and insofar as the same can now be ascertained the said 1358 shares may be all that are ever issued at any time to said decedent or to his estate." Defendant administratrix further denied that there was any delivery of the stock and alleged that no delivery was possible under the terms of the permit. It was further charged that the instrument was obtained by duress, but no evidence was presented to support such charge and the trial court found it to be untrue.

Upon the trial plaintiff Richard P. Chitwood, called as a witness by the defense under section 2055 of the Code of Civil Procedure, identified stock ledger entries of Best Drinking Water Company, showing the issuance of certificate No. A for 1358 shares to C. A. Dundas, on April 2, 1945, and a voting trust certificate, also to C. A. Dundas, for 2535 shares, issued February 14, 1946, and testified that both such certificates were delivered to a Mr. Ellis, a San Francisco attorney, as escrow holder, pursuant to the terms of the permit granted by the Commissioner of Corporations. He further testified that he prepared the instrument here under consideration at the request of C. A. Dundas, who "said there wasn't anything in existence that would prove that he had promised me anything from that well" (the well from which Best Drinking Water Company secured its water), "and also Mrs. Yates anything, and he wanted it put up in writing as to what he had promised us, and asked me to make some sort of an agreement and bring it out there and he would sign it." On redirect examination he testified that Dundas said, "This agreement will take care of you and Helen in case anything happens to me, in case I die." With reference to the phrase in the instrument, "in consideration of services rendered previously to this time," Mr. Chitwood testified on cross-examination that the phrase was inserted at the request of Dundas; that he Chitwood, "had rendered some services, yes"; "I came up here from San Diego, quit a job at Mr. Dundas' request to take over the well, and he promised at that time he would give me 1200 shares of his interest in the company; * * * it wasn't a corporation at that time * * * I kept the property at 308 North Oxford where this well was located and going to be formed into a corporation at his request until I could get it formed into a corporation. * * * I bottled water. Q. And you were paid for your services, were you? A. That is correct * * * $1.00 an hour. * * * Q. What other services

did you perform besides bottling water prior to the date of April 30, 1945? A. That is all."

The trial court found that C. A. Dundas executed and delivered the instrument hereinbefore quoted, and further found that "The escrow instructions referred to in Paragraph III of the complaint are not and never have been in the possession of defendants, or any, or either of them. No one of plaintiffs has ever had the means of obtaining the possession or control of said stock, or any thereof. C. A. Dundas said he was making a gift of said stock mentioned in the aforesaid document in consideration of services rendered by plaintiffs to C. A. Dundas prior to April 30, 1945. The acts referred to in Paragraph III of the complaint" (the execution and delivery of the instrument) "were done with the intent and purpose of thereby giving, granting and transferring to plaintiffs all the right, title and interest of C. A. Dundas in and to said stock, and that they and each of them should fully take effect in case of the death of C. A. Dundas."

The court then went on to find as follows:

"At all times herein mentioned, all of the shares of stock referred to in said agreement were held on deposit with an escrow holder pursuant to a permit of the Commissioner of Corporations of the State of California issued on the 3rd day of March, 1945. The said permit of the Commissioner of Corporations provided that all of said shares should be held as an escrow pending the further written order of the Commissioner and that the owners or persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, or receive any consideration thereon, until the written consent of said Commissioner shall have been obtained so to do. The Commissioner of Corporations has never at any time issued any written or other order taking said shares or any thereof, out of said escrow. The Commissioner of Corporations has never given his written or other consent to the sale or transfer of said shares, or any interest therein, or his consent to the reception of any consideration thereon."

The court further found that none of the shares referred to in the instrument had ever been delivered to plaintiffs.

As conclusions of law the court found that the instrument in question did not transfer any shares of stock to plaintiffs; that plaintiffs had no right, title or interest therein, and that the heirs of C. A. Dundas were the sole owners thereof.

Appellants' assignments of error are all based upon their contention that a valid gift causa mortis was effected by the execution and delivery of the instrument under consideration and that they are entitled to receive the shares of stock as and when they are released from escrow by the Commissioner of Corporations. Respondent, in support of the findings and judgment of the trial court, urges that the instrument is testamentary in character and not effective because not executed with the formalities of a will; that there was no valid gift because decedent did not surrender dominion of the subject of the gift; that under the terms of the permit issued by the Commissioner of Corporations decedent could not lawfully make a gift; and that there could be no valid gift without compliance with section 330.1 of the Civil Code, which provides that title to a stock certificate and the shares represented thereby can be transferred only by indorsement or assignment and *delivery* of the certificate.

The general rules with respect to the necesary elements of a gift causa mortis are well set forth in Wakefield v. Wakefield, 37 Cal.App.2d 648, 651, 652, 99 P.2d 1105, 1107, wherein appears the following:

"* * * In Braun v. Brown, [14] Cal.Sup. [2d 346], 94 P.2d 348, 351, 127 A.L.R. 773, it was said:

"'Section 1149 of the Civil Code defines a gift in view of death as "one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver," and by section 1150 of the Civil Code a gift is presumed to be in view of death when made during the last illness of the giver or under circumstances which would naturally impress him with an expectation of speedy death. * * *'

"* * * The gift causa mortis is discussed in Noble v. Garden, 146 Cal. 225, 79 P. 883, 884, 2 Ann.Cas. 1001, where it is said:

"'Gifts donatio mortis causa had their origin in the civil law, and were adopted with slight modifications into the common law. Ward v. Turner, 2 Ves. Sr. 431.

"'Justinian defines a donatio mortis causa as "that which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but, if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given" * * * Thornton on Gifts, § 20, and cases cited. It is there said: "But in a gift causa mortis a written instrument is not necessary; it may be, and usually is, made by parol; and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and the donee. * * * The most characteristic mark of distinction between a legacy and such a gift is the change of possession. From the nature of the donation, it is apparent that the infallible test which must distinguish it from a testamentary gift is delivery, a change of dominion in praesenti. Without this there is really nothing to distinguish it from an ordinary testamentary bequest."'

"Also in Stout v. McNab, 157 Cal. 356, 107 P. 1005, 1006, the Supreme Court said:

"'A gift in view of death must be as absolute in its terms, so far as the donor and donee are concerned, as a gift inter vivos. The difference between them is that the one is revocable by the giver and the other is not. A gift in view of death may be revoked at any time by the giver, and it is revoked by law upon his recovery from the illness, or escape from the peril, under the presence of which it was made. Civ.Code, § 1151. Gifts of any other kind cannot be revoked by the giver. Civ.Code, § 1148. But the form of a gift in view of death is as absolute and unconditional as a gift inter vivos. *The title must pass to the donee at the time the gift is made and the donor must part absolutely with all control and with the title,* subject only to the condition imposed by law that it may be revoked, in which case the title is regained by the giver. Daniel v. Smith, 64 Cal. [346], 349, 30 P. 575.'" (Emphasis added.)

[1] In considering, first, the effect of the instrument executed by the donor, the language used in Hart v. Ketchum, 121 Cal. 426, 429, 53 P. 931, 932, is pertinent: "It is essential to a gift causa mortis that the donor shall confer upon the donee, at the time of the gift, a present title and property in the thing given; and, if the thing given is capable of corporeal delivery, there must be an actual or symbolical delivery of it, or if it is not so capable, the means of obtaining control and possession of the thing must be then given. Civ.Code, § 1147. Unless the property in the thing given vests in the donee, it remains in the donor, and there is only a purpose or intention on his part to make a gift. Such purpose or intention, is incapable of enforcement. * * * if, by the terms of the gift, it is not to take effect until after the death of the donor, the disposal is testamentary, and not a gift. Such limitation is a condition precedent by which the gift is prevented from becoming absolute in the lifetime of the donor, and the thing given is, therefore, a portion of his estate at the time of his death. * * *."

[2] And in Knight v. Tripp, 121 Cal. 674, 54 P. 267, 268, it is said:

"Gifts causa mortis are not regarded in the law with favor, since they are in contravention of the general rules prescribed for the testamentary disposition of property, and therefore should in all cases be established by clear and convincing proof of the requisites of such a gift. * * * and, while a gift causa mortis is testamentary to the extent that it is made in contemplation of death, and becomes absolute only upon the death of the donor, it is at the same time subject to the rules governing a gift inter vivos. The actual delivery of the thing given is made the substitute for the formal writing required for a testamentary disposition, but without such delivery the words of the donor are unavailing to constitute a gift. * * * There must be both a purpose to give and

the execution of this purpose. The purpose must be expressed,—either orally or in writing,—and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. * * *."

[3] The instrument here under consideration does not contain apt language for the expression of a purpose to make a gift causa mortis—a gift taking effect in praesenti, subject only to revocation in the event of the donor's recovery from his illness. The decedent stated in the document: "I want the persons * * * to have the * * * shares of stock * * * as they accrue to me," and "this agreement is void and of no effect, *so long as I remain* in the capacity above stated, but becomes effective in case anything should happen to me." To us it appears plain that the instrument was wholly testamentary in character; that is, it was not to operate as a present transfer of title to the stock, but was to take effect only after his death. Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; Niccolls v. Niccolls, 168 Cal. 444, 143 P. 712.

It may be conceded that without the written instrument, a statement by decedent that he was making a gift, accompanied by a delivery of the stock certificates, whether indorsed or assigned, would constitute a valid gift, under the decisions. Crane v. Reardon, 217 Cal. 531, 532, 20 P. 2d 49; In re Estate of Escolle, 134 Cal. App. 473, 480, 25 P.2d 860; Braun v. Brown, 14 Cal.2d 346, 350, 94 P.2d 348, 127 A.L.R. 773. Such delivery may be actual physical delivery, or as in Braun v. Brown, supra, and many other cases, the requirement may be satisfied by delivery of the key to a safe deposit box containing the securities, or by delivery of other means of access to the property given, if it is not capable of manual delivery. But as heretofore indicated, the authorities uniformly hold that a gift causa mortis cannot be upheld without delivery of some nature, actual or symbolical. Appellants urge that the certificates being inaccessible, the execution and delivery of the instrument satisfies the requirements. But the instrument does not purport to be an assignment, a transfer in praesenti of the subject matter of the purported gift. Francoeur v. Beatty, 170 Cal. 740, 151 P. 123, is not in point, because in that case the gift was inter vivos and was accompanied by a formal and unconditional instrument of transfer. In Lynch v. Lynch, 124 Cal.App. 454, 12 P.2d 741, the gift was also inter vivos, and it was held that a transfer of the stock on the books of the corporation and issuance of a new certificate in the name of the donee was sufficient. C. A. Dundas, the donor in the present case, did not divest himself of title and part with all dominion over the stock, but so long as he remained alive he retained such control as he had theretofore had, subject to the terms of the permit of the Commissioner of Corporations, and appellants acquired no title and had no means of securing possession of the stock certificates.

In view of the conclusions herein reached, it becomes unnecessary to consider other points made by respondent in support of the judgment.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



80 Cal.App.2d 480

INDUSTRIAL INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13348.

District Court of Appeal, First District, Division 2, California.

June 20, 1947.

I. Workmen's Compensation ⇐1293

Payment of compensation under Utah compensation proceeding for injury sustained in Utah was a "payment" sufficient to toll California statute of limitations requiring compensation claim to be filed in California within six months of injury, or last payment of compensation. Utah Code

1943, 42—1—1 et seq; Labor Code, §§ 5305, 5405.

See Words and Phrases, Permanent Edition, for all other definitions of "Payment".

2. Workmen's Compensation 904, 1111.

Employee who was paid compensation in Utah proceeding for Utah injury did not thereby make an election of remedies or waive right to apply for and receive compensation in California, in which state the employee resided and in which state the contract to work in Utah was executed, and payments made in the Utah proceeding would be credited on the California award. Utah Code 1943, 42—1—1 et seq.; Labor Code, § 5305.

Proceeding under the Workmen's Compensation Law by William T. Waggoner, employee, opposed by Industrial Indemnity Exchange, insurance carrier. The Industrial Accident Commission awarded compensation to the employee, and the insurance carrier instituted a proceeding to review the award.

Award annulled with directions.

Leonard, Hanna & Brophy, of San Francisco, for petitioner.

R. C. McKellips, of San Francisco, for respondents.

GOODELL, Justice.

This is a proceeding to review an award to respondent Waggoner, of compensation of $30 a week and medical expenses. He made a contract in this state with Morrison-Knudsen Co. to work at Promontory Point, Utah, on a piledriver, and was injured while working there. The employer's insurance carrier on the Utah job was the State Insurance Fund (of Utah), which accepted liability, and, without any formal award, paid Waggoner $16 a week plus medical expenses, under the Utah statute. Utah Code 1943, 42—1—1 et seq. Waggoner returned to California, his place of residence, and applied here, also, for compensation. Petitioner is the employer's insurance carrier in this state.

The Commission in its award of $30 a week allowed no credit for the payments made under the Utah law, and the principal attack on the California award is that it results in double recovery for a single injury.

In a footnote to Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208, 222, 88 L.Ed. 149, 150 A.L.R. 413, it appears that "No less than thirty-four states have enacted statutes which expressly permit recovery of workmen's compensation under specified circumstances for injuries received in another state." Although California is one of them (Labor Code, sec. 5305) the question now presented seems never to have been passed on in this state. The authorities elsewhere, however, support the petitioner's position.

The Restatement of Conflict of Laws, sec. 403, says: "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award."

In 15 N.C.C.A.,N.S., at pages 529, 530 the following appears: "In the situation where the employee is hired in one state and in the course of his employment is sent to another state where he is injured while engaged in the course of his employment, the weight of the state decisions has been that recovery could be had in the state of hiring or in the state of injury. Indeed, they permitted recoveries both in the state of hiring and in the state of the injury, the recovery of award in the second state—whichever that might be—being limited to the excess of what that state allowed over the first state's award."

In 1 Schneider's Workmen's Compensation, 3d Ed., sec. 160, p. 469, the author says:

"Duel recovery for the same injury is generally not permitted where the compensation act of more than one state is properly applicable and the claimant's rights under each of the acts is invoked. There is some authority to the contrary, as will be noted hereinafter. It is not unusual to allow a second recovery after an award has been made or compensation has been paid under the law of another state. But when the second award has been made, the commissions

and courts have generally required that credit be given for the compensation paid or awarded under the law of the other state.

"To allow double recovery is contrary to one of the fundamental principles of workmen's compensation, in that if the employee were to receive more compensation while disabled than while working, the temptation to melinger and prolong his period of disability would be unwisely increased. In addition this would be penalizing the employer for his industry in extending his business to other states, not to mention questions of interstate comity and res adjudicata. The author prefers in such cases the theory of concurrent jurisdiction and one recovery or credit for others * * *."

The question has arisen in Massachusetts, New York and Wisconsin and in each of those jurisdictions the rule of the Restatement has been followed.

In McLaughlin's Case, 274 Mass. 217, 174 N.E. 338, 339, the employee a resident of Massachusetts, was hired there to work in New Hampshire, where he was injured. In holding that the receipt by the employee of money from the insurer in New Hampshire, and the giving of a release, did not bar him from proceeding in Massachusetts, the court said, "The money received should be deducted from the amount he is permitted to recover, * * *." And, further, "The employee cannot have double compensation and the money received in New Hampshire must be accounted for. The decree is to be modified by adding that execution shall issue for the sum awarded after deducting therefrom the amount received in New Hampshire."

Migues' Case, 281 Mass. 373, 183 N.E. 847, follows the McLaughlin case.

With respect to both these Massachusetts cases our Supreme Court in Pacific Employers Ins. Co. v. Industrial Acc. Comm., 10 Cal.2d 567, 576, 75 P.2d 1058, 1062, said: "In each of these cases an award made in Massachusetts in favor of an employee was sustained notwithstanding the fact that compensation had also been allowed in another state, although the employer was allowed credit for the amount previously awarded."

The most recent utterance of the Massachusetts court is found in Mizrahi's Case, 320 Mass. 733, 71 N.E.2d 383, 385 (Feb. 1, 1947), where it is said: "All compensation acts rest upon the policy that the industry should bear the burden of industrial accidents, but there is no policy that justifies placing the burden upon the industry twice, especially where that results in paying the employee so much that it becomes to his advantage to remain away from work. Schneider, Workmen's Compensation Law, 2d Ed. § 47, at page 412. The amount involved in the present controversy is small, but if double recovery is allowed for the same period of incapacity cases may arise in which double or even manifold payments must be made over long periods of time and not in accordance with the policy of any act. * * * the board and the court rightly ruled that since the employee had already received under the Federal act a larger sum than the State act would give him, he was not entitled to any compensation under the State act for the same period of total incapacity."

In Gilbert v. Des Lauriers etc. Co., 180 App.Div. 59, 167 N.Y.S. 274, where the employee, a New Yorker, had been injured in New Jersey and there had been an award in that state, the court held that as long as the insurance carrier had been credited with the amount it had paid under the New Jersey award it was not an aggrieved party.

Prior to the case of McCartin v. Industrial Commission, 248 Wis. 570, 22 N.W. 2d 522, the Supreme Court of Wisconsin was definitely committed to the rule of the Restatement that "the amount paid on a prior award in another state will be credited on the second award". Interstate Power Co. v. Industrial Commission, 203 Wis. 466, 234 N.W. 889; Salvation Army v. Industrial Commission, 219 Wis. 343, 263 N. W. 349, 101 A.L.R. 1440; Wisconsin Bridge & Iron Co. v. Industrial Commission, 222 Wis. 194, 268 N.W. 134. However, while McCartin's application in Wisconsin was pending the Magnolia Petroleum case, supra, was decided. That the Wisconsin court felt that that decision was controlling appears from the following (22 N.W.2d 524): "The procedure approved in that

case [Salvation Army v. Industrial Commission, supra] is the one that was followed here, and there would be no question about it being proper if it were not for the case of Magnolia Petroleum Co. v.Hunt * * *." The Wisconsin Commission had ordered the payment to the injured employee of certain benefits, after giving credit for the sums paid under the Illinois Act, Ill.Rev. Stat.1943, 0.48, § 138 et seq. The Circuit Court set aside the Wisconsin Commission's order on the authority of the Magnolia Petroleum decision, and the Supreme Court of Wisconsin affirmed the judgment on the same authority. Certiorari was granted by the Supreme Court of the United States "to determine the applicability of the full faith and credit clause, as interpreted in the Magnolia Petroleum Co. case, to the facts of this case" (Industrial Commission v. McCartin, 67 S.Ct. 886, 888, 91 L.Ed. 1140) and the judgment of the Wisconsin court was therein reversed, the court holding that "Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws. Magnolia Petroleum Co. v. Hunt, supra, thus does not control this case."

Wisconsin is thus found right where it was before the Magnolia Petroleum case was decided.

The McCartin case fulfills the prediction found in Horovitz on Workmen's Compensation (1944) p. 41 that "Undoubtedly efforts will be made to limit the Magnolia Petroleum Company decision". "Sufficient faith and credit" says the author, at p. 42, "are given to the first award when its entire amount is deductible from the second award. * * *."

In the instant case there was no formal award in Utah, hence no question of a former judgment is involved nor anything in the nature of an adjudication. Moreover, nothing in the record indicates that there is any provision of the Utah statute making an award in that state final or exclusive. For these reasons the Magnolia Petroleum case has no more bearing here than it had in the McCartin case. Likewise we are satisfied that by accepting the Utah compensation Waggoner did not make an election of remedies or waive his right to apply in California under section 5305, Labor Code.

Mizrahi's Case, supra, decided four months ago, deals not with awards in two states for a single injury but with two awards (one under the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., and the other under the Massachusetts Act, G.L. (Ter.Ed.) c. 152) for two separate injuries suffered in the same state. The case holds, as already indicated, that there could not be these overlapping awards. In our own state we have two companion cases somewhat similar, namely, State Compensation Ins. Fund v. Industrial Acc. Comm., 43 Cal.App.2d 233 and 236, at page 237, 110 P.2d 510 and 512, at page 513, which hold that "the injured employee, was entitled to receive but one total temporary disability award over the same period even though he received two separate injuries". If double recoveries may not be had for two separate injuries suffered or treated at about the same time in the same state it is difficult to see why the rule should be different with respect to double recoveries (in two states) for the same injury.

When respondent filed in California the statute of limitations was pleaded. The injury was on October 26, 1944, while the application was filed on June 12, 1945, more than six months thereafter. The Commission held that the claim was not barred because it had been filed within six months after the last payment of compensation. That payment, of course, was under the Utah proceeding. The Commission, while so holding, nevertheless refused to credit the Utah payments.

[1, 2] Strictly speaking, compensation paid under the laws of one state is entirely independent of that under the laws of another. However, if credit is to be given in California for the Utah payments (as we are sure it should be), then the last Utah installment may properly be treated as a "payment" within the meaning of section 5405, Labor Code, sufficient to toll the statute of limitations. If it is to be taken into account for one purpose it should be taken

into account for all purposes. For these reasons we are satisfied that the claim herein was not barred.

The award is annulled with directions to respondent Commission to modify its award so as to extend to the petitioner herein credit, on account of respondent Commission's award, for all payments made by, or for the account of, the State Insurance Fund (of Utah).

NOURSE, P. J., and DOOLING, J., concur.



80 Cal.App.2d 735

HITCHCOCK v. SOARES et al.

Civ. 3646.

District Court of Appeal, Fourth District, California.

July 2, 1947.

Contracts ⇐28(3)

In action for declaratory relief, evidence authorized finding for defendants that, while parties were attempting to make a contract to give plaintiff an interest in fishing vessel, the minds of parties did not meet, that no contract existed for the acquisition of such interest and that plaintiff was entitled to nothing more than his regular compensation as a member of crew.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action by Orley Hitchcock against Jose Soares and George Soares for a declaratory judgment determining plaintiff's interest in a fishing boat. Judgment for defendants, and plaintiff appeals.

Affirmed.

Whelan & Whelan, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief. The plaintiff was a marine engineer and the defendants were in the business of operating tuna fishing boats. In 1944, the defendants acquired a new boat, and the plaintiff acted as engineer on this boat during five fishing trips covering a period of some eight or nine months. During this period he received the usual compensation of such an engineer, including his part of the crew's share in the proceeds of the fish caught. After the fifth trip, the defendants terminated whatever relationship existed between them.

The plaintiff then brought this action, the complaint being based on the theory that a contractual relationship existed whereby he was to become the owner of a one-tenth interest in this boat, to be paid for out of a share in the earnings of the boat; that an oral agreement to this effect existed between the parties which had been reduced to writing, although not signed by the defendants; that the plaintiff had undertaken all of the obligations of the contemplated contract in the belief that a binding agreement existed; that such belief had been induced by the representations of the defendants, or their failure to inform him that no contract existed; and that the defendants were estopped to deny the existence of this contract. The prayer was that a form of agreement dated October 21, 1944, be decreed to be a valid agreement between the parties, and that the defendants account to the plaintiff for the earnings of the vessel.

It appears, without dispute, that the parties attempted to reach an agreement along the general lines contended for by the plaintiff. The defendants, in March, 1944, prepared and signed a form of contract which the plaintiff refused to sign. Shortly thereafter, the plaintiff prepared a form of contract which the defendants refused to sign. In June, 1944, the defendants submitted another form of contract which the plaintiff refused to sign. Under date of October 21, 1944, a form of contract was prepared

which the plaintiff signed but which the defendants did not sign. The plaintiff contends that this last form was prepared by an attorney at the request of the defendants, that they told him to go and look it over and sign it if it was satisfactory, and that he did so. The defendants denied that this contract was prepared at their request or that they asked the plaintiff to sign it.

After a trial, the court found in all respects in favor of the defendants and entered a judgment accordingly, from which the plaintiff has appealed.

The sole ground of the appeal is that the essential findings are not supported by the evidence. While a number of the findings are attacked, the appellant's contentions are based upon the theory that a final agreement was reached in the form dated October 21, 1944, since it was prepared at the request of the respondents, setting forth their desires in the matter; that he signed it at their request; that he did not learn until after returning from the fifth fishing trip that the respondents had not signed it; that he was induced to enter upon, and carry out, his duties in reliance upon the belief that this contract had been executed; and that the respondents are estopped from now denying the existence of the contract.

While the evidence produced by the appellant would justify an inference sufficient to support his theory, the evidence for the respondents raised a direct conflict. Not only was there evidence that the proposed contract of October 21, 1944, which was signed by the appellant, was not prepared on the instructions of the respondents and was not satisfactory to them, but there was testimony that they refused to sign that contract and that one of them so informed the appellant before the boat went on its first fishing trip. This, and other conflicting evidence, supports the trial court's findings and conclusions to the effect that while these parties were attempting to make some such a contract their minds did not meet on its terms and that the appellant, in making the five trips on the boat, acted in the hope that an agreement would finally be reached and under circumstances which did not justify him in believing that one had been reached, or that any contract existed under which he would be entitled to anything more than his regular compensation, as a member of the crew, which he received.

The judgment is affirmed.

MARKS, J., concurs.



80 Cal.App.2d 702

HOUSER et al. v. BOZWELL et al.

Civ. 15529.

District Court of Appeal, Second District, Division 1, California.

July 2, 1947.

1. Automobiles ⇐245(6, 72)

In action for injuries sustained by pedestrian struck by automobile, where evidence was conflicting as to whether automobile was driven onto dirt shoulder, and whether pedestrian stepped onto pavement, negligence of driver and contributory negligence of pedestrian were for jury.

2. Appeal and error ⇐933(4)

Where motion for new trial is based on alleged misconduct of attorney and motion is denied, trial court must be deemed to have considered that no prejudice was suffered by reason of alleged misconduct and trial court's conclusion will not be disturbed unless plainly wrong.

3. Appeal and error ⇐1060(1)

In action by pedestrian for injuries sustained when struck by automobile, and pedestrian was accompanied by another girl, argument of defendant's attorney regarding pedestrian's failure to produce her companion as witness was not reversible error.

4. Appeal and error ⇐207

Misconduct of an attorney is not ground for reversal where other party, even though objecting to remarks, fails to

request that jury be charged to disregard them.

5. Automobiles ⇐246(58)

In action by pedestrian for injuries sustained when struck by automobile, where there was evidence that pedestrian was walking entirely off pavement but that immediately before impact she had whirled around and had taken a step or two onto pavement, instructions regarding statutory duty of pedestrian to walk close to left hand edge of roadway were justified. Vehicle Code, §§ 83, 564.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Personal injury action by Betty Catherine Houser by her guardian ad litem, Louis W. Houser and Louis W. Houser, individually, against D. Myrtle Bozwell and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Henry T. Moore and E. Briggs Howorth, both of Los Angeles (Walter R. Trinkaus, of Los Angeles, of counsel), for appellants.

Parker, Stanbury & Reese, of Los Angeles (White McGee, Jr., of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

This is an appeal from a judgment rendered in favor of defendant pursuant to a verdict of the jury in an action to recover damages on account of alleged injuries sustained by the minor plaintiff when she was struck by the automobile of defendant.

It is here contended: "(A) That respondent's attorney committed a reversible error when, in his argument to the jury he made statements concerning an unidentified person who may have been a witness to the accident which were wrongful, wholly unjustified and unsupported by the evidence and amounted to a charge that appellants were guilty of withholding and suppressing evidence, and (B) that the trial court gave erroneous instructions to the jury."

This action arises out of a collision between a pedestrian and an automobile which occurred about 12:30 p.m. on January 27, 1945, on Van Owen Street between Lankershim Boulevard and Simpson Street in the City of Los Angeles. Van Owen Street, a two lane highway, runs east and west, with no sidewalks on either side. At the time of the accident, the minor appellant was walking along the north shoulder of Van Owen Street in an easterly direction, and respondent was driving her automobile in a westerly direction along said street. As the automobile passed the pedestrian, she was struck by the automobile and sustained serious injuries.

The facts as to the manner in which the accident occurred are in direct conflict. Appellants' witnesses testified to the effect that respondent drove her automobile over onto the soft shoulder where the minor pedestrian was walking, and collided with her. Respondent testified that no part of her automobile was on the dirt shoulder after she crossed Lankershim Boulevard or at any time before the accident occurred; that she saw appellant Betty Houser and her girl companion walking abreast of each other on the shoulder about a foot and a half or two feet from the edge of the pavement; that as she approached the two girls "the one on the inside stepped forward a couple of steps and the one next to the pavement whirled around on the boulevard and looked down in the opposite direction in which I was going, in front of my car. * * * I swerved the car to miss her, and after I swerved I heard a noise, a thump * * * so then I stopped my car and got out and went back"; that when the girl made the movement described by the witness, her car "was about as far as from this to that" from her (indicating a space to the jury that was agreed to be about five feet in distance); that the girl got out onto the paved portion of the highway "a step or two. She just threw herself right in line with my car and I was driving in the center of the lane"; that said witness succeeded in swerving her car to the left far enough so that she thought she "had missed the girl"; that she did not actually see the impact.

Donald Cussmenn, an attendant at the service station at Lankershim and Van Owen Street, testified he was standing by the gas pumps washing his hands, a distance of 300 feet from the place where the

impact occurred; and that when he first noticed the girls "they were on the north side of the road", on the shoulder, and were walking close together; that at that time they were a little bit west of the point where the accident occurred and he saw them "a little bit" before he saw the car stop at the stop sign; that when the car stopped at the stop sign on Lankershim Boulevard, it was entirely upon the pavement; that from the time the car started from the place where it made the boulevard stop, it was gradually veering over to the right until it got off the pavement at the point indicated at C-4, and then it was about a foot off the pavement; that at the time of the impact the girl, who was injured, was about two or two and a half feet off the pavement; that at W-1 (the point of impact), there was enough of the car on the dirt shoulder to hit the girl; that he did not know how fast the car was going at the time of the impact; that he could not estimate the speed in miles per hour; that after the impact the car continued on the dirt, but that he did not notice when it got back on the pavement again.

[1] In the state of the record, it became a question of fact for the determination of the jury as to whether respondent driver of the automobile was guilty of negligence proximately causing the collision, or whether appellants were contributively negligent.

It is here contended that because of the alleged prejudicial statements made by respondent's attorney in his argument to the jury, appellants were deprived of a fair and impartial trial, in that the jury was influenced by such statements and did not decide the case upon its real merits.

The arguments of counsel to the jury are not contained in the reporter's transcript. However, the affidavit made by appellants' counsel in support of their motion for a new trial, which was based in part on the alleged misconduct of respondent's attorney and which motion was denied, avers as follows:

"That in his argument to the jury Attorney McGee stated as follows:

" 'Where is Lucille Hodges? Why has the plaintiff not produced her as a witness? You will recall that she is the cousin of the plaintiff, Betty Houser, and that she was walking with her at the time the accident occurred. She was in a better position than anyone to know what happened, and it was incumbent upon the plaintiff to produce this witness, who was her own cousin.'

"That thereupon, Attorney Moore (counsel for appellants) objected on behalf of the plaintiffs to the aforesaid argument on the ground that it was entirely outside of the record, contrary to the evidence, inflammatory, and highly prejudicial, which objection was thereupon overruled by the Court, and that thereupon, Attorney McGee further stated to the jury as follows:

" 'Your Honor, Betty said Lucille was her cousin and the evidence certainly shows that someone was with her that day. All right, we won't use the name Lucille Hodges then. The young lady who was with Betty, why hasn't she been called or if she shouldn't be in the jurisdiction, why hasn't her deposition been placed before you because our law gives you the right to take the deposition of a party who isn't where he or she can attend the trial. Now, obviously, we wouldn't call that witness because she would of course be a prejudiced witness. I wouldn't dare call her to the stand or dare take her deposition but they could. But here is the thing, after an accident people sometimes make statements as to how it happened. If I called the young lady who was with Betty and put her on the stand I couldn't impeach her by showing what she told the police afterwards but if they called her to the stand then I could show the statement she made to the police. Now why hasn't she been called in this case?'

"That Attorney Moore then made the following statement and objection:

" 'Your Honor, do I understand my objection goes to all this? There is nothing in the record showing any witness available.'

"That thereupon the following statement was made by the Court:

" 'There is nothing to show anything at all about it except that there was somebody there and that is perfectly proper comment.'

"That thereupon, Attorney Moore then made the following objection:

"'I object to it, Your Honor.'

"That thereupon the Court made the following statement:

"'It is perfectly proper if there was somebody there to comment the way he has.'"

The victim of the accident, Betty Houser testified that she remembered nothing about the accident, either immediately prior thereto or for some time after; that she did not remember anything that happened on the day of the accident, except that she "woke up in the Valley Hospital in Van Nuys." On cross-examination, said witness testified that she did not remember what girl was with her at the time of the accident. Whereupon she was asked:

"You knew a young lady by the name of Lucille Hodges? A. Yes, I did.

"Q. How long had you known her? A. Well, she is my cousin; I have known her since I can remember."

Mrs. Gertrude Houser, the mother of Betty, testified as follows:

"Q. When did you first hear about Betty being involved in the accident? A. Well, it was on a Saturday morning, and a lady drove Lucille to my place and said that Betty had been hit by a car and that was my first knowledge of it.

"Q. What lady drove up there? A. Well, they told me later it was the lady that was involved in the accident, Mrs. Bozwell.

"Q. And then did you return to the scene of the accident in that car? A. Yes, I did."

The record leaves no doubt that appellant Betty Houser was walking along Van Owen Street with another girl at the time the accident occurred. While there is no direct evidence that said companion was appellant's cousin, Lucille Hodges, the aforesaid testimony of Mrs. Houser is sufficient to raise the inference that the Lucille, who accompanied respondent Bozwell when the latter transported Mrs. Houser from her home to the scene of the collision, was the cousin, Lucille Hodges.

[2, 3] As hereinbefore stated, appellants filed a motion for a new trial based in part upon the alleged misconduct of respondent's attorney, which motion was denied. As was aptly stated in circumstances similar to those here presented in Shriver v. Silva, 65 Cal.App.2d 753, 763, 151 P.2d 528, 534: "The trial court must be deemed to have concluded that no prejudice was suffered by defendants by reason of the conduct of plaintiffs' attorney, and as a trial judge is in a better position than an appellate court to determine whether the verdict was due in whole or in part to the alleged misconduct, its conclusion should not be disturbed unless plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538; Spear v. Leuenberger, 44 Cal.App.2d 236, 244, 245, 112 P.2d 43; Brown v. McCuan, 56 Cal.App.2d 35, 41, 132 P.2d 838."

In Brown v. McCuan, supra, where counsel was charged with misconduct in improperly injecting insurance into the case, it was stated at page 41 of 56 Cal.App.2d, at page 841 of 132 P.2d: "But, when the case comes to us after the trial judge has denied a new trial urged upon these grounds and has thus found that the claimed misconduct is not prejudicial, the judgment must be affirmed unless there is no reasonable basis for such finding. We may not assume that the jury denied appellant any recovery because it believed he might get some compensation from another source."

[4] Moreover, it appears to be well-established law that the "misconduct of an attorney is not a ground for reversal where the other party, even though objecting to the remarks, fails to request that the jury be charged to disregard them." 24 Cal. Jur. 746, sec. 29, and cases there cited.

Although no such request was made in the instant case, the trial court gave a general instruction to the jury as follows: "You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts."

The trial court gave, among others, the following instructions to the jury:

(1) "You are instructed that Sec. 564 of the Vehicle Code of California in force and

effect at the time and place of this accident provided as follows: 'No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left-hand edge of the roadway.'

"You are further instructed that a violation of this provision of this statute through a lack of ordinary care upon the part of plaintiff Betty Houser would constitute negligence."

(2) "You are instructed that the Vehicle Code of California in force and effect at the time and place of this accident defined a roadway as follows:

" 'Roadway is that portion of a highway improved, designed or ordinarily used for vehicular travel.' (Sec. 83, Vehicle Code.)

"You are further instructed that the place where the accident occurred was outside of any business or residence district."

During his argument to the jury, respondent's counsel made a statement which appears in the affidavit supporting appellants' motion for a new trial as follows:

"The Court will instruct you that it is unlawful for a pedestrian to walk upon a roadway except as near as possible to the left-hand edge thereof. I don't see how you can possibly find except for the defendant in view of that instruction and in view of the facts in this case. It is undisputed, even under the testimony produced by plaintiffs, that Betty was not complying with the law and that she was not walking near the left-hand edge of this roadway, but was walking, if not on the pavement, then within two or three feet of it. This is by law, contributory negligence, and even if you thought Mrs. Bozwell was negligent, you would have to find that Betty was negligent too and that she could not recover in this case."

Appellants submit that the above statement was an erroneous statement of the law and an erroneous interpretation of the two code sections. In this connection appellants cite Summers v. Dominguez, 29 Cal.App.2d 308, 84 P.2d 237, as authority for the proposition that a shoulder adjoining a pavement is not a portion of the roadway; that the pavement or paved portion of the highway is the roadway within the meaning of the statute, and that the shoulder is merely a part of the highway.

[5] While it is true, as appellants contend, that there is no conflict in the evidence that Betty Houser was walking upon her left-hand side of the highway entirely off the pavement prior to the accident, there is evidence that immediately before the impact, she had whirled around, and had taken a step or two out onto the paved portion of the highway "right in line" with respondent's automobile. Consequently, it cannot be said that either the argument of counsel or the instructions complained of resulted in prejudice to appellants' cause.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.



80 Cal.App.2d 711

In re RUSSELL'S ESTATE.

STROUGHTON et al. v. McGOWAN et al.

Civ. 15783.

District Court of Appeal, Second District, Division 1, California.

July 2, 1947.

Hearing Denied Aug. 28, 1947.

1. Wills ⇐427

Admission of will to probate establishes prima facie for all purposes of contest that will was duly executed in manner required by law by a testator who was competent, free from undue influence, etc., and burden of proof was on contestants to establish its invalidity.

2. Wills ⇐52(1)

It is only when contestant establishes prima facie case of absence of testamentary capacity that proponent of will has burden of meeting it.

3. Wills ⇐52(1)

Testamentary capacity is presumed to exist until contrary is established, and ul-

timate question is what was actually testator's mental state at time of testamentary act, and not what it may have been.

4. Wills ⇐386

When verdict in will contest is attacked as unsupported by evidence, province of reviewing court is same as in any other civil case in which power of an appellate tribunal begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which will support jury's conclusion.

5. Appeal and error ⇐996

When two or more inferences can reasonably be deduced from the facts, a reviewing court is not authorized to substitute its deductions for those of the triers of fact.

6. Wills ⇐386

It was province of jury, and not reviewing court, to weigh and consider the evidence on issue of testamentary capacity in a will contest.

7. Wills ⇐386

In will contest, duty of reviewing court begins and ends with determination whether there is adequate evidence to support finding of jury and judgment of trial court.

8. Wills ⇐386

Though reviewing court is authorized to consider evidence in will contest on issue of testamentary capacity it is not authorized to weigh it, but that is the function of the jury.

9. Wills ⇐300

Jury were warranted in believing as true all evidence in support of contestants' claims and discrediting as untrue all the evidence in behalf of proponents of will which was in any way contradictory or otherwise impeached.

10. Appeal and error ⇐989

Appellate courts are not authorized to review evidence except where, on its face, it may justly be held to be insufficient to support ultimate issue involved, in which case it is not review of a question of fact but purely one of law.

11. Wills ⇐50

"Testamentary capacity" exists if, at time of execution of will, testator has sufficient mental capacity to understand nature of act he is performing and to understand and recall the nature and situation of his property, and to remember and understand his relations to persons who have claims upon his bounty and whose interests are affected by the will. Probate Code, § 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

12. Wills ⇐55(5, 7)

The facts that testatrix was in feeble health, diseased, aged and infirm, were insufficient, of themselves, to establish testamentary incapacity unless it be shown by preponderance of evidence that her condition of mind and body at time of execution of will was such that she was unable to understand nature and situation of her property and of disposing of it intelligently. Probate Code, § 20.

13. Wills ⇐1

Testator's property being his to dispose of as he wills, he is not called on to consult or satisfy the wishes or views of juries or courts. Probate Code, § 20.

14. Wills ⇐52(1), 55(1)

The presumption is that person was of sound mind when he executed his will, and burden is on contestant to show affirmatively and by a preponderance of evidence the incapacity of testator and that because of mental or bodily infirmities he bequeathed his property in a way which, except for the existence of the infirmities, he would not have done.

15. Wills ⇐53(2)

Testimony on behalf of contestants concerning testamentary incapacity of testatrix before and after execution of will was admissible only as it tended to show that condition at the very time will was made.

16. Wills ⇐55(1)

A will cannot be set aside for lack of testamentary capacity unless claimed infirmities of mind or body of testator are shown to have had a direct bearing on tes-

tamentary act and the evidence must establish the fact that testator bequeathed property in manner which, except for the claimed infirmities, he would not have done. Probate Code, § 20.

17. Wills ⇐55(7)

Evidence on behalf of contestants as to infirmities and mental incapacity of aged testatrix before and after execution of will was insufficient to sustain finding of testamentary incapacity.

18. Wills ⇐52(1)

The burden rested on contestant to establish testamentary incapacity throughout case.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding in the matter of the estate of Lillie A. Russell, deceased, wherein Evelyn A. McGowan and others, proponents, appeal from a judgment annulling the probate of the will and revoking letters testamentary issued thereon, opposed by Lilla Stroughton and others, contestants. Motions by proponents for a nonsuit, for a directed verdict, and for a new trial were denied.

Reversed, with directions to enter judgment for proponents.

L. M. Phillips and Ernest Best, both of Los Angeles, for appellants Evelyn A. McGowan and Clyde A. Wilson.

P. E. Cavaney, of Los Angeles, for appellants G. A. Lindberg and Carrie Lindberg.

Pearce, Campbell, Bryan & Norcop, and Henry P. Goodwin, all of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by the proponents of the will of Lillie A. Russell from a judgment annulling the probate of said will and revoking letters testamentary issued thereon, which judgment was entered pursuant to the verdict of a jury declaring "that the will of October 16, 1944 is not the will of Lillie A. Russell."

Contestants attacked the will on the grounds of undue influence, fraud and incompetency. However, after all of the evidence adduced by the parties had been received, contestants abandoned the first two grounds of contest, and the matter was submitted to the jury on the sole issue of the claimed incompetency of the testatrix.

Motions appropriately made for a nonsuit and directed verdict were denied. A motion for judgment notwithstanding the verdict was interposed, but so far as the record discloses was never ruled upon. A motion for a new trial was denied.

Lillie A. Russell, the testatrix, died at Glendale, in Los Angeles County, on October 23, 1944, and at the time of her demise was 82 years of age. She came to California about the year 1895 with her husband, who predeceased her by some four years. For a number of years they were engaged in the wholesale millinery business in Los Angeles, the testatrix looking after the financial end of the business and her husband giving his attention to the manufacturing end. The value of the estate here involved is approximately $63,779.00 and the beneficiaries under the will include a nephew, grandnephews, nieces and grandnieces, while the contestants, three in number, are alleged to be the niece, grandniece and nephew of the testatrix.

The circumstances leading up to the execution of the will as reflected by the record are that on October 10, 1944, decedent telephoned an officer of the Glendale Branch of the Security-First National Bank requesting him to call at her home, which he did. At this meeting the decedent inquired as to whether the bank would be willing to act as executor of her will. After answering the inquiry in the affirmative, the bank official engaged in some conversation with decedent concerning her relatives and heirs, and advised her to consult an attorney. Decedent then requested the bank officer to ask attorney Clency H. Hasbrouck to call upon her. The officer of the bank had known the decedent some four years, during which interim he had talked with her some three or four times in regard to her affairs. As a result of the telephone call from the bank official, attorney Hasbrouck visited decedent on October 11, 1944. She met the attorney at the door of her home and escorted him into the living room where she

discussed in detail her proposed will. Attorney Hasbrouck made notes to be used by him in the preparation of the will. This was on Wednesday, October 11. The following Sunday, October 15, the decedent was not well and remained in bed. On that date she told Ernest L. Wellman, a nephew of her deceased husband, about her contemplated will, handed him the card of attorney Hasbrouck and requested that on the following morning he contact said attorney and "have him come right up". Pursuant to Mr. Wellman's message, attorney Hasbrouck took the will he had prepared to the home of the decedent on October 16, where it was executed about 10 or 10:30 a. m. in the presence of himself and his secretary, Miss Helen Burland, both of whom signed as subscribing witnesses.

Attorney Hasbrouck testified that prior to the execution of the will he read it to the testatrix paragraph by paragraph, and specifically asked her about each bequest or devise. That testatrix expressed her approval by either nodding her head or saying, "Yes", or "That's all right". That during the reading of the document the testatrix interrupted once to ask what further provisions could be made for her niece Mrs. Sarah E. Whipple in the event the latter should be required to take care of the testatrix over a prolonged period of illness. When informed by the attorney that should such an event occur Mrs. Whipple might file a claim against the estate for her services, the decedent announced her readiness to execute the will.

Attorney Hasbrouck also testified that while signing the will the testatrix was propped up in bed and the document was placed before her on a magazine and file cover. When first signing her name her hand slipped and the signature had an extra "L" in it. When the attorney commented upon this, the testatrix again affixed her signature. In his testimony concerning what occurred at the time the will was executed, attorney Hasbrouck was corroborated by his secretary Miss Burland. The attorney testified that while the testatrix was in bed and ill when she executed her will he was "sure she understood what she was talking about".

[1-3] The admission to probate of the will on October 16, 1944 here in question, "established prima facie for all the purposes of the contest, that it was duly executed in the manner required by law by a testator who was competent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity." Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 562. It is only when the contestant has established a prima facie case of the absence of testamentary capacity that the proponent of the will has the burden of meeting it. Testamentary capacity is always presumed to exist until the contrary is established, and the ultimate question is what was actually the testator's mental state at the time of the testamentary act, and not what it may have been.

[4, 5] As a first ground for reversal appellants earnestly urge that there was no substantial evidence to justify the verdict of the jury or to support the judgment based thereon. When a verdict rendered in a will contest is attacked as being unsupported by the evidence, the province of a reviewing court is the same as in any other civil case. In such a situation the power of an appellate tribunal begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, a reviewing court is not authorized to substitute its deductions for those of the triers of fact.

[6-10] We shall not attempt to analyze the evidence of witnesses who testified in behalf of the appellants. It was the province of the jury to weigh and consider that evidence. Our duty begins and ends with a determination of whether there is adequate evidence to support the findings of the jury and the judgment of the trial court. Should we conclude there is sufficient evidence to serve that purpose, it would be an idle task to review the aforesaid conflicting testimony and this we say because, while we are authorized to consider the evidence, we are not authorized

to weigh it. That was the function of the jury. And they were warranted in believing as true all the evidence in support of contestants' claims and in discrediting as untrue all the evidence in behalf of the proponents which was in any way contradictory or otherwise impeached. It is well established in our law that under our constitution, appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact but purely one of law.

Guided by the foregoing rules, we now turn to a consideration of the evidence offered in support of the verdict. Ernest L. Wellman testified he was related to the decedent only by marriage and was not a beneficiary under any will drawn by her. He had known the testatrix for over 40 years and was a nephew of her deceased husband. During the last six months of decedent's life this witness had seen her at least twice a week, and talked with her frequently. He testified that during the last six months of her life she failed mentally and physically; that she experienced great difficulty in moving about and would ask the witness from time to time to obtain articles for her when they were right in front of her. He testified that he saw the testatrix one day prior to the making of her will and found her very weak, that she talked in a whisper and was lying with her eyes closed and "in a semi-coma". In answer to a question by the court as to whether he had formed an opinion as to testatrix' mental condition on the morning of October 16, when the will was executed, witness stated, "in my opinion she was insane". In support of this opinion he testified, "he went into her room shortly before the will was signed. He told her that Mr. Hasbrouck was coming up there and she made no reply, did not seem to understand what I had said * * *". Again, with reference to the same occasion, he testified, "Well, she was lying there on the bed with seemingly no consciousness, and she was partly paralyzed, some of her functions were paralyzed, did not seem to act as if she did not really know me. I think that is all I care to say".

John H. Judd, an investment broker, testified he had business relations with the decedent from about 1940 until about September of 1944, approximately a month prior to her death. During this period of some four years he had visited with her on an average of about once a month, had discussed many business matters with her including income tax returns, stock investments, drawing of a will, family matters, and problems of her family. He testified that he observed that on the occasion of his visit with the testatrix in September of 1944 she was not as well as she had been previously; that she had a bad color and did not talk as coherently as she had prior thereto. In comparing his visits through the years with his visit of August, 1944, the witness testified that testatrix did not act in any manner the same as she had on prior occasions and on the visit of August, 1944, the decedent discussed with him how her marketing was to be done, family problems, who had been to see her during the past six months, and that her statements were repeated over and over again. This witness also testified that when he last visited her on September 9, 1944, he formed an opinion as to her mental capacity, stating that "she was mentally not sane". This opinion he based on the fact that no matter what he told her to do in the matter of financial transactions he believed she would have done it whether it was for her own good or not. And that contrary to his previous experiences with her, she was unable to recognize his argument or follow his reasoning and that her mind would definitely wander.

Mrs. Gladys Evelyn Woodard, a trained nurse with 15 years of experience, including a period of years when she was nurse in an asylum for demented people at Columbus, Michigan, testified that she became the decedent's nurse about 8:30 o'clock on the morning of October 17, 1944, the day following the execution of the will. She testified that on arriving at the home of the decedent she found her in a stupor, "in a very deplorable condi-

tion", that she had attempted to arouse the patient but was unsuccessful, that she had tapped her on the side of her cheek to which there was no response or even a reflex of the eyelids. That "then I went about to clean the patient up and to change her linens, before I even gave any of the medicine or anything, because she was in such a bad condition, in a bad way". The nurse further testified that the decedent was unable to swallow and that it was necessary to take her temperature under the armpit. In answer to the question propounded by the court, "what did you observe as to her general condition on that morning?" (referring to October 17, 1944) the witness stated that the decedent was in a weakened condition physically and "mentally she was in a stupor". This witness testified that during the entire time she was in attendance upon the decedent, which was for a period of approximately one week, and up to the time of the death of the testatrix, she heard the latter speak but once and at that time in order to hear her she was compelled to bend over her. On October 19 after the nurse had been there some two days, the testatrix spoke to her, saying, "Who are you; what are you doing here?" The witness further testified this was the only time decedent rallied at all. That on Tuesday, October 17, she did not speak, and on Wednesday the 18th was in a stupor all day. The witness testified that during the entire time she was there she observed decedent every day and knew her physical as well as mental reactions. That when she arrived on the morning of October 17 she found the decedent in a stupor, "her physical condition was poorly. Her mental condition, she was in a stupor, I could not arouse her * * *". The nurse further testified that during the week she was in attendance, decedent was not in a position to visit with anybody. In connection with the signing of a bank signature card by the testatrix with an "X" the nurse testified, "they tried to explain to her, but it did not penetrate; she did not even open her eyes".

Mrs. Grace Woods, who was a neighbor of the decedent for fourteen years, living next door, testified that she saw her once or twice a week, that on October 16, 1944, about 8 o'clock in the morning, approximately two hours prior to the execution of the will, the witness visited in the sickroom of the decedent, tried to talk with her but could not get any answer; that her eyes were closed and that she did not respond to questions asked.

Mrs. Helen McBride, who lived across the street from the decedent for about seven years and who for a period of some four years took the testatrix to market about twice a week, testified that on her return from Arrowhead on the evening of October 15, 1944, the night before the execution of the will, she was called to the decedent's house because of the latter's illness; that she assisted in calling a physician and remained with the decedent all of the time that the doctor was there; that she was there every night thereafter up to the time of the death of the testatrix; that during the last week of her life the testatrix was more or less in a coma and could talk only in a whisper. That her eyes were closed most of the time. When this witness was asked, "was she (testatrix) of sound mind on October 15, 1944, in your opinion?", she answered, "Well, I would sort of hesitate to say. Yes." When asked, "Was she of sound mind on October 16, in your opinion, that is Monday night?" (the day upon which the will was executed) the witness answered, "No, I would say definitely not Monday night." In giving her reasons for her expressed opinion the witness testified that the decedent "did not talk; her mouth was as though her tongue was thick, she could not articulate properly, as though she had an affliction of her speech, in other words, and her mind seemed to be as slow as her speech was; she did not respond whatsoever, did not open her eyes, she did not seem to recognize I was there. When I talked to her I would not get any answer."

Another witness called by the contestants was Elsie M. Wilson, the wife of the nephew of the decedent who, together with her husband, visited the home of the testatrix on the 22nd of October, the day before Mrs. Russell's death. With reference to the latter's condition on that day, this witness testified, "they said that she had been in a coma practically the whole week."

Mr. George E. Wilson, husband of the last-named witness, testified with reference to the decedent's condition on October 22 by saying, "Well at first glance I would not have recognized her. She did not have her glasses on, she neither had any set of teeth in. The last few years she has always had her glasses on except when her eyes ran and she wiped them. She was in no condition at all to say anything whatsoever; she was practically dead".

As heretofore indicated, there was testimony, including that of the attending physician of the testatrix, which was in direct conflict with the foregoing, but for the reasons hereinbefore stated we shall not narrate nor analyze the same.

[11] An unbroken line of decisions in this state hold that testamentary capacity exists if at the time of the execution of the will the testator is possessed of sufficient mental capacity to be able to understand the nature of the act he is performing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the instrument.

[12-14] While in the instant case, the testatrix was in feeble health, suffering from disease, aged and infirm, these facts are not sufficient of themselves to establish testamentary incapacity unless it be shown by a preponderance of the evidence that her condition of mind and body at the time of the execution of the will was such that she was unable to understand the nature and situation of her property and the disposing of it intelligently. In other words, it must be shown that her weakened and enfeebled condition had a direct influence upon the testamentary act. Section 20 of the Probate Code empowers every person of sound mind, over the age of 18 years, to dispose of his separate property by will. And the property being his to dispose of as he wills, he is not called upon to consult or satisfy the wishes or views of juries or courts. The presumption is always that a person was of "sound mind" at the time of execution of his will, and the burden therefore always rests upon the contestants to show affirmatively and by a preponderance of the evidence, the incapacity of the testator and the further fact that, because of the mental or bodily infirmities with which the testator was afflicted, he devised or bequeathed his property in a way which, except for the existence of the aforesaid infirmities, he would not have done.

In the case at bar it appears without contradiction that on October 11, 1944, the testatrix requested a bank official to have attorney Hasbrouck call upon her. It is also uncontradicted in the record that when he called on the testatrix she admitted him to her home and concededly was in full possession of her faculties, for at that time she gave the attorney minute, full and comprehensive instructions regarding the terms of the will which she desired him to prepare for her. The attorney made notes of these instructions, and the will here under attack was prepared in accordance with such directions of the testatrix.

[15] It should also be remembered that without contradiction it was established at the trial that on October 15, after decedent had taken her to bed, she advised the witness Wellman that she "had made a new will", gave him attorney Hasbrouck's profession card and asked him to see the attorney on the following morning and "have him come right out". There cannot be any question but what the testatrix then knew and understood what instructions she had previously given the attorney and what she proposed to do with her property. Neither can there be any doubt that the will executed on the following day, October 16, was prepared in accordance with her previously given instructions. It is not contended, nor was it shown at the trial, that the testatrix was afflicted with insanity or that she suffered from any delusions or hallucinations. Her claimed incompetency is predicated solely upon alleged physical infirmities occasioned by bodily illness. All of the testimony produced in behalf of the contestants, and hereinbefore narrated, concerned the condition of the testatrix before and after the execution of the will, and was admissible only as it tended to show that condition at the very time the will was made. True, some of the testimony was as to the

condition of the testatrix some two hours before or after the execution of the testamentary document, but as to the condition of the testatrix at the time of the execution of her will we have only the testimony of attorney Hasbrouck and his secretary. The testimony of the lawyer, whose professional duty it was to ascertain the condition of his client's mind, was that she was competent, and, "knew what she was talking about". There is also other direct and positive testimony that on the morning of October 16 between 10 and 12 o'clock, within which interim the will was signed, that the testatrix was mentally competent and of "sound mind".

[16] Before a solemnly executed will may be set aside, the claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed her property in a manner which, except for the claimed infirmities, she would not have done. Estate of Schwartz, 67 Cal. App.2d 512, 519, 155 P.2d 76, and cases therein cited.

[17] There is no such showing by substantial evidence in the instant case.

The evidence in the case with which we are here concerned is very much weaker than that held insufficient to justify the setting aside of the wills in other cases decided by the appellate courts of this state. It is unnecessary to do more than to cite the following authorities in support of this statement: Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Clark, 170 Cal. 418, 149 P. 828; Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Purcell, 164 Cal. 300, 305, 128 P. 932; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551; Estate of Schwartz, 67 Cal.App.2d 512, 155 P.2d 76; Estate of Kendrick, 130 Cal. 360, 363, 62 P. 605.

[18] The burden rested upon the contestants throughout the case. Taking all the foregoing evidence adduced by them as true, it falls far short of the requirements of the law as constituting satisfactory rebuttal of the inference of testamentary capacity at the time of the execution of the will, the existence of which is destroyed only when it is shown by substantial evidence that a testator was unable to understand and carry in mind the nature and situation of his property, and his relations to his relatives and those around him, incapable of understanding the act he is doing and the relation in which he stands to the objects of his bounty if any.

The foregoing conclusion at which we have arrived renders it unnecessary to discuss or decide other issues presented on this appeal.

Their day in court was had by all the parties to this proceeding and the litigation should be terminated without unnecessary delay and further expense. The motion of the proponents and appellants for a judgment notwithstanding the verdict should have been ruled upon and granted.

It appearing to us from a consideration of the entire record that the same fails to disclose any substantial evidence that at the time of the execution of the will the testatrix was of unsound mind, and that therefore a verdict should have been directed in favor of proponents and appellants, and that a motion therefor was made before the entry of judgment, the judgment rendered is reversed with directions to the court below to enter judgment in favor of proponents as prayed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

BENJAMIN et al. v. DALMO MFG. CO.* et al.

Civ. 13337.

District Court of Appeal, First District, Division 1, California.

June 30, 1947.

Rehearing Denied July 30, 1947.

Hearing Granted Aug. 28, 1947.

1. Appeal and error ⇐957(1)

District Court of Appeal could not interfere with trial court's judgment granting motion to vacate default and default judgment, unless the record indicated a clear abuse of discretion. Code Civ.Proc. § 473.

2. Appeal and error ⇐957(1)

An appellate court will be less inclined to reverse an order granting, than one refusing, an application to open a default. Code Civ.Proc. § 473.

3. Judgment ⇐136

The statute authorizing the vacation of a default is remedial and should be liberally construed and applied to the end that one who has a meritorious defense may be given an opportunity to present it. Code Civ.Proc. § 473.

4. Judgment ⇐139

A trial court's discretion to vacate a default is not arbitrary, but an impartial discretion, controlled by fixed legal principles, and is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice. Code Civ.Proc. § 473.

5. Appeal and error ⇐957(2)

If it is doubtful whether excuse offered by defendant in motion to vacate a default is sufficient or not, or whether the defense set up is meritorious, trial judge's judgment on the motion will not be disturbed on appeal, but if appellate court is satisfied beyond a reasonable doubt that trial court has come to an erroneous conclusion, appellate court will reverse. Code Civ.Proc. § 473.

6. Judgment ⇐153(1)

Trial court abused its discretion in setting aside a default and a default judgment allegedly entered through excusable neglect of defendant, where defendant, without explanation, delayed for 101 days in filing the motion to set aside the default judgment after learning that the default judgment had been entered against it. Code Civ.Proc. § 473.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action on common counts by David M. Benjamin and others, as trustee for Paullette Benjamin, against the Dalmo Manufacturing Company (a corporation) and First Doe and others, wherein a default judgment was entered against the named defendant. From a judgment setting aside the default and the default judgment, the plaintiffs appeal.

Judgment reversed.

Wolff & Wolff and Norman Sanford Wolff, all of San Francisco, for appellants.

Hilary H. Crawford and Walter Slack, both of San Francisco, for respondents.

BRAY, Justice.

The trial court set aside a default and a default judgment taken against defendant corporation. Plaintiffs appealed.

In an action on certain common counts, defendant corporation was served with summons and complaint by the delivery on December 10, 1945, to its president and secretary respectively, of copies in the County of San Mateo, the county of the corporation's residence. The action was brought in the City and County of San Francisco, hence the defendant had thirty days to appear. On the 36th day, January 15, 1946, defendant having failed to appear in the action, plaintiffs caused its default, and default judgment against defendant in the sum of $9,538.13 plus costs to be entered. On May 1, 1946—103 days from the entry of the default judgment, defendant served and filed notice of motion to set aside the default. This motion was heard on May 9th and forthwith granted by the court.

The motion was made on the grounds that the default and default judgment were entered through the "mistake, inadvertence, surprise and excusable neglect of defendant

* Subsequent opinion 190 P.2d 593.

and its officers, to-wit, its Secretary and its President." It was based on the affidavits of these two officers. The affidavit of the president set forth as the reason for the failure of the defendant to appear in the action, that upon receipt of the copies of summons and complaint by him and by the secretary, he directed the secretary, who besides being the secretary of the corporation was also his private secretary, to immediately forward the copies of summons and complaint to the corporation's attorney. On his information and belief the president stated that the secretary "misunderstood said directions so given to her by the affiant and understood affiant to say that she, [the secretary] * * * was to file said papers in the office files; that as a result of such misunderstanding the said * * * [secretary] failed to forward said summons and complaint" to the corporation's attorney; that the president knew nothing of the default until on or about January 16th when he received a letter from the corporation's attorney to the effect that the attorney had noticed that the preceding day a judgment had been taken against defendant. Then follows the usual affidavit of merits. The affidavit of the secretary was almost identical with that of the president, except that she stated positively rather than on information and belief, as did the president, that she misunderstood his directions and "understood him to say that affiant was to file said papers in the office files; that as a result of such misunderstanding the affiant failed to forward said summons and complaint" to the attorney. She, too, learned for the first time of the default on January 16th from the attorney's letter, and on January 17th forwarded the papers to him.

It will be noted that the default was known to the president and secretary of the defendant corporation the day after it was taken, and on the 2d day the copies of summons and complaint were forwarded to the corporation's attorney. No explanation, by affidavit or testimony, was made in the trial court of the failure to take any proceedings whatsoever to set aside the default until 101 days had elapsed from the time the papers were forwarded to to the attorney.

[1, 2] As the court granted the motion to vacate, this court cannot interfere "Unless the order of the trial court, and the record, indicate a clear abuse of discretion." Bonfilio v. Ganger, 60 Cal.App.2d 405, 410, 140 P.2d 861, 864. "The appellate court will therefore be less inclined to reverse an order granting, than one refusing, an application to open a default." Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426.

[3-5] Section 473, Code Civ.Proc., the section under which the motion to vacate was brought "is remedial and should be liberally construed and applied to the end that one who has a meritorious defense may be given an opportunity to present it. Nicoll v. Weldon, 130 Cal. 666, 667, 63 P. 63." "In California, following the general common law rule, to modify or vacate judgments during the term, the power of courts to control their judgments is regulated by statute specifying a time limit and leaving the matter to the discretion of the court in the interest of substantial justice to set aside its judgments. Code Civ.Proc., sec. 473; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155." Bonfilio v. Ganger, supra, 60 Cal.App.2d at page 410, 140 P.2d at page 864. "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in

a case like the present as in any other." Bailey v. Taaffe, 29 Cal. 422, 424.

In view of the foregoing rules, did the court here abuse its discretion in vacating the default? Had the defendant moved promptly upon the discovery of the default, while its excuse—that the copies of summons and complaint were inadvertently placed in the office files instead of forwarded to the attorney for action—is a bit on the weak side (see Slater v. Selover, 25 Cal.App. 525, 144 P. 298, where a partner served gave the papers to another partner with instructions to have the action defended, and the latter placed the papers in a pigeonhole in his desk and forgot them, the court holding that this excuse was not sufficient), still it is doubtful whether this court would be justified in holding that in setting aside the default there had been an abuse of discretion. But what of the 101 days of *unexplained* delay? Section 473, Code Civ.Proc., provides that application for relief *"must be made within a reasonable time,"* in no case exceeding six months after the judgment was taken. (Italics added.) No case has been cited by respondent, and our research has failed to disclose any, in which a court has set aside a default where there has been an unexplained delay of any length of time, let alone a delay of over three months. In all the cases we have found there has been some explanation, by affidavit or testimony, of the delay, and the court has determined whether such explanation was sufficient to justify the setting aside of the default. A somewhat similar delay in bringing the proceeding to vacate the default to that in this case occurred in Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 P. 934. In that case two months elapsed after the attorney learned of the default. The court there said, 151 Cal. at page 397, 90 P. at page 935: "The only excuse given for the delay in instituting proceedings to vacate the default and judgment was that given by the senior member of the San Francisco firm, to the effect that for over two months after learning of the default and judgment he was suffering from ill health, and was not in regular attendance at his office, and could only attend to his business occasionally; that thereafter he was engaged to the utmost of his capacity in court work and other business that needed prompt attention; that his partner was not familiar with the facts, and was not in the habit of handling litigation of this character; and that ever since the entry of default and judgment he had been in frequent correspondence with his associate in Los Angeles, and from time to time had explained to him that the papers for the motion were in course of preparation, and why they were delayed." In holding that this was not a sufficient excuse for the delay (it will be noticed that, contrary to the situation in our case, an excuse was offered for the delay), the court discussed the time limitation set forth in sec. 473, Code Civ. Proc., saying, 151 Cal. at pages 397, 398, 90 P. at page 935: "The six months' limitation there provided is simply a limitation upon the power of the court to grant any relief, regardless of any question either as to the merits of the application, or as to whether or not the application was made within what might be held to be a reasonable time under the circumstances. Under this statute, in addition to being made within the six months' period, the application must be made within 'a reasonable time,' and what is a reasonable time in any case depends upon the circumstances of that particular case." "The delay of nearly four months in the matter of making the application, after full knowledge of the facts, accompanied by the failure to give any intimation to the opposing party of an intention to so apply, certainly required some satisfactory explanation to warrant a conclusion that the application was made within a reasonable time."

Respondent relies upon John A. Vaughan Corp. v. Title Ins. etc. Co., 123 Cal.App. 709, 12 P.2d 117, to the effect that slight evidence only will be required to justify a court in setting aside a default where there is no showing that the other party has suffered any prejudice, or that injustice will result from a trial of the case upon its merits. However, in that case an explanation of the failure to appear was made which the court held to be sufficient to justify the setting aside of the default. The application to vacate the judgment was made and the judgment vacated by the

court the very day upon which the defendants first learned of the rendition of the default judgment against them. In laying down the rule above mentioned, the court says (123 Cal.App. at page 711, 12 P.2d at page 117) that it applies "Where a party in default *makes seasonable application* to be relieved therefrom." (Italics added.)

On page 4 of its brief respondent states: "Delay in commencing a proceeding to vacate a default will not prevent it being set aside, unless the plaintiff shows that he has been prejudiced by the delay. (Bonfilio v. Ganger, 60 Cal.App.2d 405, 407, 140 P.2d 861.)" However, the Bonfilio case does not go to the extent respondent claims for it. It does not hold that an unexplained delay in commencing a proceeding to vacate a default will be excused even though there is nothing to show that the plaintiff has been prejudiced by the delay. In the Bonfilio case the delay of almost six months was fully explained. The decision even holds (60 Cal.App.2d at page 408, 140 P.2d at page 863) that "From the facts and circumstances presented, the court was justified in concluding that there was an agreement to delay the prosecution of the action"; also (60 Cal.App.2d at page 409, 140 P.2d at page 864) that "the neglect was excusable by reason of a change in the attorney's office personnel, as averred in affidavits." The court uses this language, 60 Cal.App.2d at page 410, 140 P.2d at page 865: "There is no claim that appellant has been prejudiced as a result of the order vacating the judgment, or injured as a result of delay in the application therefor," but nowhere does it hold that the fact that it has not been shown that prejudice would result to the plaintiff, is sufficient basis for setting aside a default where the delay in bringing the proceeding to vacate is unexplained, or the excuse insufficient.

In Gorman v. California Transit Co., 199 Cal. 246, 248 P. 923, cited by respondent, the summons was served on the secretary of the defendant corporation who at once delivered it, with the file relating to the subject matter of the suit, to the manager of the traffic department with instructions to deliver them to the president of the corporation on his return to his office, which was expected within a few days. An employee, seeing the file on the traffic manager's desk, inadvertently took it from the desk and returned it to the compartment in which such files were kept. Default was taken at the end of the thirty days. Three days thereafter the company was notified of the default. Immediately the matter was referred to the attorney for the company who *promptly* brought a motion to vacate the default. Although the court held that the facts justified the setting aside of the judgment, it uses this language, 199 Cal. at page 248, 248 P. at page 924: "It is true that the discretion thus to be exercised by the trial court is not capricious or arbitrary, but is an impartial discretion which must be guided and controlled in its exercise by fixed legal principles, *and it should, therefore, appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed,* and that the inadvertence or neglect in question was not the result of mere forgetfulness on the part of the person or official charged with the duty of responding to the legal process in due time, but that such inadvertence or neglect was based upon other circumstances which would suffice to render the same excusable." (Italics added.)

In Downing v. Klondike Min. etc. Co., 165 Cal. 786, 134 P. 970, a clerk in the attorney's office mistakenly placed the copy of the second amended complaint in the files of another action. At the time there were five actions pending between the same parties, and the mistake was understandable and excusable. While the decision does not give the length of time elapsing between the discovery of the default and the application for relief, its failure to state it would indicate that the time was short.

In Morgan v. Brothers of Christian Schools, 34 Cal.App.2d 14, 92 P.2d 925, the attorney for the defendant believed that the school, which was close to the county line, was in a different county from the one in which the suit was brought, and even wrote to the plaintiff's attorney to that effect. On this mistaken assumption he believed that defendant had thirty days in which to appear. Default was taken at the end of ten days. Again here, the exact date when application for relief was made is not given, but it is obvious from a reading of the case

that it was done before the expiration of the thirty day period which counsel mistakenly believed he had within which to appear. This language from that case (34 Cal.App. 2d at page 18, 92 P.2d at page 928) is significant: "As shown by the numerous cases cited in respondent's brief, in the determination of motions to set aside defaults, mistakes of attorneys and those of parties to the action are measured by the same rules." If it be claimed that the 101 days' delay herein was the mistake of the attorney, the rule above mentioned requires that some explanation of the delay be given. The delay of the client up to the point where it forwarded the papers has been explained, but from that point on there is deep silence. In respondent's brief (p. 21) the following appears: "If there was a time lag, between the time the papers were forwarded to the attorneys and the time when the proceeding was commenced, it was no fault of the defendant. The Court must be well aware of the extraordinary burdens placed on lawyers during the war years, when so many of the members of the bar were away in war service. Few lawyers were not greatly pressed by the extra demands placed upon them in those trying times." True, the court is aware of the burdens placed on lawyers during the war years, yet there is not one word in this case that the failure to act within the 101 days was due to this cause. The above statement is merely a general one, and does not purport to claim that the delay here was caused by that situation. Moreover, the explanation for the delay should have been made at the hearing of the motion. If such were the situation, no reason is given why an application to either court or counsel for an extension of time was not made. While no counter affidavit was filed by appellants showing that any prejudice would have resulted to them from the setting aside of the judgment, none was required until defendant had at least made some excuse for the delay.

In the following cases it was held to be an abuse of discretion for the trial court to set aside the default.

In Bailey v. Taaffe, supra, the attorney claimed delay in answering was due to the fact that because of the complicated condition of defendants' title more time was required to prepare the answer than is required in ordinary cases, and also that the attorney was compelled during a portion of the time to be absent from town.

In Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863, the attorney thought he had filed the answer but inadvertently did not file it. The court there said, 106 Cal. at page 485, 39 P. at page 864: *"The reasons and the causes and the excuses for the inadvertence are the matters which concern the court, and these are not stated."* (Emphasis added.)

In Redding etc. Min. Co. v. National Surety Co., 18 Cal.App. 488, 123 P. 544, the attorney for defendant had been liberal and courteous in his treatment of plaintiffs' counsel and assumed default would not be taken against him.

Salter v. Selover, supra (the facts are heretofore set forth).

In Dunn v. Standard Acc. Ins. Co., 114 Cal.App. 208, 299 P. 575, the attorney for defendant made practically no showing at all for his failure to file answer after notice of overruling demurrer.

In Weinberger v. Manning, 50 Cal.App.2d 494, at page 498, 123 P.2d 531, at page 534, the defendant's failure to pay attention to the summons was "more reprehensible than that of one who is guilty of gross negligence only." This, of course, does not apply to the situation here, but the case is included in those in which it was held that the court abused its discretion in setting aside the default.

In Durbrow v. Chesley, 24 Cal.App. 416, 141 P. 631, defendant's attorney failed to file an appearance due to his claim that he had understood that this action was to be consolidated with other actions and to be tried as one action. There the notice of motion to set aside the default was filed the same day that the default was entered.

In Gill v. Peppin, 41 Cal.App. 487, 182 P. 815, the court held that no reasons were given for the alleged inadvertence in permitting the default to be taken.

In Ross v. San Diego Glazed Cement Pipe Co., 50 Cal.App. 170, 194 P. 1059, the attorney received service of the cross-complaint and instructed his stenographer to

place it in the office files in the action. Nothing further was done. The attorney died the day the default judgment was taken. The court said, 50 Cal.App. at page 173, 194 P. at page 1060: "The fact that by reason of the attorney's death it became impossible to obtain his explanation of his apparent negligence cannot be accepted as raising a presumption that such negligence was in fact excusable."

In the following cases the facts were held to show *inexcusable* neglect.

In Shay v. Chicago Clock Co., 111 Cal. 549, 44 P. 237, summons was served on the secretary of the defendant corporation on May 18th. He delivered it to the president of the corporation on May 2d. The following appears, 111 Cal. at page 551, 44 P. at page 237: "The president read the papers that day, and observed their date, but, without making any inquiry as to the time when they were served, kept them in his possession until after the default had been entered. He stated, at the hearing of the motion, that he did not send for his attorney, or send the papers to him, but kept them, thinking that his attorney would be in every day, and therefore waited until he should come, and that, when he did see him, the default had been entered."

In Coleman v. Rankin, 37 Cal. 247, defendant, upon receipt of copy of summons while in attendance as a witness in the district court, placed it in his hat and lost it.

In Williamson v. Cummings etc. Co., 95 Cal. 652, 30 P. 762, the attorney incorrectly marked on the copy of the summons the date of service as April 26, whereas the correct date was April 25th. Two days after default the motion to vacate the default was made.

[6] In view of the fact that no explanation whatever has been made of the 101 days' delay, we have no alternative other than to hold that vacating the default on the showing, or rather lack of showing, here made, constituted an abuse of discretion.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

80 Cal.App.2d 519

PEOPLE v. GHERNA.

Cr. 4097.

District Court of Appeal, Second District, Division 1, California.

June 23, 1947.

Hearing Denied July 22, 1947.

1. Automobiles ⇐339

Officers who were 15 or 20 feet away from police automobile when defendant drove it away without their permission were absent from the automobile within meaning of the section of the Vehicle Code providing that any person who takes a vehicle not his own in the "absence" of the owner, with intent either to deprive the owner thereof permanently or temporarily, is guilty of a felony. Vehicle Code, § 503.

See Words and Phrases, Permanent Edition, for all other definitions of "Absence".

2. Automobiles ⇐355(10)

Evidence was insufficient on which to base an inference that defendant, who took police automobile while officers were 15 or 20 feet away and drove the automobile 3.3 miles and then abandoned it, intended to deprive the officers either permanently or temporarily of the title to or possession of the automobile so as to sustain conviction under the Code. Vehicle Code § 503.

3. Criminal law ⇐494

Though trier of facts was under no compulsion to accept as conclusive opinions of psychiatrists that when defendant drove off in police automobile he was not responsible for his actions, such opinions were entitled to be considered where the prosecution failed to establish the specific intent required for conviction for violating the Vehicle Code. Vehicle Code, § 503; Pen.Code, § 1127b.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Edmund Albert Gherna was convicted of violating that section of the Vehicle Code making one who drives or takes a vehicle not his own, without the owner's consent and in absence of the owner, guilty of a felony, and from the judgment of convic-

tion and the order denying a motion for new trial, the defendant appeals.

Judgment and order reversed.

Samuel Schwartz, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant, under a plea of not guilty, was convicted by the court, sitting without a jury, of a violation of section 503 of the Vehicle Code, as charged in count two of the information. He was adjudged not guilty on count one which charged grand theft, and was sentenced to the county jail for one year; the execution of such sentence was suspended, and defendant was granted probation for a period of three years upon condition that he pay a fine of $200, refrain from the use of intoxicating liquor and remain out of places where liquor is served. Defendant had also pleaded not guilty by reason of insanity, which plea he withdrew after two psychiatrists appointed by the court to examine defendant as to his sanity had testified in his behalf.

The instant appeal is from the judgment of conviction and from the order denying his motion for a new trial.

It appears from the record that appellant and his cousin, Tony Joe Espinosa, were together during all of the evening of May 1, 1946, and had been at a bar where appellant drank some wine and beer. About 11:00 p. m. that night they were involved in an accident under the following circumstances: Espinosa was driving a tractor in which appellant and a young lady were passengers and they ran out of gas, whereupon Espinosa pulled to the side of Rosecrans Avenue about 100 yards east of Prairie Avenue in the County of Los Angeles, and the boys got out of the tractor leaving the young lady in the cab. As appellant was siphoning gasoline from the back tank to put in the side tank to enable them to get to a service station, an automobile collided with the rear of the truck and tractor knocking both boys up on the tank and the girl out of the cab. Shortly after the collision, State Highway Patrolmen White and Cooper arrived on the scene; made a routine check-up and left to call a tow truck. Said officers later returned to the scene of the accident and parked their car on the south shoulder of Rosecrans about 15 or 20 feet behind Espinosa's tractor and truck and headed in the same direction with the lights on floodlighting the accident scene and the red light pointing to the rear." At this time, appellant was "down at the corner" a couple of hundred yards away, trying to get a ride from a motorist. While the two officers, Espinosa and the driver of the car which collided with the tractor were standing talking at the scene of the accident (in the words of Espinosa), "all of a sudden a police car drove by, it was the same police car that the officers had just parked and it drove by with all the lights on it, everything, the headlights, and one of the officers said to the other, 'Isn't that our car?' And the officer said, 'I believe it is.' He said, 'What will we do?' And they stood sort of helpless for a moment"; that within two or three minutes the officers flagged down a passing automobile and started in pursuit of the police car, which they caught at Rosecrans and Figueroa three and three-tenths miles from their starting point. Officer Cooper testified that "the car was stopped at the intersection of Rosecrans and Figueroa when we came up with it * * * and a man in soldier's uniform was running away from the car"; that appellant was about 15 or 20 feet from the police car when the officers arrested him.

Appellant testified at his preliminary hearing that while he was siphoning gasoline somebody ran into the back of the tractor and knocked them all flying and from that time on he did not remember a thing; that if they said he did it, he guessed he did, but he did not remember anything about it. At the trial, appellant testified that he did not remember taking the police car; that he did not remember being arrested; that the last thing he remembered was siphoning gasoline, and that he regained his memory the next morning when he woke in the county jail and wondered where he was.

It is here urged that appellant's motion to set aside the information made pursuant to section 995, Penal Code, at the time of his arraignment in superior court, should have been granted, because the offense, if any, was a violation of section 499b of the Penal Code, a misdemeanor, hence the trial court was without jurisdiction. The basis of this contention is that, even though the information properly pleaded an offense under section 503 of the Vehicle Code by alleging that the taking of the police car was in the absence of the owner, nevertheless the evidence presented at the preliminary hearing showed that such taking was in the presence of the officers.

Section 503, Vehicle Code, reads as follows: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the State prison for not less than one year nor more than five years or in the county jail for not more than one year or by a fine of not more than five thousand dollars or by both such fine and imprisonment. * * *"

Section 499b of the Penal Code provides that "Any person who shall, without the permission of the owner thereof, take any aircraft, automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

In People v. Bailey, 72 Cal.App.2d Sup. 880, 882, 883, 165 P.2d 558, 559, a prosecution under section 499b, supra, wherein it was contended that said section had been repealed by implication by the enactment of section 503 of the Vehicle Code, it was held that "although there is a considerable overlapping" of the provisions of the two sections, "their identity is not so complete that section 499b is entirely repealed by section 503, or by any of its predecessors. * * * limiting our attention to automobiles, which are covered by both sections, and with which the complaint before us was concerned, we find the two sections do differ in at least two material respects. Section 503 is limited to cases where an automobile is driven or taken in the absence of the owner. Section 499b is not so limited; it applies, whether the taking was in the owner's absence or presence. The felony of section 503 is not committed, furthermore, unless the taking, or driving, was with the specific intent to deprive the owner of title or possession. People v. Zervas, 1943, 61 Cal.App.2d 381, 384, 142 P.2d 946; People v. Gibson, 1944, 63 Cal. App.2d 632, 637, 146 P.2d 971, while section 499b makes it a misdemeanor to take an automobile, without the owner's consent, although no intent to deprive the owner of title or possession motivates the taking. * * * One who takes an automobile in the presence of the owner, therefore, with the intention of temporarily using or operating it, without the owner's consent, violates section 499b, Penal Code, but not section 503, Vehicle Code. Moreover, whether the taking is or is not in the owner's presence, if the purpose of the taking is not to deprive the owner either of its title or of its possession, but is temporarily to use or operate it, without his permission, the taking is a misdemeanor, not a felony." See, also, People v. Ball, 204 Cal. 241, 267 P. 701.

It was testified by officer Cooper that "We were in the process of investigating a traffic collision approximately 300 feet east on Rosecrans, east of the intersection of Prairie Boulevard. We had the patrol car parked on the south shoulder, with the lights on floodlighting the accident scene, and the red light pointing to the rear.

"Q. How far was that car from the scene of the accident? A. Approximately 15 or 20 feet.

"Q. Did you there at that time discover that the car was missing? A. While we were in the process of interviewing witnesses the car was started up and driven past us.

"Q. After you saw the car was driven past you what, if anything, did you do with reference to the car? A. Flagged down an approaching car and asked the driver * * * if he would pursue the car. * * * we went in pursuit of the car * * * a distance of three and three-tenths miles, catching it at Rosecrans and Figueroa Streets. * * * When we came up to the car it was halted near the intersection on the highway and a man in soldier's uniform was running away from the car."

Officer White testified as follows:

"At the scene of the wreck we were investigating there, why, I had seen the defendant prior to the time that he walked away from the scene down to the corner and attempted to get a ride down there from a motorist, and when he came back apparently to the car as the car was driven away from the scene the headlights of the tow truck were pointed right at that patrol car, and I noticed him from a side view as he left the scene of the accident. Then we later apprehended him down at the corner with the car.

"Q. At the time you were chasing the car or the time the patrol car stopped did you observe who was driving the patrol car? A. No, he had left it at that time about 20 feet away.

"Q. Did you have some conversation with him on that occasion? A. I did. * * * I asked the defendant why he took the car, and he said he thought it was a good idea as nobody would give him a ride down at the scene of the wreck. I asked him if he had been drinking, and he said yes, and he said he thought it would be a good idea to take the patrol car for a ride."

Upon cross-examination, the court asked the witness the following questions:

"You apprehended the defendant where he left the car? A. Yes, sir.

"Q. Did you form an opinion at the time you apprehended him as to whether or not he was intoxicated? A. Yes, I did.

"Q. What was the opinion? A. That opinion was that he had been drinking. He was what we call a border line case, but I would not say I would lock him up for 502."

1 Bouv. Law Dict., Rawle's Third Rev., p. 92, defines "absence" as "the state of being away from a place"; and the word "absent" as "being away from; at a distance from; not in company with."

[1] The evidence in the instant case establishes that while the officers were present at the scene of the accident, they were away from, or absent from, the place where the car was parked. Therefore, both the taking and the driving of the car were done by appellant in the absence of the officers; hence, appellant's point that the superior court had no jurisdiction of the offense charged is without merit.

It is also contended that there is no evidence of felonious intent or any conscious intent to take the car.

In People v. Gibson, 63 Cal.App.2d 632, 635, 146 P.2d 971, 973, it is stated: "Under Section 503 of the Vehicle Code it is essential for the prosecution to prove as a necessary element of the offense charged that the defendant intended to deprive the owner of the possession of the machine. People v. Zervas, 61 Cal.App.2d [381] 142 P.2d 946, [949]; People v. Neal, 40 Cal.App.2d 115, 104 P.2d 555. While it is true that the intent may be inferred from the facts and circumstances of a particular case, there must be substantial evidence from which the intent may reasonably be determined. People v. Zervas, supra."

In People v. Zervas, supra, 61 Cal.App. 2d 381, 384, 142 P.2d 946, 947, the court stated: "While it is generally true that the question of felonious intent is for the trier of the fact, and may be inferred from all the circumstances (People v. Deininger, 36 Cal.App.2d 649, 98 P.2d 526; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770), there must be some reasonable basis in the evidence, for the inference. In prosecutions under § 503 of the Vehicle Code, while it is not incumbent upon the prosecution to prove an intent to steal the car, it is necessary to prove an intent to deprive the owner of the possession of the car. People v. Score, 48 Cal.App.2d 495, 120 P.2d 62. But that intent must be proved as a

fact. The rule is thus stated in People v. Neal, 40 Cal.App.2d 115, at page 117, 104 P.2d 555, 557: 'Under section 503 the crime is committed when the taking or driving of the vehicle is accompanied by a lack of consent from the owner and an intent to either permanently or temporarily deprive such owner of his title to or possession of such vehicle. The intent is made an affirmative element of the crime and consequently must be proved as a fact. The proof of intent as a fact was incumbent upon the prosecution and *the taking and abandoning of the car by appellant* did not necessarily furnish sufficient evidence from which the presence of a specific intent may have been inferred by the jury. * * *'" (Emphasis added.)

[2] In the instant case, appellant took the car, drove it three and three-tenths miles and then abandoned it. In our opinion, the evidence adduced at the trial herein was insufficient upon which to base an inference that appellant intended to "either permanently or temporarily deprive such owner" of the car here involved of its "title to or possession of such vehicle." People v. Zervas, supra.

Appellant's motion addressed to this court to augment the record was granted, and as a result the reports of the two psychiatrists, appointed to report to the trial court on the sanity of appellant, hereinbefore mentioned, are included in the record on appeal.

The report of Dr. Victor Parkin contains the following statement: "I talked to defendant at considerable length. I was impressed with his sincerity and believe that he is telling the truth regarding the period of amnesia following the accident. His psycho-neurotic experience overseas, during which he suffered from hysterical conversion shows clearly a predisposition to just such manifestations as the above described fugue. During the examination he was quite restless. It is my opinion that the defendant suffered such a marked alteration of consciousness as to have rendered him totally irresponsible for his behavior. He was therefore unable to form a conscious intent, and was totally devoid of the capacity to distinguish right and wrong, or to know the nature and quality of his acts."

Dr. Marcus Crahan reported, among other things, as follows: "His claim of memory loss from the point of his sucking gasoline from the tractor's tank until he became oriented at the County Jail, associated with a lump on the right side of his head and a painful ear, is very strongly suggestive of a concussion syndrone, due to a blow at the time of the original accident involving the tractor and automobile. His actions in the interim were, therefore, nonresponsible, since he had no insight into the differences between right and wrong, nor as to the nature or consequences of his alleged act at the time of its commission. A concussion state closely parallels the fugue of epilepsy, in which the subject automatically uses the instrument of greatest familiarity—in this instant, a motor vehicle."

[3] While it is true that the trier of fact is under no compulsion to accept as conclusive the opinion of an expert (Sec. 1127b of the Penal Code), in the circumstances here presented, where the prosecution has failed to establish the specific intent required for a conviction of a violation of section 503 of the Vehicle Code, such opinions are entitled to be considered.

No question has been raised on this appeal with respect to the allegation in the information that the California Highway Patrol, H. M. Cooper and C. R. White had title to and possession of the vehicle here involved. The probability is that said vehicle was *owned* by the State of California and that possession thereof was in the California Highway Patrol and its officers.

For the reasons stated, the judgment and order appealed from are, and each of them is, reversed.

DORAN and WHITE, JJ., concur.

80 Cal.App.2d 782

In re TRACY'S ESTATE.
LEHMAN v. TRACY.

Civ. 15792.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

1. Wills ⇐117

Where testatrix was bedridden and witnesses, in bedroom, watched testatrix sign her name to revocation of will and heard her declare that it was her signature and that she desired to revoke will, and, for want of a convenient place in bedroom to sign, at testatrix' direction took instrument into adjoining dining room and there signed as witnesses within view and hearing of testatrix, although she could not actually see the signing, and thereafter returned instrument to testatrix, witnesses had signed in "presence" of testatrix and the revocation was valid. Probate Code, § § 50, 74.

See Words and Phrases, Permanent Edition, for all other definitions of "Presence".

2. Wills ⇐117

Under the "conscious presence rule" a will, codicil, or revocation is executed in the "presence" of testator, although testator does not actually view the act of signing, provided witnesses sign within testator's hearing, testator knows what is being done and signing by witnesses and testator constitute one continuous transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Conscious Presence Rule".

3. Wills ⇐384

Where proponent of will alleged in her petition for probate thereof that contestant was decedent's surviving spouse, proponent was foreclosed from contending on appeal that there was no evidence to sustain finding of trial court in conformity with her own admission that contestant was an interested party.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding in the matter of the estate of Nell B. Tracy, also known as Nell Johnson, on the petition of Janice Lehman for admission of an alleged will to probate, contested by James Tracy. From an order denying the petition, proponent appeals.

Order affirmed.

Jensen & Jensen and William C. Jensen, all of Los Angeles, for proponent and appellant.

Edgerton & Colwell and J. Howard Edgerton, all of Los Angeles, for contestant and respondent.

McCOMB, Justice.

Conceded Facts

On July 18, 1945, Nell B. Tracy executed her last will and testament in which proponent, Janice Lehman, was designated a beneficiary. On September 30, 1945, Nell B. Tracy executed an instrument purporting to revoke her will. She died October 14, 1945.

The probate court held that the instrument which purported to be a revocation of decedent's will was executed in accordance with the requirements of section 74 of the Probate Code.

Questions

There are two questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Did the witnesses to the document which purported to revoke decedent's will sign it in the "presence" of decedent?*

[1] This question must be answered in the affirmative. The evidence discloses that at the time decedent signed the revocation she was suffering from cancer and confined to her home in a small bedroom about 9 by 12 feet in size. She stated to her nurse, Reba Thornton, and a neighbor, Leora B. Blot, that she desired to revoke her will and requested Miss Thornton and Mrs. Blot to sign as witnesses. They received the instrument from her after witnessing decedent sign the same, and hearing her declare that it was her signature and that she desired to revoke her former will. Since there was no place in the room where the witnesses could conveniently sign the revocation, decedent directed them

to take it into the adjoining dining room and sign on the table there. In accordance with these instructions the witnesses walked some twenty feet to the dining room table and affixed their signatures to the revocation. The testatrix could see into the dining room and hear the witnesses in conversation, but could not actually see the act of signing. After they had signed the document Mrs. Blot returned to the bedroom where decedent expressed her satisfaction at having revoked her will.

Section 74 of the Probate Code provides that a will may be revoked by a writing executed with the same formalities as are required for the execution of a will. Section 50 of the Probate Code provides as one of the requirements for the execution of a will that it be signed by at least two witnesses in the testator's "presence". "Presence" is defined in Webster's New International Dictionary, 2dEd., 1939, page 1955 thus: "The part of space within one's ken, call, influence, etc.; immediate nearness or vicinity of one; proximity."

[2] In a number of decisions where the meaning of the word "presence" has arisen in connection with the execution of wills, the courts have adopted what is known as the "conscious presence rule" which means that the testator need not actually view the act of signing by the witnesses, but that these elements must be present: (1) the witnesses must sign within the testator's hearing, (2) the testator must know what is being done, and (3) the signing by the witnesses and the testator must constitute one continuous transaction. In re Estate of Offill's, 96 Cal.App. 640, 647, 274 P. 623; In re Demaris' Estate, 166 Or. 36, 110 P. 2d 571, 585 et seq.; In re Lane's Estate, 265 Mich. 539, 251 N.W. 590, 592; Cook v. Winchester, 81 Mich. 581, 46 N.W. 106, 109, 8 L.R.A. 822; Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58, 60, 51 L.R.A. 642, 81 Am.St.Rep. 256; Kitchell v. Bridgeman, 126 Kan. 145, 267 P. 26, 27; Healey v. Bartlett, 73 N.H. 110, 59 A. 617, 618, 6 Ann. Cas. 413.

All of these elements were present in the instant case. The witnesses signed within the decedent's hearing, she knew what was being done, and the signing by the witnesses and decedent constituted one continuous transaction. It is our opinion that the finding of the trial court that the revocation was signed by the witnesses in decedent's presence is, under the foregoing rule, sustained by the evidence.

Second: *Is there substantial evidence to sustain the trial court's finding that contestant is an interested party?*

[3] This question must be answered in the affirmative. The proponent prepared, signed and filed a petition for probate of the alleged will wherein she alleged that contestant, James Tracy, was decedent's surviving spouse. She is therefore foreclosed from now contending that there was no evidence to sustain the finding of the trial court in conformity with her own admission.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 655

FOLGER v. RICHFIELD OIL CORPORATION et al.

Civ. 15534.

District Court of Appeal, Second District, Division 2, California.

July 1, 1947.

1. Negligence ⇐83

The doctrine of "last clear chance" applies only when evidence shows that plaintiff by his own negligence has placed himself in position of peril from which he cannot escape or of which he is obviously unconscious, that defendant saw or knew the danger which beset plaintiff, or knew facts from which a reasonable person would believe plaintiff to be in peril, and that, while able by use of ordinary care to avoid injuring plaintiff in his perilous

position, defendant fails to use such care and injures plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Automobiles ⇐227(3, 5)

In exceptional circumstances only is the "last clear chance" doctrine applicable to action arising from collision of two moving vehicles, especially where injured party drove rapidly, since the act which under such conditions created peril must of necessity have occurred practically simultaneously with the collision.

3. Automobiles ⇐227(3, 5)

If plaintiff and defendant could have avoided automobile collision, doctrine of last clear chance would not apply.

4. Negligence ⇐83

The last clear chance doctrine does not apply where, by their mutual carelessness, injury ensues to one of two parties, both of whom are contemporaneously and actively at fault down to moment of injury.

5. Automobiles ⇐227(3, 5)

A motorist who collided with truck at night at intersection, in order to invoke application of doctrine of last clear chance must have been so entrapped that by no reasonable effort could he save himself, and evidence must show that, after truck driver discovered motorist's peril, truck driver had sufficient time to avoid the collision by exercise of ordinary care.

6. Automobiles ⇐146

A motorist on highway is presumed to be in possession of normal faculties and to have seen that which was within range of his vision, and driver of another vehicle may presume that such motorist will perform duties imposed by law and by desire for self-protection.

7. Automobiles ⇐227(5)

In action for injuries to motorist who, while recklessly proceeding at excessive speed on popular highway on foggy night, struck rear of truck making left turn at intersection when by exercise of reasonable care motorist could have observed the truck and have avoided the collision, doctrine of last clear chance was not available to motorist.

8. Automobiles ⇐227(1)

In determining applicability of last clear chance doctrine, of driver of truck with which motorist collided on foggy night at street intersection might presume that motorist would not continue his approach until he arrived at the truck, where it was obvious that motorist could with the least care have avoided the impact.

9. Automobiles ⇐227(3)

A motorist who, proceeding recklessly at excessive speed on foggy night, collided with rear of truck making left turn at street intersection, could not invoke last clear chance doctrine on theory that truck driver could have cleared the intersection more quickly had he not continued in compound low gear, where truck driver knew that by proceeding in any higher gear up incline he would incur more likelihood of killing his motor.

10. Evidence ⇐539, 553(4)

In action for injuries to motorist who struck rear of truck making left turn at street intersection, testimony of experienced truck driver that proper practice in driving truck with compound low gear is to start in ordinary low when on level ground, and that it was improper to use compound low except when truck was heavily loaded or was started on incline, was properly rejected where witness had never driven a truck of same capacity as that involved with compound low gear and evidence showed that truck driver was heading for an upgrade as he crossed the center.

11. Trial ⇐260(1)

Requested instructions covered by instructions given were properly refused.

12. Appeal and error ⇐1078(4)

Where no argument was presented with regard to refusal to give requested instruction, assignment with reference thereto was abandoned.

13. Appeal and error ⇐1066

In action for injuries to motorist who struck rear of truck on foggy night, giving instruction on subject of imminent peril was not prejudicial on ground that truck

driver "was guilty of conduct clearly amounting to negligence", where, if truck driver was negligent, instruction could do no harm since it began with words "A person who, without negligence on his part, is suddenly confronted with peril."

14. Appeal and error ⇐901

The burden of convincing reviewing court that an order granting new trial is erroneous rests upon appellant.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Glen A. Folger against Richfield Oil Corporation and Edward A. Raines to recover for injuries sustained when plaintiff's automobile collided with a truck owned by first-named defendant and driven by last-named defendant. From an order granting plaintiff's motion for new trial, after the jury found for defendants, defendants appeal.

Reversed.

James V. Brewer, of Los Angeles, for appellants.

Kenneth Sperry, of Long Beach, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the court erred in granting plaintiff's motion for a new trial by reason of its failure to instruct the jury with respect to the doctrine of the last clear chance.

The complaint alleged that while plaintiff was proceeding in his sedan northward on Cherry avenue in Long Beach at 9:14 p. m. on December 17, 1944, defendants so negligently operated their two-ton flat-bed truck as to cause it to collide with plaintiff's car at the intersection of Wardlow road, and that as a proximate result of such negligence plaintiff's automobile was destroyed and he suffered severe personal injuries to his damage. The negligence and damage were denied and pleas of unavoidable accident, contributory negligence, and plaintiff's intoxication were alleged. After a jury had rejected his demands plaintiff moved for a new trial. It was granted "on the ground of error in law in that the court failed to give plaintiff's requested instruction with reference to the doctrine of the last clear chance." From such order comes this appeal. That the order is erroneous will presently appear.

Immediately prior to the collision plaintiff and Ann Provencher, his fiancee who subsequently became Mrs. Folger, proceeded northward on Cherry avenue in separate automobiles. By arrangement he led the way to assure her safety through the fog. He kept her within his vision by watching her headlights through his rearview mirror. If they disappeared he slowed down until she came near. Having proceeded north on Cherry avenue they arrived at Wardlow road which extends east and west. Plaintiff was familiar with the intersection from his long residence in that vicinity. He testified that by reason of the fog he could see the headlights of passing cars at no greater distance than 75 feet and he was guided solely by the white stripe in the center of the avenue along which he proceeded to travel at about the same speed until he collided with the truck. In the center of Cherry is a concrete island which extends south from the south line of Wardlow road, a distance of about 75 feet. At the south end of the island amber blinker lights flicker in the darkness as an aid to the motorist. Plaintiff observed them when 50 feet away, swerved as a signal to Miss Provencher but returned to the white stripe. At the center of Wardlow road his sedan struck the rear two feet of the truck which had almost completed a left turn from its westerly course into Cherry avenue. So violent was the collision that it destroyed the front end of the sedan, while the rear end of the truck was knocked about six feet, the two men in the driver's cab were jostled, and their 600 pounds of tools were scattered on the avenue. Immediately prior to the collision plaintiff did not swerve or apply his brakes.

Defendant Raines was driver of the truck. He and his companion, foreman Hahn, both testified that they could see headlights about 1000 feet distant. They were enclosed in the cab but the windshield wiper was in action. The headlights, the tail lights and two clearance lights were lighted. A street light over the intersec-

tion illuminated the area. When he arrived at Cherry avenue Raines stopped long enough to allow several automobiles to pass, going in both directions. Having seen the lights of plaintiff's sedan over 400 feet to the south on the avenue he started in compound low and arrived at the center going at a speed of from three to five miles an hour. He had almost completed the turn when he observed the sedan about 200 feet away and not until then did he realize its speed which he estimated to be about 50 miles an hour. In order to avoid the truck's being hit Raines increased his speed to five to seven miles an hour which was its limit in compound low. He had driven trucks for many years. Because the truck was new he feared that by shifting gears he might kill the motor. There was no other traffic to interfere with plaintiff's swerving from the white stripe. In view of such facts would the trial court have been justified in giving the instruction on the last clear chance?

[1, 2] No criticism is made of the contents of the instruction proposed. It contains the six elements essential to its correctness. But the doctrine applies only when the evidence shows (1) that the plaintiff by his own negligence has placed himself in a position of peril from which he cannot escape or of which he is obviously unconscious; (2) that the defendant, saw or knew the danger which beset the plaintiff, or knew facts from which a reasonable person would believe the plaintiff to be in peril; and (3) that while able, by the use of ordinary care to avoid injuring the plaintiff in his perilous position, defendant fails to use such care and injures plaintiff. Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915; Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36; Darling v. Pacific Electric Railway Co., 197 Cal. 702, 707, 242 P. 703; Poncino v. Reid-Murdock & Co., 136 Cal.App 223, 226, 28 P.2d 932. In exceptional circumstances only is the doctrine applicable to an action arising from a collision of two moving vehicles. This is especially true in a case in which the injured party, as in the instant action, drove rapidly, for the reason that the act which under such conditions created the peril must of necessity have occurred practically simultaneously with the collision. As a result of such occurrence at about the time of defendant's discovery of plaintiff's peril it cannot be said that the defendant had a last clear chance to avoid the accident after discovering the plaintiff's peril. Johnson v. Sacramento Northern Railway, 54 Cal.App. 2d 528, 532, 129 P.2d 503; Poncino v. Reid-Murdock & Co., supra.

[3-6] If each of them could have avoided the collision the doctrine would not apply. Palmer v. Tschudy, supra. Clearly, plaintiff could have avoided it by stopping his sedan or by veering to the right or by timing his movement so as to allow the truck to escape. But continuing as he did up to the instant of the injury he cannot establish the liability of defendants. Conceding defendants' negligence, arguendo, the doctrine "has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury." Palmer v. Tschudy, 191 Cal. at page 701, 218 P. at page 38; Young v. Southern Pacific Co., 189 Cal. 746, 755, 210 P. 259. If a plaintiff cannot recover when both parties by the exercise of ordinary care could have avoided the accident, then surely he cannot recover when his own sole negligence in driving rapidly upon a boulevard of much vehicular traffic in the foggy blackness continued to the moment of impact with the truck which was in such a position that a collision could have been avoided by his exercise of ordinary care. McHugh v. Market Street Railway Co., 29 Cal.App.2d 737, 85 P.2d 467. He was conscious of the intersection of which he had notice by the orange blinker lights 90 feet south of the point of collision. By reducing his speed to conform with the lack of visibility or by veering three feet when the truck hove into view he could have avoided the crash. In order for him to invoke the application of the doctrine of last clear chance he must have been so entrapped that by no reasonable effort could he save himself. Sadler v. Benson, 109 Cal.App. 405, 407, 293 P. 126. Also, the evidence must show that after the truck driver discovered plaintiff's peril he had sufficient time to avoid the collision by the exercise

of ordinary care. Pearce v. Elbe, 98 Cal. App. 101, 104, 276 P. 389. A motorist on the highway is presumed to be in possession of normal faculties and to have seen that which was within the range of his vision, and the driver of another vehicle has the right to presume that such motorist will perform the duties imposed by law and by the desire for self-protection. Rasmussen v. Fresno Traction Co., 138 Cal.App. 540, 546, 32 P.2d 1091.

The evidence in the instant action clearly shows that plaintiff was continously negligent for some 500 feet prior to his striking the truck. Disregarding his excessive speed, asserted by Raines and Hahn, the damage to his sedan and to himself indicates a dangerous rate of movement for a motorist in a foggy night on a much traveled boulevard. In approaching the intersection he did not slacken his speed or look out for other cars but continued anxiously to watch his rearview mirror and to think only of the welfare of Miss Provencher. He argues that he was unable "to see directly ahead with his headlights on because of the blinding effect of the refracted rays from the headlights which shine back in his eyes", and that the driver of the truck was conscious of such effect of the headlights. But how could that gentleman have known that plaintiff did not see the 22-foot truck, or that he would continue at the same speed on entering the intersection, or that he would continue to hug the center stripe? Raines knew that the light above the intersection illuminated the street and that all his lights were burning as he moved into Cherry avenue at a slow speed when plaintiff's headlights were 400 or 500 feet to the south. But he did not know (1) that plaintiff was watching the avenue in the rear of his sedan; (2) that he was either ignorant of or could not see the intersection; (3) that he could not see the courtesy lights or the bulk of the truck 40 feet away, or that he could not stop his sedan within that distance; (4) that he would not veer to the right to avoid a crash when the road was clear of traffic. Raines gave Officer Haynes at the scene of the accident substantially the same report as that given in his testimony, and the officer testified that the courtesy lights could be seen in the fog at a distance of from 40 to 60 or 75 feet. A fireman testified that the street light was visible from his station 200 feet from the intersection. Plaintiff knew the avenue and the intersection well and that they were much traveled. He had made a special effort to locate the island in order to guide Miss Provencher to the right of it.

If he could see the blinker lights 50 feet ahead, if by the exercise of ordinary care he could have seen the truck's courtesy lights at a distance of "from 40 to 60 or 75 feet," and if its headlights were bright and the street light was visible 200 feet, there was no reason why the truck driver should not have relied upon plaintiff's stopping his sedan in time or upon his bearing to the right upon the open easterly side of the 82-foot avenue. Certainly he would have done so but for the attention he was paying to the safety of the young lady who was his chief concern—of which fact defendant Raines was wholly ignorant. And if he was traveling at 20 miles an hour as he testified, one glance at his mirror consumed the time within which he traveled 30 feet while he could in the same time have brought his car to a standstill and thereby have extricated himself from danger.

[7, 8] In view of the situation presented by the proof the doctrine of the last clear chance was not available to plaintiff. Wallis v. Southern Pacific Co., 184 Cal. 662, 673, 195 P. 408, 15 A.L.R. 117; Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 627, 107 P.2d 417; Lasch v. Edgar, 46 Cal.App.2d 726, 728, 116 P.2d 949. Until the moment of the impact defendant Raines properly relied upon plaintiff's continuing duty to observe the presence of the truck and not to collide with it. Also, in the exercise of reasonable care he might presume that plaintiff would not continue his approach until he arrived at the truck, since it is obvious that plaintiff could with the least care have avoided the impact. Young v. Southern Pacific Co., 182 Cal. 369 380, 190 P. 36; Behne v. Pacific Electric Railway Co., 30 Cal.App.2d 437, 442, 86 P.2d 843; McHugh v. Market Street Railway Co., supra; Korchak v. Pacific Electric Railway Co., 9 Cal.App.2d 89, 93, 48 P.2d 752; Thompson v. Los

Angeles & San Diego Beach Railway Co., 165 Cal. 748, 134 P. 709; Haber v. Pacific Electric Railway Co., 78 Cal.App. 617, 248 P. 741; Sichterman v. R. M. Hollingshead, 94 Cal.App. 436, 271 P. 372, 1111. Nothing in the circumstances surrounding the accident would have indicated to a reasonably prudent man that plaintiff would drive directly into the truck with undiminished speed or that he was in any danger if he exercised ordinary care. The defendants were therefore not responsible for plaintiff's safety. Richardson v. Ribosso, 120 Cal.App. 641, 643, 8 P.2d 226; Sichterman v. R. M. Hollingshead, 94 Cal.App. at page 491, 271 P. 372, 1111.

The contention of plaintiff is that the truck was moving so slowly that its courtesy lights could have been mistaken for the amber light on the north side of Wardlow road; that both Raines and Hahn observed that the sedan while still 200 feet south was coming at such a dangerous speed that it would probably strike the rear end of the truck; that the sedan appeared to Raines to be following the white stripe and did not slacken its speed within the last 200 feet; that by reason of these facts the truck driver knew, or by the exercise of ordinary care should have known, that plaintiff was in a position of peril; that he was totally unaware thereof; that Raines had sufficient time to avoid the accident by merely sounding his horn. He supports his contention with the statement that Raines admitted that he was of the belief that plaintiff's sedan would probably collide with the rear end of the truck while plaintiff was still 200 feet south and by the common knowledge that a person driving in a dense fog is unable to see unlighted objects on the road ahead; that such drivers frequently steer their courses by watching the center white stripe. In support of such contention plaintiff cites Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Paolini v. City and County of San Francisco, 72 Cal.App.2d 579, 584, 587, 164 P.2d 916; Jones v. Yuma Motor Freight Terminal Co., 45 Cal.App.2d 497, 114 P.2d 438. In view of the facts heretofore recited such authorities are not applicable. If plaintiff did not in fact see the courtesy lights, by the exercise of reasonable care he could have seen them while 50 feet away, and traveling at 20 miles an hour he could have avoided the collision. In the exercise of ordinary care the truck driver was not required to expect that plaintiff would sleep from the time he saw the blinker lights on the island or otherwise fail to observe that the truck was already in the highway.

Plaintiff especially emphasizes as decisive of this appeal Gillette v. City and County of San Francisco, supra, and Girdner v. Union Oil Co., supra. Neither case lends any support to his argument. In the case of Gillette he was standing in a position of danger with his back toward the approaching street car, unaware of his peril and in plain view of the motorman. From such facts it was a fair inference that the motorman must have seen that Gillette was not conscious of his danger and could have avoided striking him by simply sounding his bell or stopping his car. His negligence in failing to do either was the proximate cause of the accident, making applicable the rule of the last clear chance. In the case of Mr. Girdner, he was in a touring car enclosed with side curtains. He had just passed over a Southern Pacific track and upon entering the highway was driving at about 12 miles an hour. Having seen no traffic coming from the north he looked to the south, and while so looking the truck traveling south at a speed of 20 miles an hour and without the driver's giving any warning of its approach struck the touring car and shoved it about 15 or 20 feet. The truck could have been stopped within twenty feet. Its driver saw that Girdner was unconscious of his peril; that he could not escape from it by the exercise of ordinary care; that by the exercise of ordinary care it would have appeared to the truck driver that Girdner was unconscious of the impending danger and was unable to escape throught the exercise of ordinary care; that after making such observations the driver had a clear opportunity to avoid striking Girdner by the exercise of ordinary care and did not avail himself of such opportunity but negligently proceeded to run down the touring car. While the Girdner and Gillette cases and others hold a motor-

ist to a stricter accountability when it is clear that he was in a position to avoid the accident there is nothing in any of the cases cited which suggests the liability of the driver of a truck which is struck on its side by the driver of another car whose driver has brought on the accident by recklessly proceeding at excessive speed on a popular highway on a foggy night, when by the exercise of reasonable care he could have observed the truck and have avoided a collision.

[9] Plaintiff contends that defendant Raines could have cleared the intersection more quickly had he started out in second gear; that he started in compound low and continued without shifting to low or intermediate until the collision; that he was thus negligent in failing to act when confronted with the last clear chance. This is not a sufficient answer to his own continuing negligence. Raines knew that by proceeding in any higher gear up the incline on the avenue he would incur more likelihood of killing his motor. It was his duty to exercise his own judgment as he proceeded, and not to act as he might have conceived another would act.

[10] Plaintiff contends that other errors were committed to his prejudice and that by reason thereof the order should be affirmed. After proving by Raines that he started to make the turn into the avenue in compound low gear, he called the witness Beseau, an experienced truck driver, and by questions offered to show by him that the proper practice in driving a truck with compound low gear is to start in ordinary low when on level ground and that it is improper to use compound low except when the truck is heavily loaded or is started on an incline. The testimony was rejected on the ground that it was not material. The witness had never driven a truck of the same capacity as that here involved with the compound low gear. Proper practice in driving one size or type of truck would not necessarily be proper practice in operating a different size or type. Furthermore, while the question assumed starting on level ground, the evidence was that Raines was heading for an upgrade as he crossed the center.

[11, 12] Error is assigned by reason of the court's refusal to give plaintiff's proposed instructions A, B, C, F, G and H. Requested instruction A defined contributory negligence as consisting of two elements, namely (1) plaintiff's negligence and (2) that it must have contributed as a proximate cause to his injuries. His requested instruction B places the burden of proving plaintiff's contributory negligence upon defendants and declares that a person who himself is exercising ordinary care has a right to assume that others will do likewise. Both of such instructions had been properly covered by the court's general charge taken in the main from "California Jury Instructions Civil." * His requested instruction C was with reference to the duty of a motorist approaching a through highway to stop and yield to one approaching so closely as to constitute an immediate hazard. This was likewise covered by the court's reading sections 552 and 577, Vehicle Code, and at the same time the jury were instructed that a violation of section 552 is negligence and that one who is exercising ordinary care may assume that others will do likewise and may act upon that assumption. Baji, 138. Requested instruction F was also covered by the court's reading section 577. Requested instruction G was given. Inasmuch as no argument is presented against requested instruction H it is assumed that the assignment with reference to it is abandoned.

[13] Contention is made that the instruction given on the subject of imminent peril was error. Appellant bases his argument upon the assumption that the truck driver "was guilty of conduct clearly amounting to negligence." The instruction is Baji, 137, and it applied to the situation presented by the evidence. If Raines was negligent, as contended by respondent, the instruction could have done no harm, for it begins with these words: "A person who, without negligence on his part, is suddenly confronted with peril."

[14] Finally, it is claimed that defendants have failed to demonstrate that the

* These forms are approved. The volume is commonly referred to as Baji.

order on appeal was erroneously made, citing 2 Cal.Jur. 905 to the effect that the granting of a new trial rests largely in the discretion of the trial court and is not to be disturbed except upon showing of a manifest and unmistakable abuse. As certain as is the rule that the burden of convincing the reviewing court that such an order is error rests upon the appellant is the fact that in this action it has been successfully demonstrated that the court improperly made the order. It is not only consonant with the traditional doctrine that litigation must have an ending, but unless prejudicial error appears clearly to have been committed by the trial judge it is conducive to the public welfare that controversies once fairly tried should be heard no more.

The order is reversed.

McCOMB, and WILSON, JJ., concur.



80 Cal.App.2d 639

DYKE v. ZAISER et al.

ZAISER et al. v. DYKE.

Civ. 3637, 3638.

District Court of Appeal, Fourth District, California.

June 30, 1947.

Rehearing Denied July 19, 1947.

Hearing Denied Aug. 28, 1947.

1. Fraud ⇐11(1)

An expression of an opinion which is untrue and which is not honestly entertained, and which, when considered with other inducements, proves to be false, is material to the transaction, and may constitute fraud.

2. Fraud ⇐11(1)

An expression of opinion may amount to fraud if it is accompanied by active misrepresentations or concealment, or relates to a subject as to which the parties have no knowledge or means of ascertaining the truth.

3. Fraud ⇐23

Generally, one has a right to rely on statements of material facts essentially connected with substance of transaction, where one of parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that facts are not, and cannot be expected to be, within the first party's knowledge.

4. Contracts ⇐94(1)

The falsity of one material representation is sufficient ground for rescission of a contract.

5. Landlord and tenant ⇐34(1)

Concessioner who leased amusement center from city councilman as an individual was not precluded from seeking rescission of lease for alleged fraud by councilman in leasing center with knowledge that premises were to be raided by officials, because of concessioner's experience and knowledge of the nature of the machines operated.

6. Landlord and tenant ⇐28(1)

One seeking to lease amusement center to another and venturing to express opinion as to past and prospective income was bound to make an honest statement of opinion.

7. Landlord and tenant ⇐28(1)

A city councilman, who as an individual sought to lease amusement center to another knowing that center was about to be raided by public officials, was guilty of actionable fraud in expressing opinion during course of negotiations regarding prospective income.

8. Sales ⇐38(5)

Generally, a vendor is not obligated to speak concerning the thing which he would sell but if he undertakes to do so, he must not only speak the truth in all he says but must tell every material fact and not conceal any facts within his knowledge which might materially qualify such statements as he may have made.

9. Landlord and tenant ⇐28(1)

City councilman seeking as an individual to lease amusement center to another,

if he had no guilty knowledge of proposed raid by police officers when negotiations started and made honest expressions of opinion at that time of contemplated income, was guilty of fraud in remaining silent after being appraised of impending raid by the chief of police.

10. Fraud ⇐58(1)

Generally, fraud may be established by circumstantial evidence.

11. Fraud ⇐58(1)

Proof indicative of fraud may be given by inference, by circumstances surrounding the transaction, and the relationship and interest of the parties.

12. Landlord and tenant ⇐28(1)

Evidence sustained rescission of lease for fraud of lessor in expressing opinion of contemplated income with knowledge of facts which would adversely affect substantially that income in the future.

Appeals from Superior Court, San Diego County; Elmer W. Heald, Judge assigned.

Action by John R. Dyke against Albert Zaiser and Carrie Zaiser to rescind a lease for fraud, tried together with an action by Albert Zaiser and Carrie Zaiser against John R. Dyke for rents due under lease. Judgments in favor of John R. Dyke, and Albert Zaiser and Carrie Zaiser appeal.

Affirmed.

Miller, Higgs, Fletcher & Glen, of San Diego, for appellants.

Rorick, Cottingham & Moore, of Oceanside, and Monroe & McInnis, of Los Angeles, for respondent.

GRIFFIN, Justice.

On March 20, 1945, plaintiff and respondent John R. Dyke brought an action for fraud against defendants and appellants, in case No. 4 Civil 3637, to rescind a lease in which appellants leased a store in Oceanside to respondent.

On May 18, 1945, plaintiffs and appellants Albert Zaiser and wife brought an action against defendant and respondent for rents due under the lease, 4 Civil 3638.

The two actions were tried and considered under the same evidence and two separate judgments were rendered. The trial court gave judgment for cancellation of the lease, the return of an $8,000 advance rental paid under its terms less certain credits, and denied appellants any relief under their action for rents. By stipulation the parties agree that the same record may be considered on these two appeals.

Zaiser had leased a store-room (60 x 100 feet) in connection with his contracting business, at a reported price of $75 per month. He was also a City Councilman in Oceanside. In November, 1944, during the war activities in that district, he conceived the idea of using the store room as an amusement center and on November 18, 1944, he sublet space therein to operators of various mechanical amusement devices and other concessions. The space rented was occupied by approximately 32 separate concessions, including a hamburger stand, ice-cream stand, Digger machines, and Lite-a-Line machines. The latter machine is a pin-ball type of game with 25 separate units, and from one to 25 people can play it at one time. Respondent Dyke had a lease on certain space for two concessions. One consisted of a number of Lite-a-Line games, which games were invented by him, and the other was occupied by "Digger machines." By his lease he was to pay appellant $100 per week on one concession and $50 per week on the other. The rental totaled about $650 per month. These written leases were drawn by a Mr. Cottingham, as attorney for Mr. Dyke, and they provided that in case it should be determined that the operation of the machines was illegal in the City of Oceanside the leases should automatically terminate. According to the testimony of one witness (Bailey) Zaiser listed the rentals he was receiving from the different concessions and that they totaled "approximately $2700, not counting Mr. Dyke's concessions." Part of the space in the store building was not utilized.

The concessions owned by Dyke, who lived in San Gabriel, were operated for him by Mr. Bailey, on a commission basis.

Dyke and Bailey had had considerable experience in the operation of amusement centers. Appellants claimed to have little knowledge thereof. In the early part of December, 1944, Zaiser came to the store inquiring for Dyke and told Bailey that he had an opportunity to lease the entire amusement center to one Nathanson, and would like to discuss with Dyke the possibility of leasing it to him because he would rather do that than lease it to Nathanson. Bailey phoned Dyke in Pasadena. Dyke came to Oceanside on December 12th. According to Bailey, Zaiser wrote on an envelope and there itemized the revenue he was getting from the concessions, as above related. He represented it at $2700 per month, not counting Dyke's concessions, and Bailey then testified that Zaiser said: "If a man like Mr. Dyke or myself—familiar with the show business or amusement business, could take care of it and take it over, we could possibly raise the income quite a bit. * * * He showed it to where he could raise it himself to $3500 or $5000 a month." He further testified that Dyke and Zaiser talked two or three different nights about the lease and on Thursday they came to some oral agreement; that on Friday Zaiser came in and said he had a better offer from a competitor at a rental of $2000 per month, and if Dyke would meet his offer he would let Dyke have it; that a check for $2500 was given Zaiser that night; that Zaiser then made arrangements to go to the office of Mr. Cross, his attorney, the next morning to have the lease drawn (Mr. Cross was also the City Attorney); that the next morning (Saturday) they met at the appointed place; that Mr. Cross inquired as to what they wanted in the lease and Zaiser said: "I want it fixed so that no matter what happens I can get my money"; that Dyke left for San Gabriel and was supposed to come back the following Monday about noon but had car trouble and did not arrive until about 11 o'clock at night; that Zaiser was waiting for him at the amusement center with the lease and said to Dyke: "If you will sign the lease, give me the check, and we will have the deal all settled"; that Dyke signed it and gave Zaiser an additional check for $5000. An additional credit for $500 was allowed Dyke for advance payments on the concessions. The lease called for a payment of $36,000 for 18 months rental. $8,000 was payable in advance and that sum paid the first two months and last two months rent. On the following day, Tuesday, December 19th, Dyke came to the amusement center at about 5 p. m. to take over the business. One-half hour later, the Chief of Police of Oceanside, accompanied by a Deputy Sheriff, came in and ordered the closing of almost all of the concessions containing the games. Out of the 32 concessions 22 were ordered closed. As soon as the other operators of concessions in the building were informed of this, almost all of them moved out their equipment. The result was that the crowds that had frequented the amusement center diminished and finally every concessioner left except the operator of the ice-cream stand. The total income from the concessions after the sale and up to July, 1945, averaged about $410.87 per month. After deducting the cost of operation the net profit, not including $2000 per month rental, for the eight months period was about $384.12 per month.

[1] In the latter part of January, 1945, Dyke received an anonymous letter indicating that Zaiser had known in advance, prior to the signing of the lease, that the officials were going to close the concessions. The letter is cast in the form of a two-act playlet, indicating that a "local business man" was elected to an official position in the City where the plot was laid; that the scene opened in the living room of the home of the local business man. The lessee was described as "Mr. Sucker." The local business man told his friend that "I put over some other deals * * * but the best one was this last one I put over * * * wherein I cleaned up $8,000 cash in one lump and got $24,000 more a coming, and then I still got the best racket in town, all thriving and making money for me for years to come." He summarized the transaction wherein he started out to exact $200 per month from "Mr. Sucker" and finally got him to sign for $2,000 a month, "but that aint the best of it

* * * You see I heard that before long they was agoing to stop all forms of gambling here in town * * * and the real money to be made was all on them gambling machines we had in there. They was two of em that was a paying off thousands of dollars a day! Well, pretty near that, and if they was to close it I had to get what I was a going to do done fast so I got * * * the deal thru with Sucker * * * boy, Im a telling you * * * I had a close call * * * I knew they was goin to close the gambling but I didn't think it was going to be so SOON but here the very day I got my attorney to draw up the lease between Mr. Sucker and me * * * and making me that $2000 a month, I gets *tipped off* that the *very next day* they was a going to close down all gambling! So here I was with the lease in my hand and couldn't find Mr. Sucker to get his name on that lease. I was sweating awful * * * Only a few hours to go and him nowhere in sight * * *. Well I finally got to him and he signed it and I got a check and got my money and did I mop my sweat then * * * I was safe and got my money and all legal and tied hand and foot, and then Hah hah hah along comes the gang and closes up the gambling, ha, ha, ha, ha, I never laffed so much in all my life * * *. Very next day they came in and closed him up. I sure would a liked to seen his face when he realized that he had been fooled. Hah hah hah * * *. And its legal too. And if he tries to put anything over me, any dishonest deals, I will not stand for it. I got the Law on my side."

Accordingly, when Zaiser came in, the letter was shown to him. He acted unnerved and said that he knew where it came from and stated that he "guessed he talked a little too much."

Dyke testified that the letter "gave him a lead" and he could use it to advantage; that he told Zaiser he had heard "quite a bit" from several sources that Zaiser knew that the concessions were going to be closed when he signed the lease and that he, Dyke, considered it a fraud and was therefore not going to pay him anything more on the lease; that Zaiser admitted at that time "that he did know it," that Chief Coyle had told him that he had been "a Damn fool—pardon me—to tell me at that time."

The trial court found generally:

"That * * * for the purpose of inducing the execution of said lease the defendant, Albert Zaiser, represented to the plaintiff that the business carried on in said leased premises was producing a revenue of approximately Twenty-six Hundred Dollars ($2600.00) per month *net* to the defendants and could, with attention and diligence be caused to produce a revenue of at least Five Thousand Dollars ($5,000.00) per month and it is true that plaintiff relied upon such representations and was induced thereby to enter into said lease agreement. That by said representations defendant, Albert Zaiser, intended that plaintiff should understand, and plaintiff did understand that there existed no reason known to said defendant why the business should not continue to operate profitably in the future as it had in the past and that plaintiff believed and relied upon said representations and so understood the representations thus made by defendant * * *. That said representations were false and fraudulent in that defendant knew that said representations were untrue and knew that law enforcement officers of the County of San Diego contemplated and intended, within a period of twenty-four hours after the execution of said lease, to compel the closing of a substantial portion of the business carried on in the leased property. That in truth and in fact within twenty-four hours after the execution of said lease agreement said peace enforcement officers did compel the closing of said machines and did compel the cessation of a material portion of the business operated in said presmises and that as a result thereof plaintiff was unable to operate the business in said leased premises at a profit or for enough money to pay the rental agreed to be paid by the terms of said lease"; and that by reason thereof the lease should be canceled.

The $8,000 paid down on the advance rentals was ordered returned less a deduction of $384.12, which was the amount received by respondent over and above the

expenses of operation up to the time of the rescission. Judgment was entered accordingly.

In discussing whether the evidence supports the findings, as questioned by appellants, it will be necessary to consider in detail the testimony of some of the witnesses. It was proven beyond doubt that before this transaction was finally closed and the lease signed, that Zaiser did know that the officers intended to close certain concessions. The only question pertains to the time when he acquired the knowledge and the extent of his knowledge as to which machines or concessions they intended to close.

The Chief of Police, called as a witness for plaintiff, testified that he was familiar with the premises and the parties running them; that he knew Zaiser owned a lease on the building and had put in the amusements because Zaiser told him; that on Monday, December 18, at about 5 p. m. before the lease was signed by Dyke, he spoke to Zaiser and told him the sheriff had called him, stating that the Grand Jury and the District Attorney's office had information that there were some "slot machines operating in Oceanside and he wanted them closed"; that he was going to close "those machines out within 24 hours" and that he should notify the men who had leased the building or concessions too; that he went down that afternoon and saw some of the operators of slot machines in town and told them that "I wanted them taken out," under the sheriff's orders; that on the following day, around 6 p. m. they just "pulled the plugs on the machines" and "that was all there was to it." Some were "Pin Ball machines (about 4 or 5) and others were "table games," two "Flat Joints," played with cards and a ball. On cross-examination he testified that he disconnected the pin-ball machines because he thought they were automatic pay-off machines; that many months later, after reviewing an appellate court decision, he learned they were not of that type and were lawful and if he had known that fact, then, he would not have interfered with them at all, but he was acting under orders from the sheriff; that he had told Zaiser that the sheriff had given the orders.

Appellant Zaiser took the stand and testified that he obtained permission from the City Council to make an exception in the zoning ordinance so he could operate the amusement center in this particular store building. He claimed that he wanted to "get rid of" the business because he was not interested in it; that he had a man named Nathanson who wanted to purchase the lease at the price agreed on by respondent but that he would rather lease it to respondent for reasons explained. He testified that he did not go to Attorney Cottingham to draw the lease because of some political differences they had entertained, and explained why the clause in reference to the right to cancel the lease if the authorities closed the concessions was not included in this lease. On the witness stand he did not deny he was told of the contemplated action of the Chief of Police and Deputy Sheriff on the day the lease was signed. Neither did he deny he had knowledge prior to that time of their contemplated action.

Respondent Dyke testified about the transaction and representations made by Zaiser; that Zaiser explained in detail what the different concessions were paying, i. e., about *$2700 per month in addition to Dyke's payments;* that Zaiser said "he thought if he could put his time in on it he could make it pay $5000 a month or more"; that "he was sure I could do the same"; that "if I would lease it and put my time in on it it could be made to pay quite a bit." He then testified that he believed those statements and accordingly entered into the lease. The record indicates these representations were made a day or two prior to Friday, the 15th of December, when the $2500 was paid. It was not until Monday, December 18th, that the written lease was signed. Dyke testified further, however, that he still believed the former statements made by Zaiser on the night of December 18th, when he signed the lease, and that neither Zaiser nor anyone else had informed him about the contemplated closing of the concessions by the authorities; that had he known about it he would not have

closed the transaction; that the next day, one hour after he took possession, the officer came and pointed out "certain concessions that had to be closed"; and that "he wanted them out of there by tomorrow"; that he pointed out all the tables, the Lite-a-Line machine, the Diggers, several of the pin-ball games, and a concession where they pitched rings; that the ball game and Dart game were restricted to "pay off in prizes only"; that he went to the several concessioners who were operating the machines in his center and told them to cease their operations; and that he left it up to them to move out their own equipment; that he moved out his Lite-a-Line machine and Diggers; that soon thereafter he received the letter charging Zaiser with previous knowledge of the contemplated closing of the concessions.

The evidence further discloses that Zaiser assigned the leases of the other concessions held by him to Dyke, as part of the same transaction. Some of these leases contained a clause that the lessee concessioners had the right to cancel their leases if the authorities closed them up, and some contained the additional provision that the lessor must return all unearned rents advanced by the lessee in case of cancellation. Apparently Dyke was found to be in a helpless position in this respect, as a result of the combination of circumstances.

Dyke then testified that there was no City ordinance of Oceanside prohibiting the operation of the machines that were in his place of amusement and that he learned from Mr. Cross, the City Attorney of Oceanside, on the day of trial of this action, that their method of operation was legal all the time.

Witness Bailey corroborated Dyke's testimony, and in addition, related more claimed conversation with Zaiser in reference to the anonymous letter. It is his story that after the letter was shown to Zaiser, Zaiser sat down and brought the paper "down in his hand on his elbows and shook violently, turned very pale, and beads of perspiration were on his face"; that Zaiser came to the amusement center in February and asked for the letter so he could sue the writer thereof for libel; that Zaiser asked him how business was and said that it was a shame that it got closed up the day we took it over; that he said to Zaiser: "Well, you should know, because you seemed to know it was going to get closed"; that Zaiser said: "Well, Gosh Darn it, I did know it. When I found it out the deposit had already been paid. I considered it a deal. I would have been a ———fool to tell you about it." Bailey further testified that although certain machines and concessions ordered closed by the Chief of Police were permitted to operate during the summer months on the beach, he was not permitted again to operate them in the amusement center.

Appellants now argue, generally, that the evidence shows that Zaiser had practically no experience and that Dyke had long experience in the operation of amusement centers and in the possibilities that the operation of borderline machines might be stopped by authorities, and that there was no duty involved upon Zaiser to inform him of that likelihood or that in fact such action was contemplated; that Dyke's familiarity with the income or the probable income of the premises was well known to him; that the past income was not misrepresented to Dyke; that any statements as to its possible future income were "no more than sellers' talk," but were only statements of Zaiser's own opinion as to future profits and were not in fact relied upon by Dyke, nor were those statements actionable; that Zaiser made no statements at any time as to whether the authorities would allow the games or machines to continue to operate or how long the place would remain open, or whether the games or machines were legal or illegal; that since respondent failed to prove that Zaiser had any knowledge of the contemplated action of the officers until after he had orally agreed to sell the place to respondent, he was not obligated to disclose to him the knowledge he acquired just before the lease agreed upon was signed; that even so, the information given him was that the Chief of Police intended to close just a few of the machines which would be but a small consequence in the entire operation; that since there was not a confidential relationship between the parties, it was not incumbent upon

Zaiser to disclose the information he had in respect thereto; that since the authorities ordered more machines closed than he had information about, he could not be held responsible for their actions; that respondent failed to test in court their authority to prohibit the operation of the concessions, and having "sat dormant in that respect," he cannot blame the appellants; that since these same games ran elsewhere in Oceanside thereafter, respondent was apparently authorized to engage in such business; that it was the duty of Dyke to investigate the facts and the law, and rely upon his own judgment rather than any representations made by Zaiser; that fraud must be clearly established; that if the games were legal, the authorities' contemplated interference was not of sufficient importance for him to report it to respondent; that if illegal, then the parties were in pari delicto and a court of equity must not act on the part of either party but should leave them where it finds them. It is then claimed that there is no evidence supporting the finding of the court that the appellants had misrepresented the income at $2600 per month *net* above expenses; that the representation was that $2600 was the gross income per month. Many cases are cited in support of the several contentions here made.

Respondent recognizes appellants' argument that ordinarily a representation as to what property has produced is considered a representation of fact, while a statement as to what property will produce in the future is ordinarily classed as a statement of opinion and not a representation of a fact. In the present case the parties were dealing mainly with a matter of income and expected income. The property was leased to Dyke for 18 months at a rental of $2000 per month. What the property had produced in income was of interest as being an indication of what it could be expected to produce in the future, and the amount of rental to be exacted could be justified only upon the expectation that it would continue to produce income substantially in excess of that amount. This is obvious. For were it otherwise, respondent would not have been interested in entering into the lease. The representation with reference to the income that had been produced or would be produced became highly material to the transaction. Zaiser, according to the evidence, represented that during the period of approximately four weeks, when he operated the center, the place was paying $2700 per month, *in addition to the rentals paid by Dyke.* The evidence is confusing as to whether the income, as represented, was the net or gross income. The record rather indicates that Zaiser was referring to gross income. However, he testified at the trial that the income was around $2800 to $3000 per month, and this calculation *included* an estimate of *$650 per month paid by Dyke.* There was, according to that evidence, a variance of approximately $650 per month between the amount of income, gross or net, testified to by Zaiser at the trial, and the amount he represented to Dyke and in the presence of Bailey. This difference would be of considerable materiality when considering the inducements held out by Zaiser as to contemplated future income. Under the figures testified to at the trial by Zaiser, that is, $2800 to $3000 less $650 paid by Dyke, or a gross income of $2150 or even $2350 per month, would hardly justify a net rental price of $2000 per month payable to Zaiser. The testimony is that the cost of operation under Mr. Dyke, exclusive of salaries, commissions and licenses, ranged from about $25 to $138 per month. Zaiser's representations as to the past and future income of the center, in view of his knowledge as to what was going to transpire, was the basis for the fraud as found by the court. The materiality of these representations becomes apparent.

[1] It has been frequently held in California that an expression of an opinion which is untrue and which is not honestly entertained and which, when considered with other inducements proved to be false, is material to the transaction, may constitute fraud. MacDonald v. de Fremery, 168 Cal. 189, 142 P. 73.

[2-4] In Zwart v. Landfield, 93 Cal.App. 328, 269 P. 740, defendant represented that a certain stock was listed and selling for $2 per share and that in no time it would go up to $4 per share. The true facts indicated that the stock only had an insignifi-

cant value and never did go up to the $4 per share. The court said, in holding the evidence sufficient for rescission, that possibly some of the representations related to matters of opinion, but expression of opinion, to avoid an action for deceit, should be honestly entertained by the person making the same. (Citing cases.) And moreover, the expression of opinion may amount to fraud where it is accompanied by active misrepresentations or concealment, or where it relates to a subject as to which the parties have no knowledge or means of ascertaining the truth. The general rule is that one has a right to rely on statements of material facts essentially connected with the substance of the transaction where one of the parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that the facts are not, and cannot be expected to be, within the first party's knowledge. If one material statement be false it is sufficient ground for rescission. See, also, White v. Financial Guarantee Corporation, 13 Cal. App.2d 93, 156 P.2d 550.

[5] The argument that respondent was in an equal or better position to know whether the amusement center would be closed by the authorities, due to the nature of the machines operated, and his experience in operating them, and that therefore he was bound to make inquiry of the District Attorney and Grand Jury, and that his failure to do so was a negligent omission, to us seems untenable. It would appear from the evidence before us that the machines, as operated, were legal and not illegal. The City Attorney of Oceanside was of that opinion. Under the circumstances, respondent was justified in believing that the authorities would not close his concessions. Appellant Zaiser, as City Councilman, it seems to us, was, by virtue of his position, in a much better position than respondent to know that those concessions might be closed by the Chief of Police of Oceanside, and that in fact they were going to be closed. It is not likely that if respondent had inquired of the District Attorney or Sheriff or Grand Jury, they would have informed him that on a day certain he was to be raided and closed, and if his operation was legal, respondent would not be expected to make such inquiry.

In Laraway v. First National Bank of La Verne, 39 Cal.App.2d 718, 104 P.2d 95, it was said that the fact that the means of knowledge may have been open to plaintiff did not necessarily debar her from relief when there was nothing in the evidence which would excite her suspicions and necessarily put her on inquiry.

In Bank of America v. Sanchez, 3 Cal. App.2d 238, 38 P.2d 787, which was an action involving a note, the evidence showed that the bank officer originally induced the defendant wife to sign the note, under a misrepresentation that *under the law* she could not be held liable for a deficiency. At that time the bank was aware that she had such misapprehension of the law, but did not rectify such misapprehension. The court held that feature of the case constituted part of the basis for the fraud alleged, and found that it was the primary cause in the transaction and that the ultimate result was respondent's act of signing the note. It was there held that such rule prevails under a confidential or fiduciary relationship, *or* where one who has had superior means of information, possesses knowledge of the law, and thereby gains an unconscionable advantage of another who is ignorant and who has not been in a situation to become informed. It was held that under the latter case the right to relief was predicated on the same ground as if the misrepresentations of law were matters of fact.

[6, 7] If the transaction here in question had taken a normal course and had there been no guilty knowledge or fraud on the part of Mr. Zaiser, Mr. Dyke could not have complained because police officers shut down the concessions and forbid their operation, and had Dyke been the party seeking to obtain the lease on the premises, Zaiser might not have been under obligation to express any opinion at all as to the past of prospective income. When, however, he chose to discuss that matter, he was bound by law to make an honest statement of opinion. Rogers v. Warden, 20

Cal.2d 286, 299, 125 P.2d 7. What may constitute a mere expression of opinion under certain circumstances may, in other circumstances, constitute actionable fraud. Ordinarily, if a man was about to sell a piece of property and he correctly stated the amount of rent which had been produced and then gave his opinion as to what rental might be received in the future, such statement, if honestly made, could not be classed as a misrepresentation of fact. Altered circumstances may make such a representation fraudulent. When we analyze the facts involved in the case at bar, in support of the findings and judgment entered, it becomes apparent that under this evidence Zaiser's statements constituted fraud. If all that was involved was Zaiser's expressed opinion that the amusement center would probably produce $5,000 per month, and it developed that the monthly income fell somewhat short of that amount, and the surrounding circumstances were such as would justify the court in finding that Mr. Zaiser's opinion, thus expressed, was an opinion honestly entertained, there might be some question as to whether such statements constituted fraud. Here, if not during the entire time, at least before this transaction was closed, Zaiser knew that the business was going to be seriously affected by the shutting down of many of the concessions. The fact remains that within 24 hours 22 of the 32 concessions were closed. The closing of any of the concessions would directly affect the income of the amusement center. Zaiser permitted a deal to be consummated, based upon his representations as to past income and his expression as to the income to be anticipated in the future, and at the same time concealed from the prospective tenant the fact that he knew that action would be taken which would detrimentally affect that income. The extent to which it was in fact affected is to be noted when we see that an income of $2800 per month was automatically reduced to an average income of $410.87 per month. Mr. Zaiser's statement that he believed that an income up to $5000 could be produced is certainly tantamount to a representation that he believed the profitable operation of the amusement center would continue. It was, in effect, a representation that he knew of no reason why it should not continue. He could not honestly, truthfully, or fairly make that representation when he knew that within 24 hours the operation of the amusement center would be substantially interfered with.

[8] Appellants state the general rule that a vendor is under no obligation to speak concerning the thing which he would sell. Yet, in this connection, under that general rule, if he undertakes to do so, he is bound not only to speak the truth in all he says, but is equally obliged to tell every material fact and not to conceal any facts within his knowledge which might materially qualify such statements as he may have made. Macco Construction Co. v. Fickert, 76 Cal.App.2d 295, 299, 172 P.2d 951.

The general rules on this subject are discussed in 37 Corpus Juris Secundum, Fraud, § 17 c, p. 251. There are noted a few decisions to the contrary, but the great weight of authority recognizes that acts such as those here described may constitute a fraud.

See, also, Kretzschmar v. Janss Investment Co., 126 Cal.App. 698, 14 P.2d 1069, 1071, which involved a transaction wherein an option was given for the purchase of property. There was given first an option and later a contract of sale. Between the execution of the two agreements permission was given to construct a tremendous drain across the property. The purchaser was not informed of this fact or of the fact that such permission had been given. The court said:

"The respondents were justified in relying upon this option and a duty rested upon the appellants to inform them of any material changes in the subject-matter which had taken place subsequent to the option."

By the same token, although the substantial terms of the lease were informally agreed upon in the conversation in Mr. Cross's office, and although a deposit had theretofore been paid, nevertheless Mr. Dyke was entitled to rely upon the representations that had theretofore been made to him and, as stated in the opinion in the

Janss case, a duty rested upon the lessor, Zaiser, to inform respondent of any material changes which had taken place subsequent thereto. Dyke had no means of knowing that Zaiser had been warned of the impending action of the peace officers. It was not until an anonymous letter was handed to him that he realized a fraud had been perpetrated. He then charged Zaiser with the fraud and, in effect, Zaiser made statements which might constitute admissions of such charge. It is true that Zaiser did not say in so many words that he knew the police would not interfere with the operation of the amusement center or that he felt the police officers were satisfied with the character of the devices operated therein. Many cases have been cited where it has been held that a man is not necessarily required to state everything he knows about the property involved. The present tendency, however, is to class concealment as actual fraud in those cases where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer. Clauser v. Taylor, 44 Cal.App. 2d 453, 112 P.2d 661; Rothstein v. Janss Investment Co., 45 Cal.App.2d 64, 113 P.2d 465.

[9] If we assume that Zaiser had no guilty knowledge of the proposed action of the police officers when the conversations leading up to the lease took place, and that therefore his expressions of opinion were honestly made when made, nevertheless, by the undisputed facts, these representations became false the instant he talked with the Chief of Police. He then knew that action would be taken which would materially affect the income of the property. He knew it would materially affect the value of the lease. In short, he knew that if Dyke was informed of the impending action, he would not execute the lease at all. Under the circumstances, it is apparent that Zaiser knew that the respondent was relying upon his representations, and that he knew incidents had transpired rendering the representations no longer true. He knew that conditions had changed which materially affected the desirability of the property and he knew that respondent was unaware of the changed conditions. Under these circumstances, his silence, together with the other circumstances related, would constitute fraud.

Under this conclusion, it becomes unnecessary to determine whether the evidence supports the trial court in its finding that Zaiser, *throughout* the negotiations, knew that the police officers intended to take action against the amusement center.

[10] It is generally held that fraud may be established by circumstantial evidence. It could hardly be expected that if a man made a false representation or was concealing knowledge of a fact that would materially affect the transaction, that he would willingly admit that he knew of its falsity all the time. Zaiser knew the Chief of Police would testify as to the time when he notified him of the contemplated closing of the concessions. The anonymous letter accuses him of knowing that the authorities "were going to close the gambling but I didn't think it was going to be so soon." His reaction to the accusation in the anonymous letter was not a flat denial, but more of an admission.

[11, 12] Considering all of the case, the trial court was justified in inferring and finding that Zaiser possessed such knowledge during the entire negotiations. Direct proof of fraudulent intent is often an impossibility, and proof indicative of fraud may be given by inference, by circumstances surrounding the transaction, and the relationship and interest of the parties. Maxson v. Llewelyn, 122 Cal. 195, 54 P. 732; Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 714, 247 P. 597; Taylor v. Osborne-Fitzpatrick Finance Co., 57 Cal. App.2d 656, 135 P.2d 598.

Judgments affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; SCHAUER, J., dissenting.

30 Cal.2d 297

In re LEACH'S GUARDIANSHIP.

In re JACOBSON'S GUARDIANSHIP.
McCALLOM v. HORNADAY.

L. A. 19230, 19231.

Supreme Court of California, in Bank.
June 24, 1947.

1. Guardian and ward ⇐25

Judgments removing guardian of two infants because of his acquisition of an adverse interest and proposed sale of assets in excess of $1,700,000 to dummy corporation and thereby enrich himself at expense of infants who would be impoverished if sale were consummated were sustained by the findings and the evidence. Probate Code, § 1580.

2. Judgment ⇐585(5)

The doctrine of res judicata does not apply to successive applications for appointment or removal in the guardianship of minors to the extent of precluding the court upon a later application, from a consideration of such circumstances as may have occurred subsequent to rendition of the prior order.

3. Judgment ⇐23

Findings and conclusions of the court do not have the force and effect of an adjudication where the subject matter is not disposed of by the judgment since the force of an adjudication rests in the judgment itself and findings not necessary to the judgment are not conclusive. Code Civ. Proc. § 1911.

4. Guardian and ward ⇐25

Where documents sought to be introduced on appeal related to matters occurring subsequent to entry of judgments removing guardian of infants were on issues raised by petition to terminate the guardianship which was still pending in trial court, application for the introduction of documents would be denied as well as application for substitution of infant sui juris as a party appellant in place of guardian ad litem.

5. Guardian and ward ⇐25

Where judgments removing guardian of infants were affirmed appeals from incidental orders would be dismissed.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding in the matter of the guardianship of the person and estate of William Ronald Leach and proceeding in the matter of the guardianship of the person and estate of Patricia Lee Jacobson, also known as Patricia Lee Leach wherein E. Mae McCallom filed petitions for the removal of F. Paul Hornaday as guardian, which proceedings were consolidated. From judgments removing the guardian, the guardian appeals and Patricia Leach Hornaday also appeals, and appeals were also taken from certain incidental orders.

Appeals from incidental orders dismissed and judgments of removal affirmed.

See also 182 P.2d 545.

Dechter, Hoyt, Pines & Walsh and B. L. Hoyt, all of Los Angeles, for appellant.

S. L. Kurland, A. C. Ackerson, George R. Maury and Baldwin Robertson, all of Los Angeles, for respondents.

SHENK, Justice.

In these consolidated guardianship proceedings, judgments were rendered removing F. Paul Hornaday as guardian of the persons and estates of his two wards, William Ronald Leach and Patricia Lee Leach. Appeals have been taken from the judgments of removal and from the various incidental orders entered in the course of the proceedings.

The determination of the appeals from the judgments will dispose of all matters presented by the other appeals. The determinative question is that of the sufficiency of the evidence to support the findings and judgment. The findings fall into two main groups, first, those which deal with the management and proposed sale by Hornaday of a company owned by his wards, and his acquisition of an adverse interest as ground for his removal as guard-

ian; second, those which deal with the subject of an alleged marriage conspiracy as ground for removal.

The primary facts are these: About 1926, or prior thereto, Vivian Armeger Leach, also known as Val Leach, organized the Leach Relay Company. The concern, although not large, was successful, and was engaged principally in the manufacture and distribution of electrical relays. Val Leach married Mrs. Opel Jacobson, a widow with a minor daughter, Patricia. A son, William Ronald, was the issue of the marriage of Val and Opel.

In 1941 Val incorporated the Leach Relay Company and became the owner of all of the issued and outstanding stock, 5,200 shares. He died on October 1, 1941. In the probate of his estate his wife Opel succeeded to all of the corporate stock. At the time of the death Val and Opel were having domestic trouble. In this difficulty Opel was being represented by F. Paul Hornaday, an attorney who had been engaged in the practice of the law since 1925 in Los Angeles.

In August, 1942, Opel died testate. Her will named Hornaday as executor of her estate and nominated him guardian of the persons and estates of both minor children, Patricia then about 16 years of age and William about 9. The will directed Hornaday to consider the love for the children on the part of their maternal grandmother E. Mae McCallom, to consult with her and to give the children the benefit of her association. Each child was to receive one half, or 2,600 shares, of the stock of the Leach Relay Company.

The will was admitted to probate and Hornaday became executor. In September, 1942, on his petition, letters of guardianship were issued to him of the persons and estates of the minors. In the Opel Leach estate the stock was appraised at $250,000 and in the estates of the minors each respective half interest was appraised at $125,000. When the Opel Leach estate was closed in 1944 the stock was distributed to Hornaday as guardian of the minors.

The deaths of Val and Opel Leach left the relay company without a guiding hand. Its affairs were in the hands of employees who had no investment or financial interest in the company. In the 10 months preceding October, 1942, the company had paid approximately $23,000 in dividends and had then suspended the payment of further dividends. In order to pay the inheritance and federal estate taxes in the Opel Leach estate, Hornaday, as executor and guardian, and after securing an order from the probate court, borrowed $97,500 from the company, executing guardianship notes therefor. For the guardianship estates to be able to repay that sum from dividends, it would have been necessary, because of the high federal income tax rates, for the company to have declared dividends of about $400,000. Hornaday, as executor of the Opel Leach estate and as guardian of the minors who were the equitable owners of all of the corporate stock, was entitled to vote all of the stock, and to that extent to control the operation of the company.

In October, 1942, Hornaday took complete charge of the management and operations of the concern. He caused himself to be appointed general manager and president of the corporation. He caused to be elected as the entire membership of the board of directors, himself, one June Edwards who was, prior to her appointment as director, his secretary, and his then attorney and office associate, Cyril A. Walton. These persons were under his domination and control and were subservient to him. They served as and constituted a majority of the directors from October, 1942, to September, 1944. While others served for various periods on the board, Hornaday at all times exercised complete control over the several boards and over the policies of the company. Walton was made vice-president of the company, and June Edwards, in addition to being director, was made secretary-treasurer and treasurer. Her salary for the latter offices was $100 a week, and she received a director's fee of $25 a week. At times her rate of compensation fluctuated to over $7,800 a year.

In November, 1942, Hornaday filed in each guardianship estate a petition for instructions setting forth the condition of the company, his right to vote all stock, and his proposal to act as chief executive and president—work which would take his full

time. He proposed to receive a salary from the corporation in keeping with his position and duties, and to waive, during any period in which he received the corporate salary, all statutory and extraordinary fees to which he would be entitled as guardian of the respective estates. The court (Judge Jess E. Stephens) sanctioned this procedure by a written order made December 11, 1942. Under this arrangement, although he had previously been drawing compensation at a higher annual rate, Hornaday agreed to accept from January, 1943, an annual salary and bonus of about $25,000. At approximately the same time the salary of Mrs. Edwards was stabilized at $5,300 a year. In addition both she and Hornaday continued to draw a weekly director's fee of $25.

In February, 1943, the paternal grandmother of William Ronald, Lena E. Shannon, filed a petition charging Hornaday with use of his position as guardian and executor for his personal profit, and she prayed to be appointed guardian ad litem. A hearing on this petition resulted in a finding that it would be in the interest of peace and harmony in the care of the boy to have his grandmother act jointly with Hornaday as guardian of his person, but not of his estate. In April, 1943, a judgment was entered favorable to Hornaday, but awarding counsel for the grandmother a fee of $1,000. An appeal was later dismissed. The judgment attests the fact that Hornaday was not chargeable with waste or mismanagement of the boy's estate up to April, 1943.

In June, 1943, the maternal grandmother of William Ronald, E. Mae McCallom, filed a petition seeking appointment as guardian of his person. At the same time she filed a similar petition in the estate of Patricia. She charged Hornaday with ignoring the testamentary request of Opel that the children be given the benefit of association with their grandmother, and with attempting to separate the children from her. At this time the feeling between the McCallom family and the Hornaday family had become very bitter. The children were practically forced to a choice, and placed their loyalty and preference for a home with the Hornaday family during the periods of their freedom from their respective boarding schools. The court proceedings terminated in a dismissal of both petitions.

During the period of Hornaday's management of the company there had been a gradual steady improvement in its financial condition. The concern had engaged in defense work at the outbreak of World War II, and after October, 1942, its business was almost 100% war production for the armed forces. The increase in volume reached 1400% and continued to rise.

Because of the rapid growth of the company, its accumulation of cash, and the consequent renegotiation and tax problems, there was an alleged desire on the part of Hornaday to have some of this cash reserve pass into the estates of the minors in such a way as to avoid, to the benefit of the guardianship estates, the heavy income tax which would have to be paid by each ward if the transfer were made through a declaration of dividends by the company. There was also the necessity of repayment to the company by the minors' estates of the $97,500 borrowed to pay estate and inheritance taxes in the Opel Leach estate. It was recognized that the rapid expansion of the business was due to war conditions and that its continuing prosperity after the war was speculative, thus presenting the question whether a present sale of the company would not bring the children a better inheritance than an attempt to hold and readjust the business to post war conditions. In weighing these factors Hornaday sought the counsel of his associates and of his attorney.

In March, 1944, in each estate, Hornaday filed a petition for instructions concerning the sale of the company, setting forth a proposed plan of procedure. On April 13, 1944, in the estate of William Ronald, E. Mae McCallom filed a petition attacking Hornaday's plan of sale and prayed to be appointed guardian ad litem of the minor. This petition was granted by Judge William R. McKay, whereupon E. Mae McCallom filed formal objections to the petition for instructions concerning the proposed sale. On April 27th this was supplemented by a petition alleging grounds for removal of Hornaday and praying for further appointment as guardian ad litem to prosecute a removal proceeding. This pe-

tition too was granted by Judge McKay, and E. Mae McCallom thereupon filed a formal petition for removal. On May 8th Hornaday filed a plea in bar, and on the same day he filed in each estate his first account current. This too was made the target for objections by Mrs. McCallom, but in August, 1944, Judge McKay entered a decree in each estate settling the account.

Meanwhile, and on July 10, 1944, in the estate of Patricia, E. Mae McCallom petitioned for the removal of Hornaday as guardian, charging that he had acquired and attempted to acquire interests adverse to the faithful performance of his duties as fiduciary and guardian in connection with his management and proposed sale of the company. On the same day the court, of its own motion, based upon the verified petition of Mrs. McCallom and upon information before it, and after the refusal of Patricia to consent thereto, issued its citation to Hornaday to show cause why he should not be removed as guardian of the person and estate of Patricia. Hornaday filed a return and answer and it was stipulated that evidence theretofore submitted in the removal proceedings in the estate of William Ronald would be deemed in evidence in the removal proceeding in the estate of Patricia.

In September, 1944, Patricia filed a petition alleging that on August 14, 1944, she had attained the age of 18 years and that she did not consent to the appointment of Mrs. McCallom as her guardian ad litem, and she prayed for the substitution of attorney Burdette J. Daniels to represent her in the proceedings relative to the proposed sale of the company and the removal of Hornaday.

On September 25, 1944, in each estate, Mrs. McCallom filed a supplement to her removal petition alleging further misconduct on the part of Hornaday. Previously, in November, 1943, Hornaday had employed his 34 year old brother Delyn, also known as W. H. D. Hornaday, Jr., or "Dr." Hornaday (herein referred to as "Delyn"), as production superintendent of the company at a salary of $9,000 a year. Before receiving this employment, Delyn had had no training in the technical matter of relay manufacturing. His previous experience was varied. He had helped his father; he had gone to the Orient with an orchestra; he had written a novelty article entitled "Ant Village"; he had been a masseur in a doctor's office; and in 1940 or 1941 he had taken a job at California Shipyards and worked as helper, learner, and finally as a supervisor. Patricia had met Delyn and claimed to have fallen in love with him. Mrs. McCallom charged that the love affair was the result of conspiracy; that Hornaday, having failed in his scheme to acquire the property of the minors for himself through his proposed sale of the company, had unlawfully conspired with Delyn and others to have Delyn and his then wife proceed to the state of Nevada and there establish a residence for the sole and fraudulent purpose of obtaining a divorce, whereupon Delyn would enter into a purported bigamous marriage with Patricia; that this would enable Patricia to attain an apparent majority and thereby divest the court of jurisdiction over her person and estate and terminate the guardianship proceedings; and that Patricia would thereby be left under the influence of and subject to Hornaday's control of her affairs because of her affection for him and marriage to his brother.

Following the filing of Hornaday's return and answer to this petition, and on October 13, 1944, Patricia filed a petition to terminate the guardianship on the ground that on October 9, 1944, at Las Vegas, Nevada, she had entered into a marriage ceremony with Delyn, and had thus attained her majority. Civil Code, section 25. No hearing was had on this petition and the court, in its findings in these removal proceedings, stated that the petition was still pending. However, E. Mae McCallom supplemented her removal petition by setting forth the fact that the alleged marriage ceremony had actually taken place.

After a hearing of these matters, and on November 14, 1944, there was entered in each estate a minute order which recited the following rulings by the court (Judge Joseph W. Vickers): Dismissal of the petition for sale of the company; granting the petitions for removal of Hornaday as guardian of the persons and estates of both minors; directing that a separate order be

entered, to take immediate effect, suspending his powers; finding that the Nevada divorce of Delyn was void; finding that the guardian had mismanaged the estate, abused his trust, and acquired an interest adverse to the faithful performance of his duties; appointing E. Mae McCallom special guardian of the estates of both minors and of the person of William Ronald, until further order of the court, with bonds fixed at $150,000 in each estate; and holding in abeyance the appointment of a guardian of the person of Patricia.

On the same day a written order was made in each estate suspending the powers of Hornaday as guardian under section 1581 of the Probate Code. On the following day, November 15, 1944, a written order was made in each estate appointing E. Mae McCallom special guardian as directed in the minute order. Hornaday gave notice of appeal in each estate from the minute order and from the two written orders which followed it.

On November 17, 1944, on additional petitions of E. Mae McCallom, the court, in each estate, made a further order appointing her guardian of the person and estate of William Ronald and of the estate of Patricia, pending determination of the appeals from the orders suspending Hornaday, and directing Hornaday to turn over to her all of the property of the estates. Hornaday gave notice in each estate of appeal from these orders.

On December 27, 1944, in each estate, the court (Judge Vickers) filed findings of fact and conclusions of law, and entered judgment removing Hornaday as guardian of the persons and estates of the minors, and awarding petitioner McCallom her costs. Hornaday appealed from both judgments. Patricia appealed separately through her then guardian ad litem, Baldwin Robertson, and also as an emancipated married woman, from the decree of removal in her estate, and particularly from any attempt by the court, as a basis for the decree, to adjudicate the validity of her marriage to Delyn.

[1] The judgments of removal are sufficiently supported by the evidence and findings bearing upon Hornaday's proposed sale of the company and his acquisition of an interest adverse to that of his wards. Nothing more is required to substantiate this statement than a consideration of the proposed plan of sale submitted by Hornaday and the testimony showing that he took practically no action to encourage offers or hasten the submission of bids by disinterested persons.

The court found, and the evidence shows, that as of approximately April 1, 1944, the corporation had $1,500,000 current assets, in addition to $128,000 post war excess profits tax credits, $157,750 net value of fixed assets, and $11,000 in prepaid and deferred assets; that the current assets consisted of in excess of $429,000 in cash on hand as of the close of business on February 29, 1944, and $596,000 in accounts receivable, of which almost all were current; that the merchandise inventory was not less than $350,000; that these assets were subject to certain liabilities, including those for accrued and estimated tax liabilities and reserves, and reserves for renegotiation, in the sum of about $1,084,468; that the corporation had a total capital and surplus of $1,782,865.64; that the estimated net profit of the corporation for the eight months from July, 1943, to February, 1944, after taking out all taxes and expenses, was about $226,674.14, subject to renegotiation; that the last prior month for which an earnings statement was available was February, 1944; that the net profits for that month were $138,374.34, with estimated income and excess profits tax of $101,290.01, leaving a net profit for the month, after deduction of all charges and taxes of $37,084.33.

The proposed sale set forth in Hornaday's petition for instructions was that of substantially all of the estate of the minors, consisting of all of the shares of stock of Leach Relay Company, Inc., to another corporation, alleged to be a California corporation, known as the Leach Relay Corporation. The consideration was to be the retirement of the $97,500 note owed by the minors' estates to the company; $250,000 in cash; and $150,000 in 10 non-interest bearing notes of the new corporation, payable serially over a period of 10 years. Until payment of the $150,000 the new corporation was to declare no dividends. It was to give the minors an option to purchase its

stock for $5,000 within 10 days after final payment on the deferred balance of $150,000. By a proposed separate contract with Hornaday, the new corporation was to bind itself to employ him in his individual capacity, and not as guardian, for a 10 year period at an annual salary of $25,000 a year, but he was to have the option of terminating the contract, if he so desired, at the end of any two year period during its term.

The evidence shows that at the time Hornaday presented his plan to the court he had already caused the formation of the new corporation, in Nevada and not in California as represented; that all of its officers, directors, and stockholders were residents of Nevada, acting solely for Hornaday; that the total authorized stock of the new corporation of $75,000 was issued to its officers, directors, and stockholders for no consideration whatsoever and that no consideration for it was contemplated to be paid at any time. Prior to filing his petition for instructions Hornaday had caused to be prepared all of the instruments for dissolution of the old company, and he intended to execute and cause them to be filed immediately upon obtaining the court's approval of the plan.

It was shown and the court found that the incorporators, officers and directors of the new corporation, to whom all of its stock had been issued without consideration, were "dummies and strawmen" of Hornaday, under his domination and control; that Hornaday intended the court's approval of the sale to the new corporation to result in, and it would have resulted in, the obtaining by Hornaday of the ownership and control of all of the stock and assets of the California corporation for himself as an individual, and not as guardian for the minors, and free and clear of all their claims, and it would have placed the ownership and control of the corporation beyond the jurisdiction of any California court. Hornaday's interest in the Nevada corporation, the court found, was and is an interest adverse to the faithful performance of his duties as guardian of the persons and estates of the minors.

The court found that the sale was to be accomplished by a transfer of both the assets and stock of the California corporation to the Nevada corporation, and that Hornaday intended to pay the consideration for the transfer and purchase solely and entirely from the earnings and assets of the California corporation; that although Hornaday alleged in his petition for instructions that he had no interest for personal gain under the proposed plan, he in fact intended as an individual to have sole control of the new corporation through his dummies and strawmen; that also he, as an individual and not as guardian, intended to enter into and caused to be prepared the contract with the Nevada corporation whereby he would be its exclusive manager for a period of 10 years, with an option at his pleasure only to renew or cancel such contract at the end of each two year period within the 10 years, without regard to the payment to the minors of the promissory notes owing to them by the Nevada corporation on the so-called purchase price, and without regard to the earnings of the new corporation or its ability to meet its obligations in matters pertaining to the welfare of the minors.

It was further found that in his petition for instructions Hornaday represented to the court that the proposed sale would result in the realization to the minors of the greatest possible sum from their estates, whereas in fact the Commissioner of Internal Revenue would have treated all consideration so moving to the minors' estates as income from the company and would have exacted an income tax therefrom such that the minors' estates would have become liable to the United States government for sums greater than those to be received from the proposed sale; that, in other words, the proposed sale would have given the minors nothing more than a cancellation of their note to the California corporation and would have resulted in their immediate tax liability to the United States government, in addition to taxes which might become owing to the State of California, which liability would have been more than the cash and notes to be paid in consideration of the sale; that thus the minors would have been deprived entirely of that portion of their inheritance represented by their ownership of the company.

The court found that prior to the filing by Hornaday of his petition for instructions, other persons had expressed an interest in the purchase of the company but had told the court that they were unable to obtain any cooperation which would enable them to prepare bids intelligently; that the court instructed Hornaday to file a petition setting forth the entire matter so as to obtain the highest and best bid for the company; that, however, Hornaday's petition for instructions did not reveal the fact that others were interested in purchasing the company; that it alleged only that the proposed sale was for the best interest of the minors.

The court found that at all times Hornaday obstructed the procuring of bona fide and high bids from others than himself by refusing to report to proposed bidders the true value of the assets of the company or to have an audit made of assets and earnings; that by his conduct and oral declarations Hornaday discouraged and dissuaded bidders and potential bidders, and voluntarily expressed adverse opinions of the value and future of the corporation to prospective purchasers.

After the hearing on the petition for instructions the court directed Hornaday not to continue with his plan of proposed sale. Thereafter, at the court's suggestion and with consent of all parties, the court ordered that a sale proceed by sealed bids presented directly to the court. The audit was not completed, nor was a sale effected, until after the close of the proceedings here under review which terminated in the judgments of removal.

In attacking the findings relative to his acquisition of an adverse interest, Hornaday argues that since he did not petition the court directly to approve the proposed sale, but merely asked for instructions whether he should proceed with the plan, it cannot be concluded that he thereby acquired or attempted to acquire an adverse interest. He argues that a guardian, by merely placing his problem before the court, cannot as a matter of law be held accountable for an attempt to commit waste, mismanagement, abuse of trust, or acquisition of an adverse interest. He asserts that his associates were consulted and that the plan was conceived and worked out by his attorney, who frankly admitted responsibility for it; that he himself is not a tax expert, and that he relied, as he was entitled to do, upon outside advice in his endeavor to solve the tax problem involved in getting money from the corporation into the minors' estates. He also claims that the court had no right to find, as a fact, that the Commissioner of Internal Revenue would have treated all of the consideration moving to the minors' estates as payment of dividends or taxable income, when the matter of what the Commissioner's attitude would have been, had the plan been consummated, is a subject of speculation. He states that when the deficiencies in the plan became apparent, he did not question the wisdom of abandoning it, and that the prosperous condition of the company belied the charge that he attempted to commit waste or mismanagement. In short, he claims that the evidence fails to establish any act on his part which would constitute a cause of removal listed in section 1580 of the Probate Code, and that a guardian may not be removed for any cause not specified in that statute.

Section 1580 specifies the causes for the removal of a guardian by the court including the acquisition by the guardian of "an interest adverse to the faithful performance of his duties" (subd. 5). That Hornaday did in fact conduct himself in a manner "adverse to the faithful performance of his duties" as a guardian is shown by the evidence which the court chose to credit and by the inferences which might reasonably be drawn from such evidence.

[2] The evidence although conflicting affords substantial support for the findings and conclusions that Hornaday acquired an interest adverse to that of his wards. These matters all transpired subsequent to the acts which formed the basis for the charges made in the Shannon removal proceeding in the estate of William Ronald, and the issues here raised were not there adjudicated. The doctrine of res adjudicata does not apply to successive applications for appointment or removal in the guardianship of minors to the extent of precluding the court, upon a later application, from a consideration of such circumstances as may have occurred subsequent to rendition of

the prior order. Guardianship of Snowball, 156 Cal., 240, 242, 104 P. 444; Guardianship of Case, 57 Cal.App.2d 844, 847, 135 P.2d 681.

The appeal of Patricia is separately briefed. She joins in all grounds for reversal urged by Hornaday but directs her main argument against the findings of fact and conclusions of law to the effect that the purported Nevada divorce of Delyn and his wife Phyllis was void; that the purported marriage of Delyn and Patricia was likewise void; and that by that marriage Patricia did not attain her majority.

These facts were found and conclusions drawn in connection with the court's findings that Hornaday conspired with others to effect a premature termination of the guardianship by inducing a purported marriage of Delyn and Patricia through which the latter would be emancipated. In view of the sufficiency of the evidence to support the findings and judgment of removal on other grounds, a determination of the question of the sufficiency of the evidence to support these conspiracy findings is not necessary to this decision.

[3] The court made no adjudication that the divorce of Delyn and Phyllis and the marriage of Patricia and Delyn were invalid. The findings and conclusions on this subject related solely to certain facts in connection with the alleged conspiracy and the effect thereof was not carried into the judgment. An adjudication of the validity of the divorce of Delyn and Phyllis, neither of whom is a party to this proceeding, or as to the validity of the marriage of Delyn and Patricia, was not essential to the judgment of removal nor appropriate in this proceeding. It is well settled that the findings and conclusions of the court do not have the force and effect of an adjudication where the subject matter is not disposed of by the judgment. The force of an adjudication rests in the judgment itself, and findings not necessary to the judgment are no wise conclusive. Code of Civil Procedure, section 1911; Lang v. Lang, 182 Cal. 765, 768, 190 P. 181; Hartfield v. Howard, 180 Cal. 376, 379, 181 P. 385; Wardlow v. Middleton, 156 Cal. 585, 586, 587, 105 P. 738; Bank of Visalia v. Smith, 146 Cal. 398, 402, 81 P. 542; Birkhofer v. Krumm, 27 Cal.App.2d 513, 543, 81 P.2d 609; Purcell v. Victor Power etc. Co., 29 Cal.App. 504, 510, 156 P. 1009; 15 Cal.Jur. pp. 153 et seq., sec. 199; 30 Am.Jur. p. 931, sec. 184. The finding here of the invalidity of the marriage was not necessary to the judgment because the gravamen of the misconduct charged was failure to protect the ward and the alleged conspiracy to effect a premature termination of the guardianship by marriage, actual or purported; and that this alleged misconduct occurred prior to the marriage ceremony.

It is true that an adjudication of the validity of the marriage of Delyn and Patricia might have been essential to a determination of Patricia's petition to terminate the guardianship by reason of that marriage, but the court expressly found that petition to be still pending and undetermined.

Patricia claims to have been greatly prejudiced by the appointment, without her consent, of Mrs. McCallom as special guardian upon the suspension of the powers of Hornaday as guardian. However, the record contains no evidence or finding bearing upon the assertions made. In fact it was stipulated at the time Mrs. McCallom was appointed that she would resign as special guardian of each estate at any time the court so requested in order that another might be appointed in her stead.

[4] Patricia has applied to this court for permission to introduce documentary evidence to establish the validity of her marriage. She has also applied for her substitution, sui juris, as appellant herein in the place of Baldwin Robertson, her guardian ad litem. The documents sought to be introduced all relate to matters occurring subsequent to entry of the judgments of removal. They do not bear upon issues adjudicated by those judgments but upon issues raised by the petition to terminate the guardianship. Since that petition was still pending at the close of the present proceeding in the trial court, the documents are not relevant to any matter involved in these appeals. There is therefore no ground upon which this court may properly grant the application for the substitution, of Patricia sui juris, as a party appellant.

[5] The application of Patricia Lee Leach for substitution, sui juris, as party appellant in the place of Baldwin Robertson, her guardian ad litem, is therefore denied. Her application now to introduce certain documents in evidence and to have this court make findings thereon contrary to those made by the trial court, is likewise denied. The appeals from the incidental orders are dismissed. The judgments of removal appealed from herein are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



30 Cal.2d 312

In re JACOBSON'S GUARDIANSHIP.
McCALLOM v. HORNADAY.
L. A. 19527.

Supreme Court of California, in Bank.
June 24, 1947.

1. Courts ⇐202(5)
Guardian and ward ⇐161

An order for allowance of counsel fees of former special guardian is not appealable, but the item may be reviewed on appeal from order settling the first and final account of former special guardian.

2. Judges ⇐47(2)

Mere erroneous rulings in prior guardianship proceedings in which counsel rendered the services for which compensation is claimed would not create a disqualification as a matter of law to pass on the value of services rendered, particularly where the allegedly erroneous rulings had been upheld.

3. Judges ⇐47(2)

An allegedly erroneous finding which was not carried into the judgment affords no basis for charge of disqualification of judge to hear and pass on matter subsequently arising in same proceeding.

4. Judges ⇐47(2)

A trial judge who had sanctioned the rendition of legal services in a guardianship proceeding and has observed the performance of counsel is ordinarily better qualified than any other to adjudge the worth of those services, and alleged overvaluation of the services and that some of them could not be properly paid from one of the estates were matters that related to the amount to be allowed and not to the qualification of the judge.

5. Judges ⇐49(2)

Remarks made by judge in open court in line with the convictions and conclusions drawn by him from conflicting evidence in proceeding before him and made in what he conceived to be the discharge of his judicial duty are not evidence of bias or prejudice as respects qualification of the judge to pass on matters subsequently arising.

6. Judges ⇐51(4)

Finding that judge was not disqualified to pass on value of legal services rendered in guardianship proceedings was sustained by the evidence.

7. Guardian and ward ⇐58

Where grandmother of infants instituted proceedings to remove guardian who was seeking to impoverish infants and was later appointed special guardian, allowance of attorney's fees and expenses for time when attorneys represented the grandmother as such, and for time when they represented her as special guardian including proceeding for such allowance, was proper. Probate Code, § 1406.

8. Guardian and ward ⇐25, 27

Upon the removal of general guardian, he stands suspended from office during pendency of his appeal from order of removal, but a new guardian may not be appointed until the order of removal becomes final, which does not prevent the appointment of a special guardian during the period of suspension, regardless of the minor's consent or nonconsent, in order that the guardianship estate may be protected. Probate Code, § 1406.

9. Guardian and ward ⇐25, 27

Where general guardian had been removed from office, the fact that one of the infants had purportedly married did not affect the jurisdiction of the court to take

all proper steps necessary to completion of the guardianship including the appointment of infant's grandmother as special guardian. Probate Code, § 1406.

10. Guardian and ward ⇐58

In proceeding by special guardian of infants for the allowance of expenses and attorney's fees, a certificate of infant's marriage and of prior divorce proceedings of her husband and his former wife were properly rejected, since the validity of the marriage was not an issue raised by or pertinent to petition for counsel fees and expenses. Civ. Code, § 25; Probate Code, §§ 1500, 1590.

11. Guardian and ward ⇐21
Infants ⇐10

A lawful marriage contracted by a female over 18 years of age terminates her minority, and guardianship of her person and estate, but the lawfulness of her marriage must be shown, and where the marriage was under attack, the jurisdiction of the court and the guardianship continue for all purposes until the validity of the marriage was established. Civ.Code, § 25; Probate Code, §§ 1500, 1590.

12. Guardian and ward ⇐58

The guardian who serves during the interim between the legal termination of the guardianship by attaining majority through marriage, and proof of the marriage and final discharge of the guardian, will be allowed reasonable expenses incurred in the execution of his trust. Probate Code, § 1556.

13. Guardian and ward ⇐58

Where sale of infant's property was consummated by special guardian with infant's consent, the special guardian was entitled to reimbursement for her expenditures even though the infant acquiesced in sale because she feared results of the special guardianship. Probate Code, § 1556.

14. Guardian and ward ⇐158, 161

In proceeding by special guardian for the allowance of attorney's fees and expenses, findings which covered only the issues of the reasonableness of the allowance made, were sufficient and failure to find on matters relating largely to issues in proceedings for removal of general guardian and the validity of infant's marriage, her expressed wishes, authorizations and the like, was not prejudicial. Probate Code, § 1556.

15. Appeal and error ⇐1048(3)

In proceeding for attorney's fees, the allowance of a 40-page hypothetical question by the court was not prejudicial.

16. Evidence ⇐553(3)

It is not essential to the propriety of a hypothetical question that the facts assumed shall be undisputed, since the question is proper if it recites only facts within possible or probable range of the evidence and if it is not unfair or misleading.

17. Evidence ⇐553(1)

The trial court has a larger discretion as to the form of hypothetical questions.

18. Guardian and ward ⇐58

Allowance of $60,000 as attorney's fees to special guardian of two infants, who had requested allowance of more than $94,000 was sustained by the evidence.

19. Guardian and ward ⇐58, 161

The allowance of counsel fees for services rendered by attorneys of special guardian rests largely in the discretion of the court in the first instance, whose allowance will not be disturbed except for a clear abuse of discretion.

20. Guardian and ward ⇐58

The granting of a lien upon the assets of the guardianship estate to secure payment of the fee and cost allowance made to special guardian of infants was proper.

21. Interest ⇐39(3)

Where sum was allowed to special guardian for attorney's fees and expenses allowance of interest from date of allowance order was proper.

22. Appeal and error ⇐660(2)

Where proffered data on petition for augmentation of record on appeal would not affect the determination of the appeal, they would be rejected.

23. Appeal and error ⇐330(2)

Petition for substitution of infant sui juris as party appellant would be denied.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding in the matter of the guardianship of the person and estate of Patricia Lee Jacobson also known as Patricia Lee Leach, a minor, on the petition of E. Mae McCallom for approval and settlement of final account and for allowance of counsel fees and expenses of E. Mae McCallom former special guardian which was opposed by Patricia Lee Hornaday also known as Patricia Lee Jacobson and Patricia Lee Leach and Harold C. Morton special guardian. From a minute order and from a written order approving and settling the first and final count of E. Mae McCallom and granting the petition of E. Mae McCallom former special guardian for counsel fees and expenses Patricia Lee Hornaday, etc., and Harold C. Morton, special guardian, appeal.

Appeal from order allowing counsel fees dismissed and order approving and settling the first and final account of E. Mae McCallom affirmed.

See also 182 P.2d 545.

Baldwin Robertson, of Los Angeles, for appellant.

George R. Maury, S. L. Kurland, Alfred C. Ackerson and Earl Redwine, all of Los Angeles, for respondent.

SHENK, Justice.

Patricia Lee Leach, as an emancipated married woman, and also by Baldwin Robertson, her guardian ad litem, and by Harold C. Morton, her special guardian, and Harold C. Morton, as special guardian, appeal from a minute order of April 2, 1945, and from a written order of May 4, 1945, approving and settling the first and final account of E. Mae McCallom and granting the petition of E. Mae McCallom, former special guardian herein, for counsel fees and expenses.

[1] The order for allowance of counsel fees is not itself appealable, but the item may be reviewed on appeal from the order settling the first and final account of the former special guardian. Guardianship of Leach, 29 Cal.2d 535, 176 P.2d 369.

The proceedings in which three attorneys rendered services are described chronologically in the opinion in prior consolidated appeals. Guardianship of Leach, (Guardianship of Jacobson, Cal.Sup., 182 P.2d 529. Reference is made to that opinion for a more extended factual background. This court there affirmed judgments entered in December, 1944, removing F. Paul Hornaday as guardian of the persons and estates of the two wards. By stipulation the evidence in that proceeding is deemed to be evidence in the present proceeding.

Following the entry of the judgments of removal and during the pendency of appeals therefrom, and on January 23, 1945, E. Mae McCallom, as special guardian of the estate of Patricia, and as guardian ad litem and special guardian of the person and estate of William Ronald, petitioned the trial court for an allowance of $94,706 counsel fees and $884.51 expenses, chargeable one-half, or $47,795.25 to each estate. Attached to the petition was a summary of the hours and days spent in court and out of court by each counsel in working on these matters. On February 8, 1945, Mrs. McCallom filed in the estate of Patricia her first and final account as special guardian, wherein she sought the sum of $47,795.25 as an item of expenditure for counsel fees and expenses. On March 30th she filed a supplemental petition for an additional allowance of counsel fees and expenses covering the period subsequent to the filing of the original petition on January 23rd.

The matter was called for hearing before Judge Joseph W. Vickers, who had heard the removal proceedings, L.A.No.19,230, L.A.No.19,231, supra. Patricia promptly filed a statement of disqualification charging bias and prejudice on the part of Judge Vickers toward her, her husband, and her former guardian, as evidenced by his rulings in the removal proceedings and by several remarks made by him in open court. A verified answer was filed on behalf of Judge Vickers denying disqualification, bias, or prejudice, and denying that he held any convictions regarding the subjects in litigation except those arrived at upon the basis

of the evidence presented before him. It was stipulated that the disqualification matter might be heard and determined by Judge Dudley S. Valentine. On March 9th Judge Valentine decided that Judge Vickers was not disqualified and denied the disqualification petition. Patricia, sui juris and by her guardian ad litem, has assigned this ruling as error. She urges the point on this appeal under a bill of exceptions which has been incorporated in the clerk's transcript. During the course of the hearing she also applied to the District Court of Appeal for a writ of prohibition. On March 28th the application was denied. Hornaday v. Superior Court, 2 Civ. 14,928, 68 A.C.A.No.6, Minutes, p. 3.

[2, 3] The contentions with respect to disqualification urged by reason of alleged errors in the rulings of Judge Vickers in the prior removal proceedings are answered first by the fact that mere erroneous rulings in prior guardianship proceedings in which counsel rendered the services for which compensation is claimed would not create a disqualification as a matter of law (McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 11, 155 P. 86, and cases there cited; 14 Cal. Jur. pp. 821–823, sec. 23); and second by the fact that this court's affirmance of the judgments of removal rendered by Judge Vickers has established the position of counsel on the prevailing side in the litigation, thus refuting any claim that their services were of no value. The charge that Judge Vickers erroneously declared that Patricia's marriage was invalid relates to an issue upon which there was a finding but not an adjudication in the removal proceedings (Guardianship of Leach, supra, Cal.Sup., 182 P.2d 529), and the finding affords no basis for the charge of disqualification.

[4] If, as charged in the disqualification statement, some of the services for which an allowance of fees was sought could not properly be paid from the estate of Patricia, that was a matter pertaining to the issue to be heard, i. e., the amount of the allowance, and not a matter pertaining to the qualification of the judge. The same is true with respect to the alleged over-valuation of the services. A trial judge who has sanctioned the rendition of legal services in a guardianship proceeding and has observed the performance of counsel is ordinarily better qualified than any other to adjudge the worth of those services. Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200; Estate of Keith, 16 Cal.App.2d 67, 70, 60 P.2d 171; Guardianship of Vaughan, 14 Cal.App.2d 594, 58 P.2d 742.

[5] The challenged remarks by Judge Vickers in open court were but statements in line with the convictions and conclusions drawn by him from the conflicting evidence in the removal proceedings, as reflected in his determination of those proceedings. Such expressions of opinion uttered by a judge in what he conceives to be the discharge of his judicial duty, are not evidence of bias or prejudice. Kreling v. Superior Court, 25 Cal.2d 305, 311, 312, 153 P.2d 734; McEwen v. Occidental Life Ins. Co., supra, 172 Cal. at page 11, 155 P. 86. Furthermore, so far as Patricia herself is concerned the remarks indicate an anxiety for her welfare rather than any prejudice against her.

[6] The issue of disqualification was submitted to Judge Valentine upon conflicting affidavits and there is no showing that he abused his discretion in resolving the conflict in favor of qualification.

After the determination of the disqualification issue, the petition for allowance of fees and expenses and for settlement of the account of Mrs. McCallom came on for hearing. On April 2, 1945, a minute order was entered approving the account and allowing, in the guardianship of William Ronald $27,500 fees and $376 expenses, and, in the guardianship of Patricia, $32,500 fees and $508.51 expenses; also allowing, on the supplemental petition, an additional $1,000 fee in each estate. Thus the total allowance in the estate of Patricia was $34,008.51. On May 4, 1945, in the estate of Patricia, formal findings were filed with an order allowing Mrs. McCallom $34,008.51 for counsel fees and costs, directing payment by special guardian Morton, granting a lien for that sum upon all the assets of the estate, and providing for interest at 7% until payment. On the same day a further written order was made approving

and settling the first and final account of Mrs. McCallom, with the fee and expense item fixed at $34,008.51, and discharging her as special guardian. She sought no allowance for her own services.

On this appeal no item of the account is challenged except the allowance for counsel fees. The day and hour summary of work submitted by the three attorneys covered the service performed by them for both estates. Mrs. McCallom petitioned, as aforesaid, for a lump sum to cover services rendered over the entire period in behalf of both wards. No effort was made by counsel or court to undertake the almost impossible task of making a separate time and period segregation as to each estate.

As shown by the minute order of April 2nd, however, the court taxed the estate of William Ronald with a much less sum than that of Patricia. The work in court started earlier in the estate of William Ronald than in the estate of Patricia but the problems raised in the latter estate involved complex factual elements and legal questions not presented in the former. But notwithstanding this, the work done was in a sense one work. The estates consisted almost entirely of a single asset, the Leach company, and any misconduct in the guarding of that asset would affect both wards. Evidence with reference to the grounds of removal adduced in behalf of one estate was also evidence which would strengthen the grounds for removal asserted in the other estate. Court and counsel were not at fault in proceeding on the theory that a single evaluation apportioned between the two estates was within the court's discretion. The record in the consolidated removal proceedings shows that whatever work was done in the estate of William Ronald redounded to the benefit of the estate of Patricia and vice versa.

It is argued that since there was no obligation on the part of Patricia to pay any portion of the fees and expenses incurred in the estate of William Ronald and since neither Mrs. McCallom nor her attorneys purported to represent Patricia in any capacity prior to July 10, 1944, no allowance against Patricia could properly be made for services rendered before that date; that no allowance could properly be made for the period July 10th to November 14th because during that period the attorneys were representing Mrs. McCallom solely in her capacity as grandmother (from September 6th Patricia was represented by a guardian ad litem of her own choosing, and from October 9th she was sui juris by reason of her marriage); that Mrs. McCallom was not made special guardian until November 14th, at which time Patricia's emancipation had effected a removal of the general guardian by operation of law. In short, under this argument, no allowance at all could properly be made from the estate of Patricia.

[7, 8] The court, however, did not err in making an allowance. At the time the services were undertaken, Patricia's parents were dead, her general guardian Hornaday was under removal charges filed in the estate of William Ronald, and the guardian ad litem of her own choosing was the brother-in-law of Hornaday's associate. The grandmother, Mrs. McCallom, alone stood in a position adverse to Hornaday. Although she was not the nominee of Patricia (Probate Code, sec. 1406), her relationship and her activity in the estate of William Ronald made her a person upon whom the court might rely in its efforts to protect the interests of both wards. She was permitted to petition in the estate of Patricia on July 10th for removal of Hornaday. Upon the basis of that petition, after Patricia's refusal to consent thereto, and upon other information before it, the court of its own motion issued a citation to Hornaday to show cause why he should not be removed as guardian of the person and estate of Patricia. The attorneys for Mrs. McCallom cooperated with and aided the court in its undertaking. There was not understanding that either their services or those of Mrs. McCallom would be rendered gratuitously. They acted upon the assumption that in so far as their services proved beneficial to the estate they would be paid for. That the court had power to employ such a procedure in its effort to guard the interest of the minors is nowhere denied. The duties assumed by Mrs. McCallom were those of a constructive, de

facto, or quasi-guardian, entitling her to an allowance for all proper disbursements for the benefit of the ward, including counsel fees. In re Beisel's Estate, 110 Cal. 267, 40 P. 961, 42 P. 819; Guardianship of Giambastiani, 1 Cal.App.2d 639, 37 P.2d 142. She was entitled to seek an allowance at any time. The fact that she did so while the appeal from the removal judgments was still pending is immaterial. The trial court correctly computed its award upon the assumption that its adjudications were proper and would become final. Had they been reversed on appeal, that fact would have affected only the question whether the allowance was excessive.

The work which was of benefit to the estate of Patricia included that which was done prior to court appearance on July 10th and also that performed subsequent to the rendition of the judgments of removal in seeing that a sale of the company was duly consummated. The allowance properly covered the entire period (Guardianship of Giambastiani, supra, 1 Cal.App.2d at pages 645, 646, 37 P.2d 142), including attorneys' fees and expenses incurred in settling the account of the guardian such as those claimed in the supplemental petition herein. Estate of Clanton, 171 Cal. 381, 387, 153 P. 459.

[9] It is contended that the court was without jurisdiction on November 15, 1944, to appoint Mrs. McCallom special guardian, since Patricia did not consent to the appointment and she had theretofore attained her majority by marriage. Section 1406 of the Probate Code permits a minor over 14 years of age to nominate his own general guardian but no mention is made of the nomination of a special guardian and the consent of the minor is not necessary to such an appointment by the court. Upon the removal of a general guardian, he stands suspended from office during the pendency of his appeal from the order of removal, but a new general guardian may not be appointed until the order of removal becomes final. Guardianship of Van Loan, 142 Cal. 429, 76 P. 39; In re Moore's Estate, 86 Cal. 72, 24 P. 846. If, during the period of suspension there is need for a guardian, it is within the power of the court to appoint a special guardian, regardless of the minor's consent or nonconsent, or to take any other steps necessary for the protection and best interests of the guardianship estate. Patricia's nominee, special guardian Morton, in his response to the McCallom petition, stated his recognition of the necessity of passing upon the petition and his consent "that the court may hear and consider the same, and further requests that the fees and expenses to be allowed, if any, be only such as are permitted and allowable under the laws of the State of California."

[10] The fact that on October 9th Patricia had purportedly married did not affect the jurisdiction of the court to take all proper steps necessary to the completion of the guardianship, including the appointment of the grandmother as special guardian on November 15th. At the time of the appointment and of the hearing and settlement of the grandmother's account there had been no order terminating the guardianship. In fact the termination proceeding had been left pending at the close of the removal proceedings. In the removal proceedings Patricia failed to establish the validity of her marriage to the satisfaction of the court and was confronted with a finding, although not an adjudication, of invalidity.

In this proceeding Patricia offered in evidence a certificate of her marriage and of her marriage and of the prior divorce proceedings of her husband and his former wife, but the offer was properly rejected for the reason that the validity of the marriage was not an issue raised by or pertinent to the petition for counsel fees and expenses. The eventual adjudication of the marriage was not vital to the determination of either the removal proceedings (Guardianship of Leach, supra, Cal.Sup., 182 P.2d 529) or the counsel fees proceeding. If the marriage was valid, Hornaday was nevertheless chargeable with failing to properly guard the minor from possible adverse influences, and the showing made by the grandmother was sufficient to support the action of the court in entertaining her petition and seeking the aid of her counsel in investigating and prosecuting the issue

for protection of the minor. If the marriage was invalid, the result would be the same so far as the work of the attorneys and the grandmother is concerned.

[11] Even assuming that on a hearing of the petition to terminate Patricia could establish the validity of the marriage, the court nevertheless retained full jurisdiction of the guardianship in the interim. A lawful marriage contracted by a female over the age of 18 years terminates her minority and the guardianship of her person and estate (Civil Code, section 25; Probate Code, sections 1500, 1590), but the lawfulness of the marriage must be shown. Where, as here, the marriage is under attack, the jurisdiction of the court and the guardianship continues for all purposes until the validity of the marriage is established. Were the rule otherwise, any ward, by entering upon a purported marriage could effectually tie the hands of the court and of the guardian and thwart the very purpose of the guardianship. The present case, where the ward resisted every effort made by the court in her behalf, illustrates the point.

[12] Moreover, the guardian who serves during the interim between legal termination of the guardianship by attainment of majority through marriage, and proof of the marriage, and final discharge of the guardian, will be allowed the reasonable expenses incurred in the execution of his trust. Probate Code, section 1556. According to the Code Commissioner's note the amendment to the predecessor of this statute in 1907 was enacted within intent to establish the rule set out in the dissenting opinion in Estate of Kincaid, 1898, 120 Cal. 203, 211, 52 P. 492, 495. It is there said: "If, then, it appears that the relation of guardian and ward has continued in fact after the termination of the strictly legal relation, the account of the guardian should embrace all the transactions, as well after as before the majority; and any court, whether probate or other, settling the account, must settle it as a whole, and upon the same principles after as during the minority. And in such settlement transactions fairly referable to the de facto relationship of guardian and ward should be treated as such, and not as transactions between strangers."

[13] So far as the rendition of services and other matters connected with the sale of the company are concerned, these matters not being essential to an accounting by Mrs. McCallom, Patricia is in no position to complain for the reason that she consented to the sale. She claims it was not a true consent as she wanted to keep the company, and that she merely acquiesced in the sale because she feared the results of the McCallom guardianship. However, even the removed guardian Hornaday had agreed that a sale of the company would probably be in the best interests of both minors and this view was never seriously challenged. Any mental reservations Patricia may have had in giving her consent are immaterial. The sale was duly consummated and the guardian is entitled to reimbursement for her expenditures in the premises.

[14] It is contended that the court committed prejudicial error in failing to find on all material issues. The findings covered only the issue of the reasonableness of the allowance made. No findings were made bearing on other matters herein discussed, such as the validity of Patricia's marriage, her expressed wishes and authorizations, and the like. These matters relate largely to issues in the removal proceedings or to the termination proceeding or to questions upon which no finding was required. No prejudice is shown.

It is contended that the amount allowed by the court for counsel fees, $32,500, with $1,000 for supplemental services and $508.51 costs, a total of $34,008.51, is so excessive as to constitute an abuse of discretion. The cost item is not challenged. The propriety of the supplemental award has already been the subject of comment. There remains only the $32,500 item. This item, and the companion award of $27,500 in the estate of William Ronald, make a total allowance of $60,000, as against the prayer of the petition for $94,706. In other words, Mrs. McCallom was allowed but about two-thirds of the sum which she requested for fees.

[15-18] Expert witnesses testified to the value of the services rendered. A 40 page hypothetical question was propounded to them. Numerous objections were interposed on the ground that the question erroneously assumed the existence of certain facts. Many of these were facts found to be true in the removal proceedings. A particular objection was that the question erroneously assumed that Mrs. McCallom and her attorneys had "saved" the minors' inheritance and recovered $610,000 for them. The trial court overruled the objection and the ruling is assigned as error. No prejudicial error, however, is shown. It is not essential to the propriety of a hypothetical question that the facts assumed should be undisputed. The question is proper if it recites only facts within the possible or probable range of the evidence and if it is not unfair or misleading. A large discretion relating to the form of the question rests with the trial court. Treadwell v. Nickel, 194 Cal. 243, 264, 228 P. 25; People v. Hill, 116 Cal. 562, 567, 48 P. 711; 10 Cal.Jur. sec. 223, pp. 966, 967. The in court and out of court day and hourly rate at which the attorneys valued their services, as stated in the question, was in line with their testimony on the subject, and there was also expert opinion to the effect that the rate specified was reasonable. Moreover, the value of the services was not itemized on this basis. Only a lump sum was sought, based upon the reasonable value of the services under the circumstances shown.

[19] It is contended that the award was so excessive as to constitute an abuse of discretion and that it was the result of prejudice on the part of the trial judge. The evidence, however, refutes this contention. The petitioner valued the services at $94,706, or $47,353 in each estate. One of the expert witnesses, and all of them were qualified, placed the reasonable worth of the services in both estates at $98,000 to $100,000. This witness testified that after the hypothetical question was submitted to him he had augmented his information by reading most of the transcript, all of the pleadings, and most of the briefs. Another witness stated that $90,000 would be a fair and reasonable fee. Another gave a figure of $100,000 to $125,000. One of the witnesses gave his opinion that a reasonable fee would approximate an amount based upon the day and hour charge testified to by the attorneys, with an additional fee of 5 to 10 per cent because of the contingent element involved in recovery, or, to compute the fee another way, "I think somewhere between 15 and 16 per cent of the amount recovered or saved would not be an unreasonable charge if you want to figure it on a percentage basis. I think if it was ordinary litigation where an estate was not involved and the economic feature was not a problem, I think if it was an ordinary individual and the person was taking it on a contingent basis, they would not hesitate to charge 20 or 25 per cent."

The allowance made by the trial court was considerably less than the figure suggested by the majority of the experts. It was about 10 per cent of the gross estate involved, or about 15 per cent of the net. It was properly based upon the court's conclusion, drawn from the conflicting evidence, that the services had been of great value to the minors. The allowance of counsel fees in a matter such as this rests largely in the discretion of the court in the first instance and the order under review will not be disturbed unless an abuse of discretion is plainly involved. Estate of Duffill, 188 Cal. 536, 553, 554, 206 P. 42; Estate of Parker, 186 Cal. 671, 672, 200 P. 620; Freese v. Pennie, 110 Cal. 467, 470, 42 P. 978; Crocker v. Crocker First Nat. Bank of San Francisco, 60 Cal.App.2d 725, 730, 141 P.2d 482; County of Riverside v. Brown, and cases cited, 30 Cal.App.2d 747, 749, 750, 87 P.2d 60; Guardianship of Garbini's Estate, 28 Cal.App.2d 715, 83 P.2d 508; Estate of Keith, supra, 16 Cal.App.2d at page 70, 60 P.2d 171; 11B Cal.Jur. sec. 1056, p. 506; 3 Cal.Jur. sec. 96, 114, pp. 697–698, 718.

[20, 21] The trial court did not err in granting the guardian a lien upon the assets of the guardianship estate to secure payment of the fee and cost allowance (Estate of Schluter, 209 Cal. 286, 286 P. 1008; Estate of Clanton, supra, 171 Cal. at page 385, 153 P.2d 459), or in providing for interest from date of the allowance order. Glenn v. Rice, 174 Cal. 269, 276, 162 P.

1020; Crane v. Stansbury, 173 Cal. 631, 161 P. 7; Crocker v. Crocker First Nat. Bank, supra, 60 Cal.App.2d at page 731, 141 P.2d 482; 14 Cal.Jur. sec. 48, p. 945.

A petition on behalf of Patricia for augmentation of the record and for her substitution, sui juris, as party appellant was filed in this court, but a letter was later received stating that counsel was not greatly concerned whether the request be granted or denied. The proffered data would not affect the determination of this appeal.

[22, 23] The petition for augmentation of record and for substitution of party appellant is denied. The appeal from the order allowing counsel fees is dismissed. The order approving and settling the first and final account of E. Mae McCallom is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



30 Cal.2d 326

In re JACOBSON'S GUARDIANSHIP.
HORNADAY v. McCALLOM.

L. A. 19843.

Supreme Court in California, in Bank.

June 24, 1947.

1. Guardian and ward ⇐127

Where general guardian of infant was suspended pending appeal from judgment of removal, infant was entitled to bring an action in her own name to establish her marriage and properly joined as a party defendant, her special guardian, and the deposed guardian was not a necessary party. Civ.Code, § 78.

2. Guardian and ward ⇐25

In proceeding to terminate guardianship, finding that due and regular notice of hearing had been given and that a copy of the petition had been duly and regularly served on contestant was sustained by the evidence. Probate Code, §§ 1600, 1601.

3. Judgment ⇐742

Where there was no adjudication in proceeding for removal of general guardian as to validity of infant's marriage, a judgment subsequently rendered in action by infant to establish validity of marriage was res judicata in proceeding to terminate guardianship. Civ.Code, § 78.

4. Judgment ⇐510

Where alleged collusion did not appear on face of judgment roll it could not be made the basis of a successful collateral attack on the judgment.

5. Judgment ⇐510

The appearance and waiver of bank in propria persona as special guardian in action by ward to establish validity of marriage did not render the judgment vulnerable to collateral attack in subsequent proceeding to terminate guardianship. Civ. Code. § 78.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the guardianship of the person and estate of Patricia Lee Jacobson, also known as Patricia Lee Leach, on petition of Patricia Lee Hornaday also known as Patricia Lee Jacobson and as Patricia Lee Leach against Citizens National Trust & Savings Bank of Riverside, special guardian E. Mae McCallom to terminate guardianship and for a declaration of the attainment of her majority. From an order instructing and directing a special guardian and terminating guardianship subject to an accounting and distribution of assets, E. Mae McCallom appeals.

Order affirmed.

Samuel L. Kurland, George R. Maury and A. C. Ackerson, all of Los Angeles, for appellant.

Baldwin Robertson and Earl Redwine, both of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by E. Mae McCallom as "maternal grandmother of the ward

herein, and objector, and lienor, and predecessor Special Guardian" from an order instructing and directing a special guardian and terminating the guardianship, subject to an accounting and distribution of assets.

For a statement of the facts necessary to an understanding of the questions presented see opinions this day rendered on prior appeals. Guardianship of Leach, Cal. Sup., 182 P.2d 529; Guardianship of Jacobson, L. A. No. 19,527, Cal.Sup., 182 P.2d 537.

On May 4, 1945, the probate court made its order approving and settling the first and final account of Mrs. McCallom, and discharging her as special guardian. Guardianship of Jacobson, supra, L. A. No. 19,527, Cal.Sup., 182 P.2d 537. In August, 1945, Harold C. Morton, who, as Patricia's nominee, had also been serving as special guardian, resigned. On August 22nd, on nomination of Patricia, the court appointed the Citizens National Trust and Savings Bank of Riverside to take the place of Mr. Morton as special guardian of the estate, with the powers of a general guardian. The pending petition of Patricia to terminate the guardianship on the ground that she had attained her majority through marriage went off calendar.

Thereafter, and on October 13, 1945, Patricia filed in the superior court in Riverside County, a proceeding to determine the validity of her marriage pursuant to section 78 of the Civil Code, naming as defendants her husband Delyn and the special guardian bank. Section 78 of the Civil Code, as amended in 1943, provides that "If the female party to any marriage, who has reached the age of 18 years, desires to have the validity of said marriage established in order to establish the fact or time, or both, of her attaining majority, she may proceed, by action in the superior court, brought against the husband * * *; and even though she be under the age of 21 years, such action may be commenced and prosecuted by her in her own name and right and need not be brought or prosecuted in her behalf by general guardian or by a guardian ad litem; but if she has a general guardian of her estate he shall, unless he prosecutes the action on her behalf be joined as a defendant together with the husband, in which latter event no judgment shall be made * * * until such general guardian of the estate has either appeared in the action, or defaulted * * *; and provided further, that if the plaintiff * * * has no general guardian of her estate the court may, in its discretion require the appointment of a guardian ad litem to prosecute the action on her behalf and to safeguard her interests in the action."

[1] Under this statute Patricia was entitled to bring the action to establish her marriage in her own name. Since the powers of her general guardian Hornaday were suspended pending his appeal from the judgment of removal, she joined as a party defendant her special guardian with powers of a general guardian, the Riverside bank. This was proper. The deposed guardian Hornaday was not a necessary party. His powers being suspended, the situation was as if Patricia had no general guardian. Indeed, Mrs. McCallom would probably have been the first to protest any effort to include Hornaday as a party to the action since her whole effort throughout this prolonged litigation has been to remove him from the scene. The requirement of the statute as to essential parties was satisfied.

At the time the complaint was filed there had been no adjudication in the removal proceedings of the validity of the marriage (Guardianship of Leach, supra, Cal.Sup., 182 P.2d 529); neither was that question at issue in any other calendered proceeding in the guardianship matter. The prior petition to terminate the guardianship by reason of the marriage was off calendar and the present proceeding had not yet been instituted. Riverside County was the then residence of Patricia and her husband and it was the county in which the Riverside bank was holding the assets of the guardianship estate.

The complaint in the Riverside action alleged facts concerning the Nevada divorce secured by the former wife of Delyn and the Nevada marriage of Patricia and Delyn. It also alleged the pendency of the removal proceeding and the finding therein of the invalidity of the marriage. It stated that on September 14, 1945, after appoint-

ment of the bank as guardian, and in order to protect Patricia's property for many years to come, Patricia had executed a declaration of a 15 year full management trust, irrevocable until she reaches the age of 30 years, and to be operative upon termination of the guardianship provided that termination shall occur before her attainment of the age of 21 years. She will be 21 on August 14, 1947.

The defendants Delyn and the bank each filed a written appearance and waiver of notice of trial and of findings. Judgment was entered the same day, October 13, 1945, decreeing that the marriage of Patricia and Delyn was in all respects lawful and valid; that Patricia attained her majority on the date of the marriage; and that she was thereafter an emancipated person. That judgment became final.

Thereafter, on January 9, 1946, Patricia instituted the present termination proceeding. She prayed for a declaration of the attainment of her majority and among other things asked that upon approval of the account of the special guardian bank and payment to it of a just fee, an order be made directing it to convey the guardianship assets, pursuant to the full management trust, to itself and attorney Earl Redwine as trustees. By leave of court Mrs. McCallom, as maternal grandmother and former special guardian, filed an answer asserting that the issues raised by the petition had been determined adversely to Patricia in the prior guardianship proceedings. She also asked for protection of her lien for counsel fees and expenses. See Guardianship of Jacobson, supra, L. A. No. 19,527, Cal.Sup., 182 P.2d 537.

The matter was heard by Judge John Gee Clark. Among other things the court found that there had never been in any prior proceedings an adjudication of the invalidity of the marriage of Patricia and Delyn although there was in the removal proceeding, in which an appeal was pending, a finding to that effect; that, however, no persons other than the grandmother and F. Paul Hornaday were parties to that proceeding; that a judgment determining the validity of the marriage had been entered in the Riverside action; that the marriage was in all respects valid and that in November, 1945, a son was born, the issue of that marriage; that Patricia attained her majority on the date of her marriage; that no evidence was introduced by Mrs. McCallom in support of her allegations other than statements of the status of prior proceedings; and that $50,000 would be a reasonable amount for the bank to retain as special guardian to protect the McCallom lien. On these findings, and on April 12, 1946, an order was entered declaring that Patricia had attained her majority on the date of her marriage, and that the guardianship should be terminated; directing the bank to distribute all except $50,000 of the guardianship assets to itself and Mr. Redwine, as co-trustees of the full management trust; terminating proceedings except for a reservation of jurisdiction to settle the guardian's account; directing the guardian to hold $50,000 until further order of the court; and authorizing Patricia to apply for substitution in pending appeals as appellant sui juris.

This order adequately protects the lien of Mrs. McCallom in that the bank as special guardian will not only retain $50,000 for the purpose of "discharging all final awards that may be made against said guardianship estate and for the payment of just fees, compensation and expenses, all until the further order of the court," but the trust declaration also provides that the trustees shall pay out of the principal of the trust estate "all sums finally ordered by any court of competent jurisdiction, as attorneys' fees, compensation and expenses, guardian fees and costs in the above entitled proceeding, which are finally adjudicated to be a charge against said guardianship estate, * * *"

It is contended that the court did not have jurisdiction to hear and determine the petition for termination because appellant McCallom did not have proper notice of hearing. Pursuant to section 1600 of the Probate Code, Mrs. McCallom had filed a request for special notices. The petition to terminate was filed on January 9th and on January 10th written notice was sent to Mrs. McCallom and all other interested parties that the petition had been set for hearing on February 4th. However, a copy

of the petition to terminate did not accompany the notice as specified in section 1601 of the Probate Code. When the matter was called for hearing on February 4th Mrs. McCallom was personally present with her counsel. The defect in the notice was called to the attention of the court and Mrs. McCallom's counsel requested a continuance. After an effort to find a date convenient for all, February 25th was selected.

The court then said: "* * * All matters will be continued until February the 25th at 2 p. m. Now, will you gentlemen see that the requisite notices are sent out for that time unless notices are waived. Mr. Crump (representing Patricia): Will notice be waived of everything except the service of that petition? Mr. Maury (representing Mrs. McCallom): Surely * * * The Court: * * * Notice is waived except as to the petition to terminate, and it is not waived * * *"

Thereafter, and on February 8th, which was 16 days before the hearing set for February 25th, a copy of the petition was served on Mrs McCallom. On the hearing date she was present with all three of her attorneys and filed an answer which raised no issue of lack of jurisdiction because of defective notice. Her counsel, however, claimed that the court had not acquired jurisdiction of the subject matter because the copy of the petition to terminate had not been mailed with the notice within two days after the filing of the petition as specified in section 1601. Mr. Crump thereupon read to the court a transcript of the proceedings had on February 4th and reminded the court that counsel for Mrs. McCallom had not appeared especially at that time, nor had they requested a dismissal, or stated that they would insist upon a new petition being filed; that on the contrary, they had requested and consented to a continuance, merely stating that they wanted a copy of the petition served, and they waived notice of the hearing set for February 25th. The court overruled the objection to its jurisdiction, and thereafter found that due and regular notice of the hearing had been given and that a copy of the petition had been duly and regularly served.

[2] The record sufficiently supports the finding. Notice was duly given within the two day period specified in section 1601, but the notice was defective in failing to have appended thereto a copy of the petition. Pursuant to this notice Mrs. McCallom made a general and not a special appearance. Notwithstanding the defect in the notice she submitted to the jurisdiction of the court. She was not prejudiced in any way by this procedure; in fact her counsel were accommodated by the granting of the continuance at their particular request, and under the circumstances they may not now assert that the notice was insufficient to confer jurisdiction.

[3] Neither the Riverside judgment nor the order here under review constitutes a redetermination of an issue adjudicated in the removal proceeding and the several contentions based upon this premise must fall. As already stated, there was in the removal proceeding no adjudication of the validity of the marriage. Guardianship of Leach, supra, Cal.Sup., 182 P.2d 529. The Riverside judgment, however, is res adjudicata of the issue in this proceeding and it is upon the ground that the court based its determination herein. That the court acted in the best interest of the ward is supported by the record. The guardianship estate had already been depleted by litigation and the conduct of the proceeding by the court evidenced a commendable purpose to bring it to a close without further technical entanglements and expenses.

The contention that the Riverside judgment is void upon the face of the judgment roll and that extrinsic fraud was practiced upon the Riverside court is not shown. It appears that in the Riverside action Earl Redwine, who was counsel for the special guardian bank, prepared the two waivers, one of which was signed for the bank by its Trust Officer and the other by Patricia's husband Delyn. It is contended that this constituted an appearance and waiver by each in propria persona. It is argued that the bank, being a corporation, could only appear by counsel, and that Mr. Redwine,

who had filed the complaint as attorney for Patricia, committed a fraud upon the court in failing to show that he also acted as attorney for the defendants, the proceeding thus being a collusive one.

[4] Mr. Redwine states in a separate brief that he was not representing the bank in its capacity as special guardian at the time in question or prior to November, 1945; that the trust officer of the bank advised him that the bank, as special guardian, was not disposed to resist the action and was willing to appear by waiver, whereupon the notice was prepared by Mr. Redwine and executed by the Trust Officer. Mr. Redwine's statement that he was not the attorney for the bank is countered by an affidavit of opposing counsel appended to the closing brief of appellant. The issue is immaterial to the determination of this appeal. The alleged collusion does not appear on the face of the judgment roll in the Riverside action and therefore cannot be made the basis of a successful collateral attack on the Riverside judgment. No evidence of the alleged collusion was introduced at the hearing in this proceeding. Mrs. McCallom was not a party to the Riverside action; she did not seek to be joined as a party; nor did she sue in equity to set aside the judgment for extrinsic fraud. It was not incumbent upon the bank, as special guardian, to contest the Riverside suit or to try to invalidate the marriage if it felt that this would not be for the best interest of the ward or that the marriage was valid. There was no conflict of interest. In other words, the bank, as special guardian, acted within its right in joining in the protest against the allowance of alleged excessive fees to counsel for Mrs. McCallom and in refusing to join in an attack, in the removal proceeding or elsewhere, upon the validity of Patricia's marriage.

[5] Although the appearance and waiver of the bank in propria persona may have been irregular (see Prudential Ins. Co v. Small Claims Court, 76 Cal.App.2d 379, 173 P.2d 38, and authorities cited page 41, 167 A.L.R. 820; Mullin-Johnson Co. v. Penn. Mutual Life Ins. Co., D.C., 9 F. Supp. 175; 9 Cal.Jur.Supp. p. 348, sec. 15; 19 C.J.S., Corporations, § 1323, pp. 1004, et seq.; Hexter Title & Abstract Co. v. Grievance Committee, etc., 142 Tex. 506, 179 S.W.2d 946, 157 A.L.R. 282), this would not render the judgment vulnerable to collateral attack in the guardianship proceeding. The defect in the waiver left the situation as though the bank had defaulted and the default judgment had been prematurely entered. A premature default judgment is merely irregular or erroneous; it is not void; and as against a collateral attack in a proceeding in which it has been pleaded as res judicata, it is res judicata, even though erroneous. Mather v. Mather, 22 Cal.2d 713, 723, 140 P.2d 808; Gray v. Hall, 203 Cal. 306, 317, 265 P. 246; In re Newman, 75 Cal. 213, 220, 16 P. 887, 7 Am. St.Rep. 146; Harnish v. Bramer, 71 Cal. 155, 159, 11 P. 888; 14 Cal.Jur. sec. 28, p. 903; see also Mitchell v. Automobile etc. Underwriters, 19 Cal.2d 1, 7, 118 P.2d 815, 137 A.L.R. 923.

It is also suggested that the service upon, as well as the appearance of the bank, was meaningless because a Trust Officer is not one specifically designated to receive service under section 411, subd. 1 of the Code of Civil Procedure. The bank asserts in its brief that the trust officer is the officer whom it has regularly designated for the service of process upon it. The record contains no showing to the contrary.

The order appealed from is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



30 Cal.2d 295

**In re JACOBSON'S GUARDIANSHIP.
HORNADAY v. McCALLOM.**

L. A. 19843.

Supreme Court of California, in Bank.

June 24, 1947.

1. Courts ⇐202(5)

An order instructing and directing special guardian is appealable. Probate Code, § 1630.

2. Courts ⇐202(5)

Where there was no showing that appeal from order instructing and directing special guardian was not being prosecuted in good faith and appellant claimed to be a person aggrieved for the reason that order touched upon material issues involved in prior and pending proceedings in guardianship, wherein appellant had prevailed in trial court, and announced conclusions contrary to those reached in prior proceedings and appellant was a prior special guardian and asserted an undischarged lien upon assets of the estate, respondent's motion to dismiss appeal would be denied.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the guardianship of the person and estate of Patricia Lee Jacobson also known as Patricia Lee Leach on petition of Patricia Lee Hornaday, also known as Patricia Lee Jacobson, and as Patricia Lee Leach, against Citizens National Trust and Savings Bank of Riverside and E. Mae McCallom to terminate guardianship. From an order instructing and directing special guardian, E. Mae McCallom appeals. On motion of respondent to dismiss appeal.

Motion denied.

Samuel L. Kurland, George R. Maury and A. C. Ackerson, all of Los Angeles, for appellant.

Baldwin Robertson and Earl Redwine, both of Los Angeles, for respondent.

SHENK, Justice.

Respondent Patricia Lee Leach has moved to dismiss the appeal of E. Mae McCallom from an order entered April 12, 1946, in this guardianship proceeding, on the ground that the order is not appealable, that E. Mae McCallom is not aggrieved by it, and that her appeal is not taken in good faith.

The order was entered after a full hearing on the petition of the minor to terminate the guardianship upon the reaching of her majority and for other relief, and its entry was preceded by the filing of formal findings of fact and conclusions of law. In the order the court declares that the minor reached majority by virtue of her marriage in October, 1944. It is then ordered that the guardianship proceedings be terminated, subject only to the reserved jurisdiction of the court to require the special guardian to account, and to adjudicate the account and order distribution of the assets of the estate.

The order then directs the special guardian bank to convey to itself and to Earl Redwine as co-trustees for the petitioner Patricia Lee Leach, under a full management trust, all of the assets of the guardianship estate except $50,000; directs that the bank, as special guardian, retain the $50,000 for the purpose of discharging all final awards and charges which may be made against the guardianship estate, all until the further order of the court, and that when this purpose is accomplished, the $50,000, or so much thereof as remains in the hands of the special guardian, be paid to itself and Redwine as co-trustees of the management trust.

Lastly, it is ordered that in all pending appeals in the guardianship proceedings, particularly appeals L.A. No. 19,231, Cal. Sup., 182 P.2d 529, and L.A. No. 19,527, Cal. Sup., 182 P.2d 537, pending in this court, wherein Patricia Lee Leach is named as appellant sui juris and by guardian ad litem, she be authorized to apply to this court for substitution therein "as an emancipated person and as sui juris, and that Baldwin Robertson, who has heretofore acted in said appeals pursuant to said orders of court," be discharged as guardian ad litem.

[1] In essence the order is one instructing and directing the special guardian, and as such it is an appealable order. Probate Code, section 1630. It anticipates the final termination of the guardianship, and the discharge of the special guardian upon its compliance with the instructions given and the settlement of its account.

[2] There is no showing that the appeal is not being prosecuted in good faith. E. Mae McCallom claims to be person aggrieved for the reason that the order touches upon material issues involved in prior and pending proceedings in the guardianship matter wherein she has prevailed in the trial court, and announces conclu-

sions contrary to those reached in the prior proceedings; also that she was a prior special guardian and asserts an undischarged lien upon the assets of the estate.

The motion to dismiss is denied.

GIBSON, C.J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, J., concur.



30 Cal.2d 433

ALLEN v. ALLEN.

L. A. 19701.

Supreme Court of California, in Bank.

July 3, 1947.

1. Army and navy ⇐34

Where divorced wife's notice of motion to modify support order was served on husband's attorney in the divorce action, who informed wife's attorney that he was no longer authorized to represent husband and did not know where he was except that he was in military service, and later husband's attorney appeared at hearing on motion and explained situation to trial judge, it was error to fail to appoint attorney to represent defaulting husband. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 200(1), 50 U.S.C.A.Appendix, §§ 501 et seq., 520(1).

2. Army and navy ⇐34

In wife's proceeding to modify allowance for support, the mere service of process on attorney of record in the divorce action, without proper affidavit required by Soldiers' and Sailors' Civil Relief Act that husband was not in military service, was not sufficient to satisfy requirement of statute. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 200(1), 50 U.S.C.A. Appendix, §§ 501 et seq., 520(1).

3. Army and navy ⇐34

Error in failing to appoint attorney to represent defendant divorced husband in military service in wife's proceeding to modify support allowance did not render order of modification entered on husband's default void, but merely voidable and valid until properly attacked by husband. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 200(1), 50 U.S.C.A.Appendix, §§ 501 et seq., 520(1).

4. Army and navy ⇐34

Where divorced husband's attorney of record in divorce action was not authorized to represent him in wife's proceeding for modification of support allowance and so notified wife's attorney and trial court, and husband was never notified of such proceeding or order increasing allowance until shortly before his discharge from navy, his motion to vacate the modification order made immediately after discharge was timely and should have been granted. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 200(1), 50 U.S.C.A. Appendix, §§ 501 et seq., 520(1).

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Gertrude Ann Allen against Glen V. Allen for divorce. From an order denying his motion to vacate an order increasing plaintiff's allowance for support, defendant appeals.

Reversed.

Prior opinion, 175 P.2d 919.

Arthur C. Fisher, of Los Angeles, for appellant.

Leo K. Gold, of Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant appeals from an order denying his motion to vacate an order of the superior court increasing plaintiff's allowance for support.

Plaintiff's final judgment of divorce was entered in January, 1941, and defendant was ordered to pay $25 a month for the support of their child and $5 a month for plaintiff's support. In 1943 plaintiff served notice of a motion to modify the support order on A. C. Fisher, defendant's attorney in the divorce action. Fisher informed plaintiff's attorney that he was no longer authorized to represent defendant and did

not know where he was beyond the fact that he was in the military service. Fisher stated that he would attempt to locate defendant and later appeared at the hearing on the motion to explain the situation to the trial judge. The hearing was continued for about a month, but Fisher did not succeed in communicating with defendant, for the letter he sent defendant, who was overseas at the time, did not reach him because of his transfers. Fisher sent a representative into court when the hearing was resumed to advise the trial court of his inability to communicate with defendant. The trial court nevertheless granted plaintiff's motion and increased her support to $37 per month without appointing any one to represent defendant.

Defendant first learned of the modification twenty-seven months later, while under treatment in the Naval Hospital at San Leandro. He was informed by the officer in charge that he was delinquent in his support payments in the sum of $1198 and he wrote to Fisher who explained what had happened. Shortly thereafter, and immediately upon his release from the Navy, defendant gave notice of a motion to vacate the modification order on the ground that plaintiff had not complied with the Soldiers' & Sailors' Civil Relief Act, 54 Stat. 1180, 50 U.S.C.A.Appendix, § 501 et seq., and the order was therefore void.

[1] Section 200(1) of the Act, 54 Stat. 1180, 50 U.S.C.A.Appendix, § 520(1), provides that if there is a default of appearance by the defendant in any proceeding, plaintiff shall file an affidavit showing that the defendant is not in the military service. If such an affidavit cannot be filed, plaintiff must file an affidavit showing that defendant is in the military service or that plaintiff is unable to determine whether or not defendant is in such service. If an affidavit cannot be made showing that defendant is not in the service, the court shall not order the entry of judgment without appointing an attorney to represent defendant and protect his interests. In the present case, no such affidavits were filed by plaintiff, although the court was informed by Fisher that defendant was in the military service.

There is no doubt that the trial court erred in failing to appoint an attorney to represent the defaulting serviceman. Plaintiff contends, however, that Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251, and Russ v. Russ, 68 Cal.App.2d 400, 156 P.2d 767, relieved the trial court of this duty. The Reynolds case is clearly distinguishable from the one now before this court. In that case the defendant, a serviceman, was afforded actual notice of the hearing and appeared specially, through attorneys, to contest the jurisdiction of the court on the ground that he had discharged his attorneys of record long before the hearing on the modification. This court held that where the serviceman is notified of the proceeding and appoints attorneys to represent him and to follow a particular course of action that proves to be unsuccessful, the court is not required to appoint another attorney to pursue a different course of action. Reynolds v. Reynolds, supra, 21 Cal.2d at page 586, 134 P.2d 251. Defendant here, however, was not notified of the hearing, nor was he represented therein, within the meaning of the Act.

[2] Plaintiff also relies upon Russ v. Russ, supra, but in that case the serviceman was notified of the proceeding. The court was apparently convinced that the case was similar to the Reynolds case on its facts, although the serviceman's attorney did not appear at the hearing. Russ v. Russ, supra, 68 Cal.App.2d at page 406, 156 P.2d 767. Any implication in the Russ case that mere service of process upon attorneys of record in the divorce action is sufficient in a modification proceeding to satisfy the requirements of the Act is disapproved.

[3] The error of the trial court in failing to appoint an attorney to represent defendant does not, however, render its order void. Section 200 of the Act, requiring the appointment of a representative for the protection of the serviceman before entry of judgment, also contains a provision authorizing a trial court to vacate or set aside its judgment in any proceeding where it appears that the serviceman was prejudiced by reason of his military service in making his defense:

"If any judgment shall be rendered *in any action or proceeding governed by this section* against any person in military service during the period of such service or within thirty days thereafter, and it appears

that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." (Italics added.) 54 Stat. 1180, 50 U.S.C.A.Appendix, § 520(4).

The foregoing provision prescribes the procedure to be followed by a serviceman whose defense has been prejudiced by reason of his military service. This provision would be mere surplusage had Congress intended to condemn as void those judgments and orders entered contrary to the directions of other provisions of section 200. Accordingly, it is held that proceedings contrary to section 200 are valid until properly attacked. Schroeder v. Levy, 222 Ill. App. 252; Eureka Homestead Soc. v. Clark, 145 La. 917, 918, 83 So. 190; Snapp v. Scott, 196 Okl. 658, 167 P.2d 870; Mims Bros. v. N. A. James, Tex.Civ.App., 174 S.W.2d 276; Lyle v. Haskins, 24 Wash.2d 883, 168 P.2d 797; see, Winslow v. Harold G. Ferguson Corporation, 25 Cal.2d 274, 282, 153 P.2d 714; Howie Mining Co. v. McGary, D.C., 256 F. 38; State v. District Court, 55 Mont. 602, 179 P. 831; Hynds v. City of Ada, 195 Okl. 465, 158 P.2d 907; see generally, Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587.

[4] Defendant's motion to vacate the modification order was timely, and he was unquestionably prejudiced by reason of his military service in making his defense to plaintiff's motion. It is contended that Miller v. Miller, 26 Cal.2d 119, 156 P.2d 931, compels the conclusion that defendant was not prejudiced. That case was concerned, not with the failure of a trial court to appoint a representative to protect the defaulting serviceman before entering an order against him as required by section 200, but with the refusal of a trial court to grant a stay as authorized by section 201 of the Act. 50 U.S.C.A.Appendix, § 521. Under section 201 the trial court may, upon application, grant a stay at any stage of a proceeding "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

In the Miller case the serviceman had obtained the entry of a final decree of divorce after entering the Army. His wife, the plaintiff in the divorce action, instituted a proceeding to vacate the entry of the final decree on the ground that the serviceman had filed false affidavits. At the hearing, counsel for the serviceman requested a stay under section 201, but the request was denied by the trial judge. This court affirmed the trial court's ruling on the grounds that the serviceman was represented by counsel at all stages of the hearing and that all necessary witnesses were present and subject to counsel's interrogation. Miller v. Miller, supra, 26 Cal.2d at pages 124, 125, 156 P.2d 931. The opinion further stated, "Having thus set in motion *after* his entry into the Army the chain of circumstances giving rise to the proceeding to vacate, the trial court in the exercise of a sound discretion could reasonably reject defendant's plea for an indefinite postponement of an investigation of those circumstances." Miller v. Miller, supra, 26 Cal.2d at page 124, 156 P.2d at page 933. Miller v. Miller is not, therefore, comparable to the instant case. The record shows that there was no actual notice to the serviceman and that he was not represented at the hearing.

Defendant alleges that at the time of the divorce, and for some years prior thereto, plaintiff's salary was greater than his and that she was awarded substantially all of the community property by the divorce decree. He now seeks the opportunity to present his case and contest the motion. He is requesting the very relief contemplated by the Act. The trial court therefore abused its discretion in refusing to permit him to defend.

The order denying the motion of defendant to vacate the order of June 13, 1943, is reversed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment. It should be noted that the majority opinion, in applying and following the Soldiers' and Sailors' Civil Relief Act (holding that "Defendant * * * was unquestionably prejudiced by reason of his military service in making his defense to plaintiff's motion") in divorce litigation, is substantially inconsistent with the holding in Miller v. Miller (1945), 26 Cal.2d 119, 156 P.2d 931. In the last cited case the showing of prejudice was much stronger than in the case at bar. It appeared, as noted in the dissenting opinion of Mr. Justice Carter at page 127 of 26 Cal.2d, at page 935 of 156 P.2d, that there the defendant, who likewise was in military service and absent, was the only person who had knowledge of the facts and could rebut the charge upon which the action against him was taken. Nevertheless this court sustained the drastic action of setting aside a final judgment in his absence after a request on his behalf for even a three weeks' continuance was denied. The Miller case should be overruled.

The true rule as to the burden of proof in applications of the Soldiers' and Sailors' Civil Relief Act is stated in Pacific Greyhound Lines v. Superior Court (1946), 28 Cal.2d 61, 67, 168 P.2d 665, 668. "The Soldiers' and Sailors' Civil Relief Act * * * leaves discretion in the trial court [assuming the evidence admits of conflicting inferences] in resolving the issue as to whether 'the ability of plaintiff to prosecute the action or the defendant to conduct his defense is * * * materially affected by reason of his military service' but it, in effect, places the burden of proof upon the party resisting a postponement and *'unless,* in the opinion of the court, the ability of * * * [the party to prosecute or defend] is *not* materially affected' a postponement of the trial by the court is mandatory 'on application to it by such person or some person on his behalf.' (The section provides that on such application, *unless* the court is of the view stated, the action or proceeding *'shall* * * * be stayed as provided in this Act.')"

In my view, upon the facts of this case, as upon the facts of the Miller case, a stay was mandatory.

CARTER, Justice.

I concur in the judgment of reversal, and generally with what is said in the majority opinion. But I think it is obvious, however, that the majority opinion in this case is in clear conflict with the majority opinion in the case of Miller v. Miller, 26 Cal.2d 119, 156 P.2d 931, and for the sake of uniformity and consistency in the law of this state, the latter case should be overruled.



30 Cal.2d 421

CHRISTIAN v. CALIFORNIA BANK et al.

L. A. 19997.

Supreme Court of California, in Bank.

July 1, 1947.

1. Pleading ⇐214(1)

Facts alleged in first amended complaint would be accepted as true in testing sufficiency of the pleading as against general demurrer.

2. Banks and banking ⇐189

Allegations respecting rubber stamp endorsement of cashier's check payable to plaintiff's order which was stricken out by plaintiff's copartner, did not state cause of action against issuing bank for wrongfully paying check, in absence of allegation that issuing bank had knowledge or notice of any limitations upon ostensible authority on part of plaintiff's copartner to negotiate the check. Civ.Code, §§ 2403, 3111, 3115.

3. Banks and banking ⇐189

Allegations respecting rubber stamp endorsement of cashier's check payable to

plaintiff's order which was stricken out by plaintiff's copartner stated a cause of action against bank cashing check. Civ. Code, § 3137.

4. Bills and notes ⇐339

Mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title of negotiable instrument does not preclude transferee from occupying position of a holder in due course, unless circumstances or suspicions are so cogent that to remain passive would amount to bad faith. Civ.Code, § 3137.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by G. G. Christian against California Bank, Security-First National Bank of Los Angeles and others for wrongfully paying a cashier's check. From a judgment of dismissal in favor of defendant banks, the plaintiff appeals.

Judgment reversed as against defendant California Bank and judgment affirmed as to defendant Security-First National Bank of Los Angeles.

Prior opinion, 173 P.2d 318.

A. W. Brunton, of Los Angeles, for appellant.

Roane Thorpe, Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for respondents.

SHENK, Justice.

Plaintiff appeals from a judgment of dismissal entered in favor of defendant banks pursuant to an order sustaining their demurrers to the first amended complaint without leave to amend.

[1] The first amended complaint alleges in substance the following facts, which are accepted as true in testing the sufficiency of the pleading as against general demurrer:

About the month of June, 1945, plaintiff and the defendant Rotsios orally agreed to enter into a copartnership under the name of S & R Produce Company, and instructed an attorney to draft articles of copartnership. It was orally agreed, among other things, that moneys of the copartnership would be withdrawn from the bank only upon the signatures of both partners. The articles of copartnership provided that neither partner should without the consent of the other "* * * sign or endorse negotiable paper * * * No check shall be drawn or voucher issued unless signed by both partners to this agreement."

On June 4, 1945, plaintiff purchased from the defendant Security-First National Bank of Los Angeles a $3,500 cashier's check payable to his own order. He indorsed the check and also stamped upon it, immediately below his signature, the following further indorsement: "Pay to the order of 303 Bank of America 303 Trust & National Savings Association S & R Produce Co."

Plaintiff delivered this check to Rotsios with instructions to deposit it in the Bank of America to the account of the produce company. Rotsios had no right to indorse the checks of the produce company without the joint signature of his copartner and had no right to deposit them to his personal account. However, contrary to instructions, he took the $3,500 check to a branch of the defendant California Bank, where he had a personal account. There, according to the amended complaint, Rotsios "presented said Cashier's Check to said bank, at which time said bank, by and through its agents and servants, and the said Bill Rotsios, blocked out the stamped restrictive endorsement which the plaintiff had caused to be placed on the back of said check, and the said defendant, Bill Rotsios, then endorsed his own name on the back of said Cashier's Check and the said defendant, California Bank, accepted said altered check and credited the same to the personal bank account of the defendant, Bill Rotsios." This was done without the knowledge or consent of plaintiff.

After acceptance of the $3,500 check by the defendant California Bank on June 5th, the bank charged against it certain personal checks drawn by Rotsios. Some of these personal checks had already been paid by the bank and were being held by it pending the deposit of moneys by Rotsios. None

of those checks represented debts or obligations of the copartnership.

Thereafter, in the usual course of business, the defendant Security-First National Bank paid the amount of the $3,500 check to the defendant California Bank through the Los Angeles clearing house. Plaintiff made demand upon all of the defendants for repayment to him of the $3,500, and thereafter instituted the present suit to recover that sum.

[2] The first indorsement on the check was an indorsement in blank by the plaintiff. Without the second indorsement the check was clearly negotiable by delivery (sections 3111, 3115, Civil Code). The mere fact that the subsequent indorsement of the produce company had been stricken did not of itself imply an infirmity or defect of title in a subsequent holder. It may be assumed that ostensibly one partner had as much right to strike the partnership indorsement as the other partner had to make it. Each is the agent of the partnership for the handling of partnership business (section 2403, Civil Code) and there was nothing on the check to discredit its apparent regularity in that connection. It does not appear from the allegations of the amended complaint that the defendant Security-First National Bank had knowledge or notice of any limitations upon the ostensible authority on the part of one of the partners to negotiate the check. Therefore, so far as that bank is concerned, it appears that its demurrer to the amended complaint was properly sustained.

[3] A different situation is disclosed with respect to the position of the defendant California Bank. That bank knew that Rotsios had overdrawn his personal account with it, and that it would be advantageous to have him make a deposit of the $3,500 or sufficient thereof to cover his checks. With such knowledge the bank and Rotsios blocked out the indorsement of the produce company. At the time the bank took this action it was neither a holder nor an indorser of the check. Rotsios was the holder. After he and the bank blocked out the produce company indorsement, he indorsed his own name. Then the bank, for the first time, accepted the check as aforesaid and became a holder. But the information which it must have necessarily acquired from Rotsios at the time the indorsement of the produce company was stricken, may have constituted knowledge of facts sufficient to put it on inquiry and raise an issue as to its good faith in accepting the instrument. It seems unlikely that it could have failed to suspect that Rotsios was without authority to divert partnership funds to his personal use. Any inquiry at all would have revealed that Rotsios held the check merely as plaintiff's agent, with limited authority to deposit to the partnership account; also that Rotsios, as a copartner, had no authority to indorse or strike indorsements on behalf of the copartnership.

The bank argues that since the check was indorsed by the payee in blank and delivered to Rotsios and since Rotsios was a partner in the produce company, it was justified in assuming that Rotsios placed the indorsement of the copartnership on the check, intending to deposit it in the copartnership account, and thereafter changed his mind and deposited it in his personal account, as he had the apparent right to do. This might be so if the allegations of the amended complaint were merely to the effect that Rotsios presented the check to the California Bank, after striking the copartnership indorsement. But the allegations show that the bank and Rotsios struck the indorsement and that Rotsios thereafter indorsed and presented the check. The form of the stricken indorsement showed a direction for deposit of the check to the partnership account, and not for its negotiation for the personal use of one of the partners. See Nordin v. Eagle Rock State Bank, 139 Cal.App. 584, 594, 34 P.2d 490. Plaintiff's allegations are to the effect that despite the form of the indorsement, the bank took part in striking it without investigation as to the propriety of the conduct of Rotsios, and thereafter became a holder of the instrument. The allegations sufficiently raise an issue whether the bank acted in good faith, that is, whether at the time of acceptance of the check it had knowledge of facts which should have put it on inquiry.

Section 3137 of the Civil Code provides that "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

[4] Under this section it is the well settled rule that " 'mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith.' * * * [T]his rule is subject to the qualification that, 'where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, such indorsee is charged with knowledge'." Popp v. Exchange Bank, 189 Cal. 296, 303, 208 P. 113, 116; Jordan v. Grover, 99 Cal. 194, 33 P. 889; Robb v. Cardoza, 110 Cal. App. 116, 293 P. 851; Silberschmidt v. Moran, 79 Cal.App. 533, 539, 250 P. 205; 10 C.J.S., Bills and Notes, § 324, pp. 818–820; Walker v. Commercial Credit Co., Tex.Civ.App., 107 S.W.2d 688.

The facts here alleged would if established justify the conclusion that the failure of the defendant California Bank to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument. As against this defendant the amended complaint states a cause of action.

As against the defendant California Bank the judgment of dismissal is reversed. As against the defendant Security-First National Bank of Los Angeles the judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 439

BERNIKER v. BERNIKER et al.

L. A. 19779.

Supreme Court of California, In Bank.

July 8, 1947.

1. Divorce ⇐286

In action for divorce and division of community property by wife who joined her father-in-law as a defendant on ground that he held community property in his name as trustee for wife and husband, discrepancy in wife's testimony was for the trial court to evaluate in relation to the evidence corroborative of wife's position.

2. Appeal and error ⇐931(1), 989, 1010(1), 1012(1)

Generally, an appellate court will view the evidence in the light most favorable to the respondent, will not weigh the evidence, and will indulge all intendments and reasonable inferences which favor sustaining finding of the trier of facts and will not disturb the trier's finding if there is substantial evidence in the record in support thereof.

3. Appeal and error ⇐1011(1)

It is not reviewing court's province to analyze conflicts in the evidence but rather, when a finding of fact is attacked as being unsupported, the appellate court's power begins and ends with the determination of whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding.

4. Husband and wife ⇐264
Trusts ⇐44(1)

In action by wife for divorce and division of community property wherein father-in-law was joined as a defendant on ground that he held community property in his name as trustee for the wife and husband, evidence sustained finding that business, lease and bank account were community property, and that father-in-law held the property in his name as trustee for wife and her husband.

5. Husband and wife ⇐265

Within purport of statutory provision relating to management and control of community property by husband, wife was in

no position to interfere with or prevent husband's use of community funds to effect a property holding in his father's name though such arrangement stemmed from a plan to defraud creditors and wife had knowledge of such fraudulent purpose. Civ. Code, § 172.

6. Husband and wife ⇐265

Wife's right to establish a community interest in property standing in father-in-law's name was not affected by any fraudulent purpose of her husband in transferring the property to his father, even if wife knew that transfer was part of a plan to defraud creditors. Civ.Code, §§ 161a, 172.

7. Trusts ⇐69

A voluntary resulting trust in favor of wife was created by husband's transfer of community funds to his father for purchase of business. Civ.Code, §§ 161a, 172.

8. Limitation of actions ⇐103(2)

The statute of limitations does not begin to run against a voluntary resulting trust, in absence of repudiation by trustee. Code Civ.Proc. § 338, subds. 3, 4.

9. Limitation of actions ⇐102(3)

The statute of limitations does not run in favor of a trustee as against the beneficiary while the latter is in possession of the property. Code Civ.Proc. § 338, subds. 3, 4.

10. Limitation of actions ⇐103(2)

Where husband furnished father with community funds with which to purchase a business, and husband assumed possession and conducted the business as if he owned it, and father never refuted the voluntary resulting trust thereby created, wife who joined father-in-law as defendant in her divorce action on ground that he held the business as community property in trust was not barred by limitations seeking to establish her interest. Civ.Code, §§ 161a, 172; Code Civ.Proc. § 338, subds. 3, 4.

11. Trusts ⇐365(2)

In divorce action by wife wherein father-in-law was joined as a defendant on ground that he held community property in his name as trustee, defense of laches was not available to father-in-law in absence of legal prejudice to him from delay in making a demand or in seeking enforcement of the trust.

12. Equity ⇐84
Trusts ⇐365(4)

Laches is not applied strictly between near relatives and is of little significance in case of a resulting trust.

13. Equity ⇐69

Laches is not designed to punish a plaintiff, but is invoked where a refusal would be to permit an unwarranted injustice.

14. Appeal and error ⇐774

Respondent's failure to discuss belated demand raised by appellant for the first time in his opening brief was no reason for allowing demand nor for holding that respondent had thereby confessed the point.

15. Divorce ⇐282

In divorce action by wife wherein father-in-law was joined as a defendant on ground that he held community property in his name as trustee for wife and husband, where father-in-law's defense upon trial was that he was the sole owner of the property and evidence as to expenditures made by him was introduced solely in furtherance of that claim, the father-in-law could not prevail on appeal on a claim to a right of reimbursement as a trustee for moneys expended in management of alleged trust estate, raised by him for the first time in his opening brief on appeal, particularly where trial court had inferentially found against him on the point.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Nadine Berniker against Barnett Berniker, wherein Nathan Berniker was joined as a defendant on the ground that he held in his name community property belonging to the plaintiff and the principal defendant. From so much of a judgment for plaintiff as directed the additional defendant to turn over certain property to plaintiff, the additional defendant appeals.

Affirmed.

Prior opinion, see 174 P.2d 668.

Samuel Schekman, Walker, Meyers, Ingram & Moser and Hubert O. Butler, Jr., all of Los Angeles, for appellant.

Wm. Christensen and Barry B. Stepsay, both of Los Angeles, for respondents.

SPENCE, Justice.

By her original complaint, plaintiff sought separate maintenance from her husband, Barnett Berniker, and a division of the community property. In pursuance of this latter purpose, plaintiff joined her father-in-law, Nathan Berniker, as a defendant upon allegations that he held such property in his name and that her husband had so placed it "in order to defeat the claims of judgment creditors." Defendants filed a joint answer denying the allegations of the complaint. At the conclusion of the trial, plaintiff amended her complaint, thereby seeking a divorce from defendant Barnett Berniker but making the same allegations concerning the community property as were contained in the original complaint except for (1) the express addition of the statement that "defendant Nathan Berniker has no right, title, or interest therein other than and except the naked legal title as trustee for" plaintiff and her defendant husband; and (2) the complete elimination of any reference to the purpose of such property holding as related to the avoidance of creditors. Defendants likewise amended their answer in categorical denial of plaintiff's claims and specifically alleged that "the property standing in the name of Nathan Berniker is his sole property." These amended pleadings were framed to conform to the proof and the court made its findings in response thereto. Accordingly, the court found that a "ladies' ready-to-wear business" in Santa Monica and a "bank account for said business," both of which stood "in the name of defendant Nathan Berniker," together with "the lease" in "the name of both defendants" on the premises where said business was located, were community property of plaintiff and her defendant husband, and that defendant Nathan Berniker had no interest therein "except the naked legal title as trustee" for plaintiff and her defendant husband.

An interlocutory decree of divorce was granted to plaintiff, awarding to her one-half of the community property and directing Nathan Berniker to transfer and assign to her an undivided one-half interest in the specified "ladies' ready-to-wear business," "the lease," and "the bank account." The propriety of this adjudication is challenged only by defendant Nathan Berniker, who has appealed from the entire judgment except that portion granting a divorce to plaintiff.

As grounds for reversal appellant contends: (1) that the evidence was not sufficient to sustain the findings as to community property; (2) that the trial court ered in establishing a trust in favor of respondent; (3) that respondent's claim was barred by the statute of limitations and by laches; and (4) that appellant in any event should be allowed credit for money invested by him in the business. The record does not support appellant on any of these points.

Respondent and defendant Barnett Berniker were married in 1927. For some years after the marriage he worked in Los Angeles, first as a manufacturer's representative in ladies' ready-to-wear, and then in several retail dress stores in and about the same vicinity. In 1932 he opened a retail dress shop in Hollywood. Some six months thereafter the business was incorporated and the capital stock was issued to various members of the respective families of respondent and himself. About three years later the corporation acquired a store in Santa Monica. In 1937 the Hollywood shop was sold because "business was bad" and the attorney who acted as the escrow-holder testified that the entire amount realized on such sale was used to pay pro rata shares to the creditors of the corporation. There then followed a "big sale" of merchandise in the Hollywood store and the proceeds therefrom were likewise used to pay the creditors' claims. The balance of the stock remaining after such close-out sale was removed to the Santa Monica shop for disposal. But the Santa Monica business also failed to prosper, and within a few months an assignment of the corporation's assets was made for the benefit of creditors. Then in 1938 the Santa Monica store was sold at public sale to appellant.

There is a sharp conflict in the evidence as to whether appellant purchased the Santa

Monica store with his own funds or with money furnished by Barnett Berniker. Appellant is a retired building contractor without knowledge of or experience in retail merchandising of wearing apparel. He and Barnett Berniker testified that the business was bought with appellant's personal funds, and that following the purchase, Barnett Berniker was placed in charge of the store as manager for appellant. On the other hand, respondent testified that she saw her husband, Barnett Berniker, give appellant the purchase money as part of the arrangement for appellant "to bid in" the store at the public sale, and that after the store was so acquired, her husband conducted it as his own personal business. While respondent added that the purchase money so given appellant by her husband represented part of the proceeds of the sale of the Hollywood store, this statement conflicts with the testimony of the attorney acting as the escrow-holder upon such sale that "all" the proceeds thereof were used to pay creditors of the corporation. The parties to this appeal have since stipulated concerning this discrepancy, which stipulation is in accord with the testimony of the attorney, who was called as a witness for the defense. But this same attorney also acted as "attorney for the assignee of the corporation's assets" when the Santa Monica store was sold and he further testified that when that sale was made, his dealings were entirely with Barnett Berniker and that the latter stated that "he was starting this business and he was going to put it in his father's name." This coincides with testimony of respondent and her witnesses that appellant upon several occasions acknowledged that the Santa Monica business belonged to his son, Barnett Berniker. For example, respondent stated that she heard appellant at one time say to her husband, Barnett Berniker: "You will come to no good. A man in business cannot gamble. Why don't you take the business from my name? I don't want the business in my name. It will cause me headaches and trouble all the time." Respondent's father testified that on one occasion appellant told him: "The business does not belong to me and I wish he [Barnett Berniker] would put everything in his name and I would not have any headache." Referring to another conversation with appellant, the same witness testified that appellant said: "I wish he [Barnett Berniker] would take off from my head these headaches. This business is his. It does not belong to me." And at another time respondent stated that appellant said in her presence that he did not want the business in his name and that "it was Barney's business." to which the latter replied: "Well, when the war is over I will make a corporation out of it, or I will take it off of your name."

The finances of the business were handled through the bank account which is in controversy here. During the years following appellant's purchase of the Santa Monica store, the enterprise proved to be a successful one, with a gross annual business for the years 1943 and 1944 ranging from $75,000 to $100,000 and net profits for the respective years fixed at $5,900 and $6,900. Appellant testified that he gave the net profits to Barnett Berniker. Appellant knew nothing about the operation of the store; he did not know the amount of the sales made for cash and the amount on credit. Barnett Berniker hired and discharged the employees and paid bills for gas, electricity and other expenses of the business. Not until after the commencement of this action was any social security, withholding tax or unemployment insurance withheld on account of Barnett Berniker.

[1-4] Appellant argues that by reason of discrepancies found in respondent's statements and by reason of testimony adduced from other witnesses, respondent is unworthy of belief and consequently there is no credible evidence to uphold the finding that community funds were used to purchase the business which stands in appellant's name. But respondent unequivocally testified that she saw her husband, Barnett Berniker, give appellant the purchase money; and the reasonable inferences which would arise from such positive statement are not dispelled by respondent's mistake in her testimony in assigning the proceeds from the sale of the Hollywood store some months previously as the source of the money coming into her husband's hands for the purchase of the Santa Monica business

upon its subsequent public sale. The significance of that discrepancy was a detail for the trial court to evaluate in relation to the considerable evidence in the record corroborative of respondent's position that appellant held merely legal title to the property in question, and was not the real owner thereof. It must be remembered that the trial court was face to face with the witnesses and had the opportunity to judge, from their demeanor on the stand and their manner of testifying, which of those giving positive testimony were worthy of credence. As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. Gates v. McKinnon, 18 Cal.2d 179, 180, 114 P.2d 576; California Employment Comm. v. Betthesda Foundation 54 Cal.App.2d 348, 350, 351, 128 P.2d 874; Morrison v. Willhoit, 62 Cal. App.2d 830, 836, 145 P.2d 707; Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779-780, 163 P.2d 756. It is not the province of the reviewing court to analyze conflicts in the evidence. Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559. Rather, when a finding of fact is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. So viewing the record here, there is substantial evidence, though contradicted, sustaining the finding that the Santa Monica business, the lease and the bank account are community property, and that appellant holds such property in his name as trustee for respondent and her husband. Accordingly, appellant's challenge of the evidentiary support for such findings cannot prevail

[5, 6] Nor is there merit to the claim that considerations of fraud vitiate the propriety of the trial court's establishment of a trust in favor of respondent with respect to the community property. In her original complaint for separate maintenance, respondent charged that her husband, Barnett Berniker, had placed the community property in the name of his father, Nathan Berniker, "in order to defeat the claims of judgment creditors." Relative to that allegation, respondent testified that when her husband gave to his father the money with which to purchase the Santa Monica Store, he stated to the latter in her presence that he could not have "the business in [his] name on account of the bankruptcy and on account of the creditors." Both appellant and Barnett Berniker, in their joint answer and at the trial, denied that the property holding in question was in any way related to an attempt to "defraud creditors." Then respondent filed at the conclusion of the trial an amended complaint for divorce, wherein she merely alleged that the community property stood in the name of appellant, Nathan Berniker, but that he "has no right, title, or interest therein other than and except the naked legal title as trustee for" respondent and her husband, Barnett Berniker. Of significance in the amended complaint is the absence of any reference to the reason or purpose motivating appellant's alleged trusteeship. The amended pleading superseded the original complaint; it was expressly filed "to conform to the proof"; the trial court made its findings in response thereto and declared a trust in respondent's favor as to an "undivided one-half interest" in the community property. However, despite this agreement of the parties, through their pleadings, that no element of fraud entered into the transaction in question and the consequent elimination of this case, appellant now argues that respondent is not entitled to relief because she does not come into court with clean hands. He cites respondent's above-mentioned testimony as establishing her as a party to a fraudulent property arrangement, and he invokes the rule stated in 12 Cal.Jur. 1026 that "One who has transferred his property in order to defraud his creditors cannot thereafter recover from his grantee that which he has conveyed." There can be no doubt of the rule of law

thus invoked, but respondent's testimony does not support its application to this case.

It must be remembered here that the transfer in question concerned "community personal property" as to which respondent's husband had "the management and control," with "absolute power of disposition," provided that he did not make a gift thereof nor dispose of it without a valuable consideration. (Civil Code, sec. 172.) Within the purport of this statutory provision, respondent was in no position to interfere with or prevent her husband's use of community funds to effect a property holding in appellant's name though such arrangement stemmed from a plan to "defraud creditors" and she had knowledge of such fraudulent purpose. Wholly distinguishable from such situation are cases cited by appellant on the proposition that a transferor will be denied relief in equity against his own conveyance in fraud of creditors. Tognazzi v. Wilhelm, 6 Cal.2d 123, 125, 56 P.2d 1227; Withrow v. National Surety Co., 122 Cal.App. 242, 245, 10 P.2d 83; Morrison v. Willhoit, supra, 62 Cal.App.2d 830, 837, 145 P.2d 707; Taylor v. Bank of America, etc., 67 Cal.App.2d 59, 67, 153 P.2d 617; see, also, Allstead v. Laumeister, 16 Cal.App. 59, 65–66, 116 P.2d 96. Nor does the case of Saint v. Saint, 120 Cal. App. 15, 7 P.2d 374, 376, appear "so similar in its fundamental facts" as to fortify appellant's argument. There the wife, after her husband's death, sought a reconveyance of his interest in his father's estate which he had transferred to certain members of his family "for the purpose and with the intent of putting whatever property he might inherit * * * beyond the reach of his creditors." In denying her relief the court said at page 22 of 120 Cal.App., at page 377 of 7 P.2d: "She could no more assert title to the property than could he [her husband], regardless of whether or not she knew of the fraud. The original transaction, being fraudulent, remains tainted not only to the parties to the transaction, but as to all persons claiming under them * * *." But here respondent is not asserting a claim to her husband's separate property so that she would be bound by his fraudulent acts; rather, she is seeking to establish a trust in connection with "community property," in which "the respective interests of the husband and wife * * * during continuance of the marriage relation are present, existing and equal * * *." (Civil Code, sec. 161a.) Her lawful interest in the community property should therefore not be affected by a fraudulent purpose of her husband in consummating a transfer of such property as here involved. Though she testified that she heard her husband tell appellant that the transfer was necessary "on account of the creditors," such knowledge would not impair her standing in court, for she in any event was powerless to exercise any control in the matter. This situation is in nowise akin to cases where the husband has made an authorized transfer of community real property (Civil Code, sec. 172a) and the wife has been estopped to set it aside to the prejudice of "innocent purchasers for value." Vierra v. Pereira, 12 Cal.2d 629, 86 P.2d 816; Mark v. Title Guarantee & Trust Co., 122 Cal.App. 301, 9 P.2d 839; Bush v. Rogers, 42 Cal.App.2d 477, 109 P.2d 379; MacKay v. Darusmont, 46 Cal.App.2d 21, 115 P.2d 221.

[7, 8] Likewise without force is appellant's assertion that respondent's recovery is barred by the "statute of limitations" and by "laches." The Santa Monica store was purchased in the name of appellant in "July or the early part of August, 1938." This action was commenced in January, 1945. In his amended answer appellant pleaded the three-year statute of limitations. (Code Civ.Proc., sec. 338, subds. 3 and 4.) The trial court resolved the conflict between the parties in accordance with respondent's claim that her husband gave to appellant community funds which the latter was to use, and did use, in purchasing the Santa Monica business. While the trial court did not classify the trust thereupon found to exist in respondent's favor, the accredited evidence clearly stamps it as a voluntary resulting trust, continuing in nature as reflecting the intention of the parties at the time of its creation. Bainbridge v. Stoner, 16 Cal.2d 423, 428, 106 P.2d 423. Speaking to this point, the court said in Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, at page 251, 196 P. 884, 890: "A resulting trust is not founded on the simple

fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired." In the absence of a repudiation by the trustee, the statute of limitations does not begin to run against a voluntary resulting trust. Lamb v. Lamb, 171 Cal. 577, 581, 153 P. 913; England v. Winslow, 196 Cal. 260, 271, 237 P. 542; Leviston v. Tonningsen, 212 Cal. 656, 664, 665, 299 P. 724; Cohn v. Cohn, 7 Cal.2d. 1, 8, 59 P.2d 969. Equally pertinent here is the statement in Dillon v. Cross, 5 Cal.App. 766, at page 769, 91 P. 439, 440: "The case made by the pleadings and the evidence was a continuous trust, and the statute of limitations did not commence to run until demand [upon the trustee] and [his] refusal to account."

[9, 10] The record shows that prior to the commencement of this action there never had been a demand upon appellant to account for or to convey the property to the rightful owners and he had never repudiated his trust until he filed his answer herein. On the contrary, as the evidence is above reviewed, appellant acknowledged upon various occasions that he did not want the Santa Monica business in his name, that it did not belong to him but to his son, Barnett Berniker. Moreover, appellant was never in possession of the store. Rather, Barnett Berniker was in possession and conducted the business in the same manner as if he had always owned it. No one else ever had charge of it. The statute of limitations never runs in favor of a trustee as against the beneficiary while the latter is in possession of the property. Gilbert v. Sleeper, 71 Cal. 290, 294, 12 P. 172; McClure v. Colyear, 80 Cal. 378, 380, 381, 22 P. 175; Peixouto v. Peixouto, 40 Cal.App. 782, 786, 181 P. 830. Material in this connection is the fact that inasmuch as her husband was in possession and had sole charge of the Santa Monica business, there appears to have been no reason for a demand by respondent that appellant transfer the legal title of the property to her and her husband. The occasion for such demand did not arise until conditions caused respondent to institute this action and to advance her claim for a share in the community property.

[11-13] Nor is the defense of laches available here, for it is plain that no legal prejudice was caused to appellant by reason of the delay in making a demand nor by reason of the nonenforcement of the trust. Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 486, 111 P. 360. Moreover, the facts and circumstances of this case suggest other grounds for the rejection of the doctrine of laches: It is not applied strictly between near relatives (Butler v. Hyland, 89 Cal. 575, 582, 26 P. 1108; Rottman v. Rottman, 55 Cal.App. 624, 632, 204 P. 46); it is of little significance in the case of a resulting trust (Moultrie v. Wright, 154 Cal. 520, 526, 98 P. 257); and "[it] is not designed to punish a plaintiff" but is "invoked where a refusal would be to permit an unwarranted injustice." Hiett v. Inland Finance Corp., 210 Cal. 293, 300, 291 P. 414, 417. To this latter point, the court said in Hovey v. Bradbury, 112 Cal. 620, at page 625, 44 P. 1077, 1078: "* * * it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong."

[14] Finally, to be considered is appellant's claim of a "right to reimbursement" as a trustee who has expended moneys in the management of a trust estate. Perry on Trusts and Trustees, Seventh Edition, Vol. II, sec. 913. Appellant argues that he advanced several thousand dollars of his personal funds for improvements in the Santa Monica store and for the purchase of merchandise, for which investments he seeks credit before a division of the trust property is made between respondent and her husband, Barnett Berniker. This matter of accounting was first raised by appellant in his opening brief and was not answered by respondent. But the mere fact that respondent did not discuss such belated demand by appellant is no reason for al-

lowing it nor for holding that respondent has thereby confessed the point, and the cases cited by appellant do not so hold. Thus, Campbell v. Ingram, 37 Cal.App. 728, 731, 174 P. 366, merely states the recognized rule that a finding is not required upon facts that are admitted in the pleadings. And Atwood v. Hammond, 4 Cal.2d 31, 46, 48 P.2d 20, refers to a statement of fact made in the brief of one party and not contradicted by the other, and the reviewing court accepted such statement as true. But the decision does not hold that a point of law advanced by one litigant and unanswered by the other must be adopted by the court as correct.

[15] Appellant in his original answer did not plead that he had made any advancements on account of the Santa Monica store but restricted himself to a simple denial of the allegations contained in the complaint. At the trial appellant testified as to certain investments that he had made in the business: $3,000 in 1938 for the purchase of merchandise; $1,740 in 1940 for the repairs of the store front; and $12,000 in 1944 for improvements. These amounts were not correlated with any business records or itemization accounts attesting to advancements made by appellant as a trustee or in any other capacity. Then, at the conclusion of the trial, he filed an amended answer to conform "the pleadings to the proof" but he made no claim for expenditures despite his testimony in regard thereto. Rather, he rested his whole case upon the premise that there was no trust and that he was the sole owner of the Santa Monica business. From such state of the pleadings and the issues thereby created, it seems reasonable to conclude that appellant's testimony as to his expenditures in connection with the Santa Monica store was proffered, and admitted in evidence, for the single purpose of furthering his claim of absolute ownership of the business and in opposition to respondent's demand for her community interest therein. While the trial court made no direct finding as to the claim for reimbursement now asserted by appellant, it inferentially follows from the findings in favor of respondent that the court gave little credence to appellant's unsubstantiated recital on that point: his casual approximations of large scale investments in the Santa Monica store while at the same time maintaining that he sought no recompense therefor from the profits of the business. Thus, though claiming to have made an investment of $12,000 for improvements in 1944, appellant stated that he gave the entire net profit of the store for that same year, $6,900, to Barnett Berniker, without reference to any accounting allowance in favor of himself. Moreover, while recounting instances of his expenditures in the Santa Monica store, appellant admitted that he knew nothing about the conduct of the business, and that its entire possession, management and operation was in the hands of Barnett Berniker—a situation of unconcern wholly at variance with ordinary business prudence. From its disposition of the entire community property issue against appellant, it inferentially follows that the trial court not only regarded the Santa Monica store to have been purchased with community funds of respondent and her husband, but likewise reasoned that any funds subsequently used in the purchase of merchandise or in improvements for the store came from the earnings of the business, a community asset. In fact, at the close of the trial, upon announcing the terms of the judgment, the court said: "There is not any question but what there has been a lot of perjury in this case." The record supports this declaration and the findings establish the source of the perjury as viewed by the trial court in disposing of the factual issues before it. To this extent appellant's claim of advancements to the business may be said to have been decided inferentially, by the findings, against him.

Nor do the cases cited by appellant sustain his belated demand for reimbursement under an entirely different theory, in the absence of a pleading that would have afforded respondent an opportunity to controvert his claim as raised in issue. In Woodard v. Wright, 82 Cal. 202, 22 P. 1118, the defendant admitted "[the] trust for the benefit of the plaintiff" and pleaded in his answer the amount he had expended on the property while under his control. In Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732, the opinion reveals that the

parties involved had conducted extensive joint farming operations over a period of years in various relationships: partners, associates, employer and employee, and as a cooperative. In that situation the court at page 816 of 22 Cal.2d, at page 737 of 141 P.2d refers to the "conflicting claims of the parties connected with the acquisition, operation and development of the property," the trustee's assumption of "personal liability under the contract of purchase from which he should be relieved" and "outstanding obligations" and "expenditures made, by one party for the benefit of the other, in relation to" their joint enterprise. With this factual background, the necessity of an accounting between the parties was before the court as a matter of pleading their respective positions and for the complete adjudication of their rights and responsibilities as so involved.

The remaining case cited by appellant on this point is Wright v. Chilcott, 61 Or. 561, 121 P. 895, 122 P. 765, an Oregon decision, wherein, upon special petition, the original decree was modified to permit the trustee to file a supplemental answer showing the value of the permanent improvements that he had placed on the property. Although "no claim for these items was set up in the court below," such claim was wholly reconcilable with the pleadings and with the respective positions of the parties at the time of their original litigation. Thus, plaintiff sought a declaration of trust in certain lands and defendant did not deny the transaction, but urged that because the agreement between the parties involved the doing of certain executory acts which could not be enforced in equity, it was void and defendant should be allowed to retain the property as absolute owner. The parties' agreement was introduced in evidence by plaintiff, and it showed various advancements to be made by defendant and provision for the latter's reimbursement. So the pleadings as well as the proof and the relationship of the parties disclosed at the trial did not preclude the establishment of the trust and the application of the general rule in recognition of the trustee's right of reimbursement for improvements made in connection with the trust property during the period of his management thereof. Defendant's subsequent filing of his claim for reimbursement, despite his abuse of the trust, was wholly consistent with defendant's position at the trial and the purpose for which proof as to his advancements was made. But here, an entirely different situation prevails: appellant's evidence as to expenditures made in connection with the Santa Monica store was introduced solely in furtherance of his claim of absolute ownership of the business and his unequivocal denial of a trust relationship at any time in regard thereto. Now he seeks reimbursement for such expenditures on a basis wholly irreconcilable with his former position, entirely foreign to the pleadings and the premise of the evidence in the case, and furthermore in challenge of an inferential finding of fact against him as to the verity of his claim of having made such expenditures out of his personal funds. In this distinguishable situation appellant cannot prevail.

The judgment is affirmed.

GIBSON, C.J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



30 Cal.2d 285

In re VAN DEUSEN'S ESTATE.

BRIGHT et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

L. A. 19800.

Supreme Court of California.

June 24, 1947.

Rehearing Denied July 17, 1947.

1. Trusts ⇐178

A beneficiary as well as a trustee may petition court for instructions to trustee pursuant to statute authorizing trustee to petition superior court from time to time for instructions as to administration of trust. Probate Code, § 1120.

2. Trusts ⇐177

The statute providing for retention of jurisdiction over testamentary trusts applies only to testamentary trusts that continue after distribution. Probate Code, § 1120.

3. Trusts ⇐177

The statute providing for retention of jurisdiction where testamentary trust continues after distribution was intended to broaden jurisdiction of probate court so as to give that court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries under the trust. Probate Code, § 1120.

4. Trusts ⇐178

Under statute authorizing petitions for instructions to trustees and directing that notices of such petitions be mailed to designated parties, after trustee is appointed and has received distribution of at least some of the corpus, court has jurisdiction to hear a petition for instructions to trustee filed by beneficiaries, notwithstanding that petition was filed before appointment of trustee. Probate Code, § 1120.

5. Trusts ⇐178

Under statute providing for retention of jurisdiction where testamentary trust continues after distribution construed as permitting a petition for instructions to trustee to be filed by a beneficiary although statute merely specifies that trustee may petition for instructions, petitioning beneficiaries may properly satisfy notice requirements of the further provision that trustee shall cause notice of hearing to be mailed to beneficiaries, with reference to a petition filed before appointment of trustee. Probate Code § 1120.

6. Executors and administrators ⇐315(6)

A decree of distribution is a final and conclusive construction of will as against all interested parties, including beneficiaries of a testamentary trust.

7. Executors and administrators ⇐315(6)

With respect to construction of will, decree of distribution incorporating a prior order for ratable distribution directing that net income be paid to beneficiaries of testamentary trust and that corpus be distributed to grandchildren of testatrix on death of surviving life beneficiary was conclusive as to rights of beneficiaries to an invasion of corpus. Probate Code, §§ 1010, 1020.

8. New trial ⇐2

The reference to proceedings to determine heirship and interests in estates in section 1231 relating to motions for new trial in probate proceedings refers to special proceedings under section 1080 for determination of heirship. Probate Code, §§ 1080, 1231.

9. Descent and distribution ⇐71(3)

Under statute regulating procedure for determination of heirship, a petitioner is not entitled to be heard unless he claims to be an heir, and when such claim is made, court acquires jurisdiction to determine heirship and also interest of each respective claimant to estate. Probate Code, § 1080.

10. Jury ⇐19(7)

There is no right to a jury trial in a probate proceeding unless that right is granted by statute.

11. Jury ⇐19(7)

A party to a probate proceeding has right to demand a jury trial if there is statutory authority for formation of issues of fact on the issue joined. Probate Code, §§ 1230, 1233.

12. Jury ⇐19(7)
New trial ⇐2

Section 1120, providing for retention of jurisdiction of probate court where testamentary trust continues after distribution and authorizing petition for instructions to trustees, does not authorize formation of issues of fact on issue joined so as to grant right of jury trial under section 1230 and 1233 and consequently section 1231, authorizing new trial where issues of fact are of such character as to entitle parties to have them tried by a jury, gives no right to a new trial in a proceeding under section 1120. Probate Code, §§ 1020, 1080, 1120, 1230, 1231, 1233.

13. New trial ⇐2

Where civil action analogous to probate proceeding would be an action in equity which does not give parties a right to a

jury trial, parties to probate proceeding were not entitled to a new trial under statutory provision giving probate court authority to grant new trials in those cases where issues of fact of which a new trial is sought were of such character as to entitle parties to have them tried by a jury. Probate Code, §§ 1120, 1230, 1231, 1233.

14. New trial ⇐2

In proceeding on petition by beneficiaries for instructions to trustee to obtain a modification of testamentary trust to carry out actual intent of testatrix, probate court lacked jurisdiction to make an order granting a new trial. Probate Code, §§ 1120, 1230, 1231, 1233.

15. Trusts ⇐58

Equity may modify a trust on a proper showing of changed conditions occurring after creation of trust if rights of all beneficiaries may be protected.

16. Trusts ⇐58

Where only interest in testamentary trust given life beneficiaries by either will or decree of distribution was the net income from corpus, and grandchildren of testatrix were entitled to distribution of corpus on death of surviving life beneficiary, order allowing an invasion of corpus by life beneficiaries without consent of grandchildren, as residuary beneficiaries, or any attempt to protect their interests was error.

17. Trusts ⇐58

Where testamentary trust provided for distribution of income to life beneficiaries and of corpus, upon death of surviving life beneficiary, to testatrix' grandchildren, and income was sufficient to provide only from $100 to $125 each for life beneficiaries, service of notice upon living residuary beneficiaries of petition to increase the allowance to life beneficiaries and statement of two reduary beneficiaries who appeared that they had no objection to increasing payments to $150 was not such a consent by all residuary beneficiaries so as to warrant an invasion of corpus of trust to provide each life beneficiary with at least $200 a month. Probate Code, § 1120.

18. Trusts ⇐276

Where trust instrument provides for payments to a life beneficiary out of net income, there may be no invasion of corpus or of accumulated income in the absence of a clear expression to the contrary in trust instrument.

19. Trusts ⇐58

In construction of a testamentary trust on petition for modification to carry out alleged intent of testatrix to pay life beneficiaries at least $200 a month, where will provided that payments to life beneficiary be made out of net income, evidence was insufficient to establish that testatrix clearly intended an invasion of corpus, if necessary, to provide each life beneficiary with such income. Probate Code, § 1120.

20. Wills ⇐435

Where testatrix died without changing her will, court did not have power to remake will on basis of fact that at one time some 11 years after making will, she expressed an intention, which she failed to act upon, to change her will.

21. Trusts ⇐58

Sympathy for needs of life beneficiaries of testamentary trust does not empower court to deprive residuary beneficiaries of their interests in corpus of trust without their consent or enable court to construe non-testamentary declarations of testatrix into an expression of her plan or purpose in providing for trust some 11 years previous thereto.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Florence Lenore Van Deusen, deceased, wherein Gladys Van Deusen Bright and another filed a petition opposed by Bank of America National Trust & Savings Association, asking that trustee under decedent's will be directed to pay at least $200 per month to each petitioner even though invasion of corpus of trust should be necessary to make such payments. From an order directing such payments, the bank appeals.

Order reversed.

Prior opinion, 175 P.2d 908.

William K. Young, Brady & Nossaman and Walter L. Nossaman, all of Los Angeles, for appellant.

Ben C. Cohen, of Los Angeles, and Leonard Hartigan, of Glendale, for respondents.

TRAYNOR, Justice.

Florence Lenore Van Deusen by her will dated June 20, 1932, left the residue of her estate to American Security and Trust Company of Washington, D. C., as trustee, for the following purposes: "* * * to pay over the net income arising therefrom, in equal shares, unto my aforesaid daughters, Gladys Van Deusen Bright and Hazel Van Deusen Lee, during the period of their joint lives, and in case of the death of either of them, then all of said net income unto the survivor, for and during the natural life of the survivor. Upon the death of the survivor of my said daughters, this trust shall finally cease and determine, and my trustee shall thereupon transfer, assign and pay over the entire trust fund, including any undistributed income, absolutely and in fee simple, in equal shares unto those of my grandchildren who may then be living, the then surviving issue, however of any of them who may then be dead, to take, per stirpes, the same part or share the deceased ancestor would have taken if living."

The testatrix died on April 10, 1944, and the will was admitted to probate on June 13, 1944. The named trustee declined to act, and Bank of America National Trust and Savings Association was appointed administrator-with-the-will-annexed. On March 22, 1945, the daughters of the testatrix, the life beneficiaries of the trust, filed a "Petition for Directions to Trustee" with the probate court. The purpose of the petition was to have the trustee, when appointed, instructed to pay each of the life beneficiaries at least $200 a month, out of income, if that was sufficient, but if not, out of the corpus of the trust. It is alleged in the petition that the provision made by the testatrix for her daughters was intended to provide them with enough income to take care of their needs, that it was contemplated at the time the will was executed that the net income from the trust investments would be at least $400 a month, and that the testatrix intended that not less than $200 a month would be available for each daughter under the trust. It is also alleged that since the creation of the trust one of the daughters has been afflicted with a disease believed to be incurable and needs special medical care and that the other daughter must rely entirely upon the income from the trust for the necessities of life.

On April 3, 1945, Bank of America Trust and Savings Association was appointed trustee, and by order for ratable distribution a part of the residue of the estate was distributed to the trustee. On the same day the "Petition for Directions to Trustee" was denied. The order for ratable distribution provides: "The Trustee shall pay in equal shares to Gladys Van Deusen Bright and Hazel Van Deusen Lee during the period of their joint lives, and in case of the death of either of them then to the survivor for and during the natural life of said survivor, all of the net income arising from said trust estate.

"Upon the death of both of decedent's daughters, said trustee shall distribute the corpus of the trust estate in equal shares to the grandchildren of decedent who may then be living, or, in the event of any of said grandchildren not surviving, then his or her share shall be distributed to his or her surviving issue in equal shares and per stirpes, and thereupon this trust shall cease and terminate."

On September 12, 1945, the probate court made its order of final distribution, distributing the balance of the residue to the trustee "in trust for the uses and purposes set forth in the Order for Ratable Distribution, dated April 3, 1945. * * *" No appeal was taken from either order of distribution. Some time after April 3, 1945 (the record does not disclose the date of the order) a new trial was granted on the "Petition for Directions to Trustee" and another hearing was held on the petition on February 14, 1946. On the basis of the record at the original hearing on the petition, the court entered its order granting the petition of the life beneficiaries for directions to the trustee to pay each of them at least $200 a month, after a showing that the net income of the trust at that time was sufficient to pay each beneficiary from $100 to $125 a month only. This order was based on a finding by the probate court "that the main benefits under said trust were intended for the petitioners herein who were the

primary objects of the testatrix's solicitude and that the primary purpose of the trust could not be accomplished by a strict adherence to the terms of the declaration of the trust * * * and that it is the purpose of said trust that the said petitioners herein receive the sum of $200 each per month." From this order the trustee, who appeared at the hearing in opposition to the petition, appeals.

The trustee contends that the probate court was without jurisdiction to make the order on the grounds that respondents' petition was not a proper petition under section 1120 of the Probate Code, that the new trial on the petition after the final decree of distribution constituted a collateral attack on the final decree of distribution, that the probate court was without jurisdiction to modify the trust pursuant to section 1120, and that if the probate court had jurisdiction and the matter was not conclusively determined by the final decree of distribution, the probate court erred in ordering an invasion of the corpus of the trust contrary to the express terms of the decree of distribution and of the will itself.

Probate Code section 1120 provides: "When a trust created by will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, or settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of his trust, or at the termination thereof, render for settlement his accounts and report his acts as such trustee, before the superior court in which the will was probated. * * * The trustee may also petition such court, from time to time, for instructions as to the administration of the trust. * * * The trustee shall cause notice of the hearing to be mailed to the beneficiaries at their last known addresses. * * *"

[1-3] It has been held that a beneficiary as well as a trustee may petition the court for instructions to trustees pursuant to this section. Estate of Marre, 18 Cal. 2d 184, 186, 114 P.2d 586. It has never been decided, however, whether the petition may be filed before the appointment of a trustee and before distribution. It is clear that the section applies only to testamentary trusts that continue after distribution, and most of its provisions expressly refer to action taken after distribution. In Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565, 567, it is stated that "the language employed in the present section of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." Quoted with approval in Estate of Smead, 12 Cal. 2d 20, 24, 82 P.2d 182.

[4, 5] There is nothing in section 1120 that specifies the time for filing the petition, although it seems clear that it should not be heard and determined before the trustee is appointed and has received distribution of at least some of the corpus. See Estate of Rey, 31 Cal.App.2d 648, 653, 88 P. 2d 718. The trustee contends that since the "trustee" is required to mail notice to the beneficiaries, the petition cannot be filed until a trustee is appointed who can carry out this direction. Since the clause providing for the petition has been held to apply to petitions filed by beneficiaries, although the statute refers only to a petition of trustees (Estate of Marre, supra), there is no reason why the petitioning beneficiaries may not satisfy the notice requirements of the statute. Although the petition was filed before the decree of distribution and before the appointment of a trustee, its prayer is for directions to the trustee that the court appoints, and it was heard after the appointment of the trustee and the order of ratable distribution, and the trustee appeared to contest the granting of the relief sought. The probate court had jurisdiction to hear the petition at that time.

[6, 7] The trustee contends that the orders of distribution were final and conclu-

sive with respect to respondents' rights under the will and that the probate court had no power to grant a new trial on the petition thereafter. With respect to the construction of the will, the decree of distribution was clearly conclusive as to the rights of the beneficiaries to an invasion of the corpus. By the order for ratable distribution of April 3, 1945, incorporated in the decree of final distribution of September 12, 1945, the probate court directed that the net income be paid to respondents and that the corpus be distributed to the grandchildren of the testatrix on the death of the surviving life beneficiary. A decree of distribution is a final and conclusive construction of the will as against all interested parties, including beneficiaries of a testamentary trust. Estate of Loring, 29 Cal.2d 423, 428, 175 P.2d 524, 527; Estate of Easter, 24 Cal. 2d 191, 194, 148 P.2d 601; Probate Code § 1021; cases collected 136 A.L.R. 1180, 1185. "The administration of a decedent's estate involves a series of separate proceedings, each of which is intended to be final * * * not only as to the parties who appear therein, but also as to all persons 'interested in the estate' * * *. In fact, it is undoubtedly because all such persons were to be bound by various orders and decrees entered in the course of the administration of the estate, that the Legislature expressly provided that they might appear and protect their rights in the proceedings that lead to such orders and decrees. See Prob.Code §§ 361, 370, 407, 442, 522, 584, 681, 756, 810, 831, 841, 860, 921, 922, 927, 1000, 1010, 1020, 1200." Estate of Loring, supra, 29 Cal.2d at page 428, 175 P.2d at page 524.

Among such proceedings are those for ratable distribution (sec. 1010) and final distribution (sec. 1020). Any question of construction of the will in favor of the respondents should therefore have been determined either at the time of the order for ratable distribution or the decree of final distribution.

The life beneficiaries, however, contend that the petition was filed to obtain a modification of the trust to carry out the actual intention of the testatrix rather than to obtain a favorable construction of the will. That this is the theory on which the order was granted is shown by the probate court's finding after the new trial "that the primary purpose of the trust could not be accomplished by a strict adherence to the terms of the declaration of the trust expressed in said last Will and Testament, * * *" The original order on respondents' petition was one of denial and no appeal was filed therefrom. Subsequently a new trial was granted on the petition, and the issue remains whether the probate court had jurisdiction to grant a new trial. Section 1231 of the Probate Code lists the cases in which a probate court has jurisdiction to grant a new trial: "A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried."

[8, 9] The proceeding involved in the present case was not a will contest. Nor was it a proceeding under the second category specified in section 1231. The phrase "Proceedings to determine heirship and interests in estates" refers to the special proceedings under section 1080 of the Probate Code. Under this section, "any person claiming to be an heir or entitled to distribution of any part of the estate of a decedent, may file a petition in the pending probate proceeding to have the court ascertain and declare the rights of himself and all others to the estate or any interest therein." Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333, 336. In such proceedings, however, a petitioner is not entitled to be heard unless he claims to be an heir, and when such a claim is made, "The court acquires jurisdiction to determine, and it is made its duty to determine, not alone the heirship to said deceased, but the interest of each respective claimant to his estate." In re Blythe's Estate, 112 Cal. 689, 694, 45 P. 6, 7.

[10-13] The last category specified in section 1231 of the Probate Code covers "Those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury * * *." There

is no right to demand a jury trial in a probate proceeding unless that right is granted by statute. Estate of England, 214 Cal. 298, 300, 5 P.2d 428; Estate of Land, 166 Cal. 538, 541, 137 P. 246. If it is assumed therefore that the new trial was granted on an issue of fact, namely, the purpose and intention of the testatrix in executing the trust provisions of her will, the question remains whether there is a statute providing for a right to a jury trial of that issue in a proceeding pursuant to section 1120 of the Probate Code. If there is any statutory authority for a jury trial in such a case, it must be found in sections 1230 and 1233 of the Probate Code. Section 1230 provides that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant." Section 1233 provides that "the provisions of part II of the Code of Civil Procedure * * * constitute the rules of practice in the proceedings mentioned in this code with regard to trials * * *." It was held under former sections 1713 and 1716 of the Code of Civil Procedure, on which these sections are based, that a party to a probate proceeding had a right to demand a jury trial if there is statutory authority for the formation of issues of fact on the issue joined. Estate of Baird, 173 Cal. 617, 620, 160 P. 1078. This rule has been applied under the Probate Code to an issue of fact raised under Probate Code section 1020 authorizing an interested party to resist the application for a decree of distribution. Estate of Perkins, 21 Cal.2d 561, 567, 134 P.2d 231. Section 1120, however, makes no provision for such issues of fact and it has been held that there is no right to a jury trial and therefore no right to a new trial in proceedings thereunder to settle the accounts of a testamentary trustee. Estate of Smead, 12 Cal. 2d 20, 24, 82 P.2d 182. Moreover, even if there were such a right to a jury trial, the analogous civil action under section 1230 would be an action by the respondents against the trustee and the remaindermen to determine the extent of their rights in the trust. Such an action in equity does not give the parties a right to a jury trial. Cauhape v. Security Savings Bank, 127 Cal. 197, 201, 59 P. 589.

[14] Since Probate Code section 1231 provides the only authority for the granting of new trials in probate proceedings and does not authorize the granting of a new trial in a proceeding such as the present one, the probate court lacked jurisdiction to make the order appealed from. Diamond v. Superior Court, 189 Cal. 732, 740, 210 P. 36.

[15, 16] Even if it be assumed that the probate court had jurisdiction to grant a new trial on respondents' petition for instructions to the trustee, the order appealed from is erroneous on its merits. The theory of the order, and the only basis for granting it after the decree of distribution, was to allow a modification or deviation from the trust to carry out the purpose of the testatrix in view of changed conditions. A court of equity may modify a trust on a proper showing of changed conditions occurring after the creation of a trust if the rights of all the beneficiaries may be protected. Whittingham v. California Trust Co., 214 Cal. 128, 134, 4 P.2d 142; Adams v. Cook, 15 Cal.2d 352, 358, 101 P.2d 484; Moxley v. Title Insurance & Trust Company, 27 Cal.2d 457, 466, 467, 165 P.2d 15, 163 A.L.R. 838; see Rest. Trusts, §§ 167, 168; Scott on Trusts, §§ 167, 168. If it is assumed that a probate court has the same power under section 1120, the order appealed from is nevertheless erroneous, since it provides for an invasion of the corpus of the trust contrary to the express provisions of the decree of distribution without any attempt to protect the interests of the residuary beneficiaries in that corpus.

The only interest given respondents in either the will or the decree of distribution is the net income from the corpus. The grandchildren of the testatrix, children of the respondents, are entitled to distribution of the corpus on the death of the surviving respondent. To allow an invasion of the corpus without the consent of the residuary beneficiaries contrary to the provisions of the trust instrument is to take property from one without his consent and give it to another. (See 3 (pt. 1) Bogert, Trust and Trustees, 504.) As stated in the Re-

statement of Trusts (sec. 168, comment d.) "The court will not permit or direct the application of the principal to the support or education of one beneficiary where by the terms of the trust income only is to be so applied, if the result would be to deprive another beneficiary of property to which he is or may become entitled by the terms of the trust, whether the interest of such other beneficiary is vested or contingent, or unless such other beneficiary consents to such application." See also Hughes v. Federal Trust Co., 119 N.J.Eq. 502, 504, 183 A. 299; Scott on Trusts, sec. 168.

[17] In Whittingham v. California Trust Co., 214 Cal. 128, 134, 4 P.2d 142, the claimant, a beneficiary of a testamentary trust, was the only person interested in the estate. It was held that a court of equity could modify the trust to allow distribution of part of the corpus to the beneficiary on a proper showing of the beneficiaries' need therefor and of changed circumstances occurring since the execution of the will. In the present case, the respondent life beneficiaries are not the only persons interested in the trust, and the rights of the residuary beneficiaries must be protected. The respondents contend, however, that the probate court did not have to protect the interests of the residuary beneficiaries, and that the trustee had no right to attempt to do so, since the living residuary beneficiaries were all served with notice of the filing of the petition and two of them, who appeared through counsel, stated that they had no objection to increasing the payments to $150. This can hardly be considered consent by all the residuary beneficiaries to an invasion of the corpus of the trust to provide each of the life beneficiaries with at least $200 a month.

[18, 19] Moreover, in Estate of Markham, 28 Cal.2d 69, 74 168 P.2d 669, it was held by this court that where the trust instrument provides for payments to a life beneficiary out of net income, there may be no invasion of the corpus or of accumulated income in the absence of "a clear expression to the contrary in the trust instrument." The respondents contend that the rule of the Markham case is confined to a situation where there is a fully expressed plan or purpose set forth in the trust instrument and that in the present case there was no plan or purpose shown by the will itself. Even if this limitation of the rule might be applied in a proper case, respondents have failed to show by parol evidence or otherwise that the testatrix clearly intended an invasion of the corpus, if necessary, to provide each of the daughters with an income of $200 a month.

[20] The conditions as to the health and need of the respondents were stipulated to by the trustee at the hearing. The only other evidence of changed conditions after the execution of the will in 1932 is that the income from the securities that were distributed as the corpus of the trust decreased some time between 1932 and the date of the original hearing on the petition. The evidence introduced by respondents consisted only of the testimony of the husband of one of the life beneficiaries that he was the financial adviser of the testatrix, that at the time of the execution of the will in 1932, the testatrix received $400 a month income from the securities in question; that at that time she told the witness that she expected that her daughters would receive a similar income therefrom under the trust. The witness also testified that in 1943, the testatrix stated in a letter that "I *will arrange it* so that it will be used to the advantage of Gladys and Hazel [the respondents], no others." (Italics added.) He also testified that the testatrix did make a statement "with respect *to seeing* that her children were not impoverished as a result of illness or any unforeseen contingencies." (Italics added.) This evidence, whether admissible or not, shows only that in 1932 the testatrix expected the income from her securities to remain at approximately $400 a month after her death and that in 1943 she contemplated changing her will to provide solely for her daughters. Nevertheless the will admitted to probate provided for her grandchildren as well as her daughters. She died without changing her will and the court did not have power to remake the will on the basis of the fact that at one time some 11 years after making the will she had an intention, which she failed to act upon, to change her will.

[21] Sympathy for the needs of the respondents does not empower the court to deprive the residuary beneficiaries of their interests in the corpus of the trust without their consent, nor does it enable the court to construe the non-testamentary declarations of the testatrix into an expression of her plan or purpose in providing for the trust some 11 years previous thereto. If the courts could increase the payments under testamentary trusts without the consent of all the beneficiaries merely because the income therefrom is not what it was at the time the will was executed and because at one time or another the testator expressed the desire to provide adequately for the beneficiaries, there would be no stability to any testamentary trust in this state.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



80 Cal.App.2d 579

Application of TORRES.
Application of SILVERS et al.
Cr. 2489, 2490.

District Court of Appeal, First District, Division 1, California.
June 27, 1947.

1. Bail ⇐44
Criminal law ⇐1147

One convicted of a felony is not entitled under statute to bail pending appeal as a matter of right but only within the discretion of trial court, which however is subject to control by appellate court but only in case of manifest abuse of discretion or where some extraordinary circumstance has occurred since trial. Pen. Code, § 1272; Rules on Appeal, rule 32(b).

2. Bail ⇐44

Under statute, on appeal from a judgment imposing imprisonment in a misdemeanor case, defendant is entitled to bail pending appeal as a matter of right. Pen. Code, § 1272.

3. Bail ⇐44

Where defendants, though convicted of felonies, were admitted to probation and upon condition of confinement in county jail and payment of fines within the limits of punishment for a misdemeanor, they were entitled to admission to bail pending appeal in absence of circumstances or additional terms in probation order indicating inadvisability of admitting them to bail. Pen. Code, § 1272; Rules on Appeal, rule 32(b).

4. Bail ⇐44

The mere fact that one convicted of a felony will probably have served a large portion or all of his sentence before his appeal can be heard does not entitle him to bail on appeal. Pen. Code, § 1272; Rules on Appeal, rule 32(b).

5. Bail ⇐51

Appellate court having determined that defendants though convicted of felony, were entitled to admission to bail pending appeal could either remand the proceedings to trial court with instructions to that court to fix the bail or appellate court could itself fix the bail. Pen. Code, § 1272; Rules on Appeal, rule 32(b).

6. Bail ⇐51

Appellate court, having determined that defendants, though convicted of felonies, were entitled to admission to bail pending appeal, would in the interests of justice itself fix the amount of such bail. Pen. Code, § 1272; Rules on Appeal, rule 32(b).

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Proceedings in the matter of applications by Henry Torres and by Mike Silvers and Louis Coloretti for bail pending appeal from felony convictions.

Applications granted and amount of bail fixed in accordance with opinion.

Marvin E. Lewis and James A. Himmel, both of San Francisco, for Torres.

Leslie C. Gillen and John R. Golden, both of San Francisco, for Silvers and Coloretti.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

BRAY, Justice.

These are applications for bail pending appeal after felony convictions.

In the Torres case, the defendant was convicted of conspiracy to violate section 347 of the Penal Code. On May 27, 1947, he was admitted to probation for a period of two years upon condition of confinement in the county jail for a period of six months (less time served to date of order of probation) and payment of a fine in the sum of $200.

In the Silvers and Coloretti cases, both defendants were convicted of two counts: 1. Conspiracy to violate section 347 of the Penal Code; and 2. Violation of section 347 of the Penal Code. Silvers was admitted to probation for a period of two years upon condition of confinement in the county jail for a period of four months and payment of a fine on each count of $200. Coloretti received a like probationary term except that his term of imprisonment was only two months.

On May 27, 1947, all applicants moved the superior court to be admitted to bail pending appeal, which motions were forthwith denied. All applicants have appealed from the respective judgments of conviction, and in their applications here have shown that their appeals are not frivolous.

These applications are made under the provisions of Rule 32(b), Rules on Appeal, which reads: "An application to the reviewing court for bail or to reduce bail on an appeal pending therein shall be made on such notice to the district attorney and the attorney general as the court may determine, and shall include a showing that proper application for bail or a reduction of bail was made to the superior court and that such court unjustifiably denied the application."

[1] Petitioners are not entitled to bail as a matter of right but only within the discretion of the court. (Penal Code, sec. 1272.) "It always has been the law in this state that the discretion referred to in section 1272 of the Penal Code, supra, is a discretion conferred upon the trial court where the conviction was had, and is not a discretion conferred upon the appellate courts. [Citing cases.] Of course, such discretion should not be arbitrarily exercised, and an abuse thereof will be controlled by an appellate court. Ex parte Smallman, 54 Cal. 35; Ex parte Hoge, 48 Cal. 3. The discretion being vested in the trial court where the conviction was had, its exercise by that court will not be disturbed except in an instance of manifest abuse, or where some extraordinary circumstance has occurred since the trial, such as the illness of the defendant, or after discovered evidence which tends to show his innocence." People v. Davis, 67 Cal.App.2d 837, 839, 155 P.2d 675, 676.

The applications here are solely upon the ground of alleged abuse of discretion of the trial court in refusing bail. The question here resolves itself into one proposition: Did the trial court in exercising its discretion in the matter of probation and punishment, determine that the interests of society will be protected by treating the defendants, though convicted of felonies, similarly to persons convicted of misdemeanors, and therefore by analogy, in the matter of bail on appeal, defendants are entitled to be admitted thereto almost as a matter of right?

[2, 3] On appeal from a judgment imposing imprisonment in a misdemeanor case, a defendant is entitled to bail as a matter of right. (Penal Code, sec. 1272.) In each instance here the length of probation and the terms of imprisonment and fine were within those which could be granted in case of a misdemeanor conviction. It therefore appears from the record that for those purposes the court believed that the rights of society were well protected, and the ends of justice met, by treating each defendant as if he were convicted of a misdemeanor rather than of a felony. It would seem, therefore, that in the matter of bail on appeal it would be an abuse of discretion to treat them more harshly than they had been treated in the

matter of probation and punishment, and more harshly than other men receiving the same probation and punishment, who as a matter of right must be admitted to bail on appeal, are treated. The mere fact that the crime with which they were convicted is a felony rather than a misdemeanor should not deprive them of the right to equal treatment as to bail on appeal with men equally treated as to probation and punishment.

It is true that the statute makes bail on appeal in misdemeanor cases a matter of right, and in felony cases only a matter of discretion, and there will be many cases in which, because of the circumstances or because of additional terms in the probation order, it may be inadvisable to admit the defendant to bail on appeal, even though the length of the probation term and the conditions thereof as to incarceration are within the limits of a misdemeanor case. Here, however, there are no additional terms of probation, and the action of the court indicates that in its judgment no severity greater than that imposed in misdemeanor cases should be imposed.

[4] Petitioners contend that the mere fact that, in all probability, all the jail terms will have been served before a final determination of the merits of their appeal can be obtained constitutes an abuse of discretion in denying bail on appeal. This does not necessarily follow. Take the cases of two men convicted of crimes. One is given a five months' sentence; another a year's sentence. It has frequently been held that the mere fact that a person will have served a large portion of his sentence before his appeal can be heard does not entitle him to bail on appeal. Let us assume for argument's sake, that in the case of the two men illustrated it would take six months to obtain a decision of their appeal. Under petitioners' argument the man who was given only a five months' sentence would be admitted to bail, but the other man would be denied bail although in the event his conviction was set aside on appeal he would have actually served a month longer than the other man would have, the latter not being admitted to bail.

It is not the fact that the whole or any portion of the sentence would have been served unnecessarily were the conviction set aside that makes it an abuse of discretion in a case like this not to admit the defendants to bail, but rather, the fact that the court in the exercise of its discretion has determined that for certain purposes the cases are analogous to misdemeanor convictions, and hence it is an abuse of discretion not to consider them similarly for purposes of bail on appeal.

In Re Pantages, 209 Cal. 535, 536, 291 P. 831, 832 the court said, referring to bail on appeal in felony cases: "* * * the laws of the state should be administered in a humane manner, and it is for that reason that the power to grant bail in a proper case is conferred upon courts and judges." It would seem only humane, where the trial court, exercising its discretion and knowing the facts of the case, determined that the circumstances justified the treatment of the defendants similarly to misdemeanants in the important matter of punishment and probation, that it should not deny them the right to bail while the appeal from their convictions is being determined.

[5, 6] Having determined that the defendants are entitled to admission to bail pending appeal, there are two methods of procedure open to us. As in People v. Oreck, 69 Cal.App.2d 317, 158 P.2d 940, to remand the proceedings to the trial court with instructions to that court to fix bail, or as In re Pantages, supra, for this court to fix the bail. In the interests of justice we have decided to follow the latter procedure.

Accordingly, it is ordered that each petitioner be admitted to bail pending his appeal, in the sum of $1,000 cash, such bail to be deposited with the clerk of this court, and upon such deposit, order of release of petitioners to issue.

PETERS, P. J., concurs.

80 Cal.App.2d 745

PEOPLE v. GREENE.

Cr. 583.

District Court of Appeal, Fourth District, California.

July 7, 1947.

Hearing Denied Aug. 6, 1947.

1. Criminal law ⇐406(2)

Testimony of shorthand reporter as to statement made by defendant in response to questioning by police officer and deputy district attorney that he borrowed automobile without owner's consent was admissible in prosecution for taking automobile without owner's consent with intent to deprive owner of its possession over objection that defendant was not warned by deputy district attorney of his constitutional right to remain silent. Vehicle Code, § 503.

2. Criminal law ⇐232

Defendant need not be represented by counsel before the committing magistrate, unless he enters a plea of not guilty or waives preliminary examination. Pen.Code, §§ 859a, 860.

3. Criminal law ⇐232

Where preliminary examination was in fact held, notwithstanding committing magistrate's statement of his understanding that defendant desired to waive such examination and defendant's confirmation of such understanding, presence of counsel representing defendant was not mandatory. Pen.Code, §§ 859a, 860.

4. Criminal law ⇐393(1), 406(4)

Defendant having made no motion to set aside information could not object to admission against him at trial of his testimony at preliminary examination on grounds that he was compelled to be a witness against himself, that he was not represented by counsel at preliminary examination and that his constitutional rights had been violated. Pen.Code, §§ 995, 996.

5. Criminal law ⇐406(4)

Where defendant was informed of his rights at arraignment before committing magistrate and was warned that any statement he might make at preliminary hearing might be used against him and he made no motion to set aside information, admitting in evidence against him at trial in superior court his testimony at preliminary hearing was not error. Pen.Code, §§ 858, 996, 1323.

6. Criminal law ⇐245

Matters respecting improper or unlawful committment by a magistrate should be raised on motion to set aside the information before entry of a plea. Pen.Code, § 996.

7. Criminal law ⇐1202(1)

Final judgments of conviction could not be collaterally attacked in subsequent prosecution for another criminal offense wherein defendant was accused of having been previously convicted of felonies. Pen. Code, § 969b.

8. Criminal law ⇐1037(1), 1044

Defendant could not complain for the first time on appeal of district attorney's remark to jury as to which no objection was made at trial nor motion to strike interposed.

9. Criminal law ⇐1037(2), 1044

Prejudicial error could not be predicated on district attorney's reference to defendant as a jailbird in remarks to jury, where defendant did not move to strike such remark nor request that jury be admonished to disregard it.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Tom Greene was charged with violation of Vehicle Code, Sec. 503, in that he unlawfully took an automobile without owner's consent with intent to deprive owner of its possession. From an adverse judgment and order denying a motion for new trial, he appeals.

Judgment and order affirmed.

J. Emmet Chapman and Frederick C. Dewar, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was charged in Fresno County in an information with the

violation of section 503 of the Vehicle Code in that he did unlawfully take a Cadillac automobile, without the consent of the owner, with intent to deprive such owner of its possession. He was also accused of having been previously convicted in that county on July 21, 1943, of the crime of burglary and two counts of grand theft, and having served a term therefor in the State Prison. Upon arraignment in that court defendant appeared with counsel, entered a plea of not guilty to the charge, and denied the previous convictions. No other or further proceedings were had until a trial by jury which followed. The clerk read the information setting forth the several accusations and defendant's plea thereto.

Mr. Rogers, owner of the car, testified that he drove to the Fresno Hotel on the evening of August 17, 1946, and ordered his car taken to the Fresno garage. A claim check was returned to him. The next morning he went to the garage to obtain his car and it was gone. He gave no one permission to take it. That night defendant, who was a night attendant at the garage, said he "borrowed" the Cadillac, without the owner's permission, to take a ride with two friends. They proceeded as far as Gilroy, and on their return at about 3 a. m., they met with an accident and the car burned up. A highway patrol officer found the burned car. The two occupants thereof were located in the hospital at Gilroy. He apprehended the defendant taking a bus to Fresno.

The officer testified as to certain conversations with defendant at the hospital, in the presence of the two guests and hospital attendants. He testified that the defendant said that he was driving the Cadillac at about 70 miles per hour and could not negotiate a turn so he ran into a culvert and the car caught fire; that he "borrowed" the car from some one; that he could not think of his name. He later gave the name as Rogers but could not think of his first name.

Detective Sergeant Scott of Fresno called in a shorthand reporter, a deputy district attorney, and a statement was given by defendant in their presence. The officer testified that no promise of immunity was given if defendant would make a statement. Counsel for defendant cross-examined the officer on this subject and complained bitterly because there was no warning given on that occasion by the deputy district attorney to the defendant of the defendant's constitutional right to remain silent.

[1] The shorthand reporter, testifying at the trial, was called upon to produce and read the statement given by defendant. Objection was made because there was no showing that prior to the taking of the statement defendant was not advised of his constitutional rights. The objection was overruled and the witness gave the conversation by questions and answers as reflected from his shorthand notes. Defendant related in detail the taking of the car from the garage by him about 1 o'clock a. m. of the day in question and stated that he "just went for a ride"; that he did not know who the car belonged to and that he did not have permission of any one to take it. We see no merit to the complaint that the court erred in admitting the statement in evidence. We are apprised of no provision of law that requires a police officer or district attorney to advise a defendant of his constitutional right to remain silent if he does not desire to speak, when the defendant is being questioned by them under such circumstances as here related. No claim is made that the claimed admissions or confessions do not otherwise comply with the requirements necessary to the reception of such declarations in evidence.

Defendant thereafter, on August 20th, was taken before the committing magistrate and arraigned. According to the minutes of that court, which were received in evidence at the trial, the defendant was "duly informed of the nature of the charge against him and of all his legal rights". The preliminary hearing was set for August 21st. On that day, defendant came into the magistrate's court, without counsel, and the judge thereof stated to the defendant: "I understand you want to waive your preliminary hearing". Answer by defendant: "That is correct". The Court: "In order to do so you must be informed that when you take the stand and testify, anything that you say here in this court may be held against you in this court, or in any other court hereafter. You do not have to testify unless you want to, but you may do so

if you want. With that understanding, do you want to testify?" Defendant: "Yes, sir." The defendant then testified in more detail about the facts before related. He was held to answer. This evidence was offered against the defendant in the Superior Court and counsel for him objected and moved to strike that evidence on the ground that "defendant was compelled to be a witness against himself * * * that he was not represented by counsel * * * and that his constitutional rights had been violated." The motion was denied and on this appeal defendant claims error of the trial court in its ruling.

The record not only indicates that defendant was informed of his rights according to section 858 of the Penal Code, at the arraignment, but he was later warned that any statement he might give at the preliminary hearing might be used against him. Sec. 1323, Penal Code. Although the question propounded by the committing magistrate might indicate that the magistrate was of the belief that the defendant was *waiving* a preliminary examination, the facts indicate from the testimony taken that a *preliminary examination* was being held, and the evidence produced did show probable cause justifying the committing magistrate in holding the defendant to answer to the Superior Court.

[2, 3] In People v. Brooks, 72 Cal.App. 2d 657, 660, 165 P.2d 51, in construing Penal Code section 859a and Penal Code section 860, this court stated that it is not necessary that a defendant be represented by counsel before the committing magistrate, unless he enters a plea of guilty, or unless he waives the preliminary examination.

Since the proceeding had was a preliminary examination, the presence of counsel representing the defendant was not mandatory. The record nowhere shows that defendant desired the services of counsel or sought a continuance for that purpose. After defendant secured counsel, which was before his arraignment in the Superior Court, no motion was made questioning the validity of the proceedings in the committing magistrate's court. In fact, it was not questioned until the proffered evidence relating to his testimony at the preliminary hearing was presented during the trial of the action.

[4, 5] Section 995 of the Penal Code provides that the information must be set aside, *upon defendant's motion,* when it appears that before the filing thereof defendant had not been legally committed by a magistrate. Section 996 of the Penal Code provides that if the *motion* to set it aside is not made, the defendant is precluded from afterwards taking the objections mentioned. Since counsel for defendant failed to make such a *motion,* and failed to address himself to the discretion of the court in this respect, he is now foreclosed from raising the objection suggested. See, also, People v. Harris, 219 Cal. 727, 28 P.2d 906, and cases there cited. We perceive no error of the trial court in its ruling on the admissibility of the testimony of defendant taken at the preliminary examination.

Defendant took the witness stand and did not deny taking the Cadillac car nor any of the conversation had before the enforcement officers, nor the testimony given by him at the preliminary examination. All that he testified to was that at the time of the preliminary hearing *on the prior convictions charged,* he *had no money to employ counsel;* that he was not informed *that he was entitled to counsel at all stages of the proceedings,* and at the time of the preliminary hearing in the instant case he *did not have funds to secure counsel.*

On cross-examination he was asked if he had ever been convicted of a felony. He answered: "* * * according to the records" he had been convicted of the felonies charged in the information and served time in San Quentin, and that he had been convicted of another felony (burglary) on January 15, 1943.

Defendant did not, on the witness stand, contradict any of the evidence offered by the people. Under the facts, it is difficult to see how he could justly claim that he was prejudiced by the admission into evidence of the claimed confessions or admissions of guilt.

[6, 7] Defendant next asserts that the court erred in refusing to compel the production of the entire record of the cases, including the transcript of hearings on the

preliminary examination relating to the prior convictions alleged. The objection was interposed at the time the people sought to read the certificate of the warden of Folsom prison prepared and submitted pursuant to section 969b of the Penal Code. A specification in the objection made by defendant concerns certain claimed improper conduct pertaining to the failure of the court in appointing counsel for defendant at the preliminary examinations in those cases. There is obviously no merit to this claim for many reasons, including the reasons stated in the preceding discussion. Matters respecting the improper or unlawful commitment by a magistrate should be raised on motion to set aside the information and prior to the entry of the plea. Irregularities occurring in preliminary hearings prior to trial are merged in the trial, and the judgment of conviction is bottomed on the evidence adduced at the trial and not on irregularities preceding it. Certainly the judgments that became final in those cases cannot be inquired into collaterally in this case. In re Northcott, 71 Cal. App. 281, 235 P. 458; People v. Harris, supra.

[8] Lastly, defendant makes two points in his brief to the effect that the district attorney committed error in his remarks to the jury wherein he indirectly referred to the defendant as a "jail bird" and in another remark indicating that the defendant would have pleaded guilty to the charge if his counsel had not suggested otherwise. This latter statement went unchallenged and no motion to strike it was interposed by counsel for defendant. Counsel cannot now be heard to complain. People v. Entriken, 106 Cal.App. 29, 33, 288 P. 788.

[9] When the first remark was made the trial court's attention was called to it in these words: By Mr. Dewar: "I don't agree with this conduct of the district attorney referring to jail birds * * *." The Court: "I didn't hear it. Will you read it?" (Record read.) The Court: "Now, was there an objection?" Mr. Dewar: "Yes, * * * I think the district attorney misconceives his duty to the ordinary citizen by that statement." Mr. Savory: "Well, that is your opinion, counsel." The Court: "You may proceed with the argument." The remark might well have been left unsaid. Since it is apparent that there was no motion to strike it, nor any request to have the jury admonished to disregard it, no prejudicial error resulted. People v. Dominguez, 61 Cal.App. 182, 183, 214 P. 448; People v. Ong Mon Foo, 182 Cal. 697, 705, 189 P. 690.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.



80 Cal.App.2d 731

In re FLENTJEN'S ESTATE.

Civ. 15672.

District Court of Appeal, Second District, Division 3, California.

July 2, 1947.

1. Wills ⇐309

Where hearing on petition for probate of will had been continued for a month and court did not intend to hold hearing on petition until legal notice had been given to testatrix' foreign heirs, and proceeding continued only for purpose of taking deposition of attesting witnesses, and counsel had stated before taking of depositions commenced that he would be unable to prove signature of testatrix by such witnesses, order denying probate because witnesses did not see testatrix attach her signature was void.

2. Wills ⇐289

If evidence shows that instrument purporting to be a will bears signature of testator and was declared by him to be his will to two persons who signed at end of will as witnesses, in his presence and at his request, the instrument is duly proved as a will since presumption of due execution arises which supplies evidence that signature of testator had been affixed to will before he made his declaration and before signatures of subscribing witnesses were affixed.

3. Wills ⇐118

A declaration of a testator that a document which bears his signature is his will amounts to "acknowledgment" of his signature so as to meet statutory requirement for acknowledgment. Probate Code, § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "Acknowledgment".

4. Wills ⇐386

An order denying probate of will because attesting witnesses did not see testatrix affix her signature to instrument was void where witnesses were not questioned as to whether testatrix' name appeared on will at time they signed as witnesses, and if proponent should produce satisfactory evidence that decedent subscribed her name at end of will, whether by verification of her handwriting or some other sort of proof, a prima facie case of due execution would be made out.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Auguste Caroline Flentjen, also known as Auguste C. Flentjen, deceased. From an order refusing the probate of alleged will, Lawrence E. Sterner appeals.

Reversed with directions.

L. M. Cahill and Bloom and Bloom, all of Los Angeles, for appellant.

SHINN, Acting Presiding Justice.

Lawrence E. Sterner presented for probate an alleged will of Auguste Caroline Flentjen, in which he was named executor and sole beneficiary. When his petition came on for hearing, April 30, 1946, it was disclosed by him to the court that he had learned, after the filing of his petition, that there were two nieces residing in Italy, children of a deceased brother and sister and who, with the others named in the petition, would be the heirs of decedent. The judge thereupon stated: "You will have to continue it to notify the Alien Property Custodian, and get them to appear. Do the best you can to figure out who these people are. Continued to May 28th at 9:30." Counsel then stated that it would be inconvenient for the subscribing witnesses to return to court, and the court said:

"We will take their deposition and the reporter will write it up and give it to you, and you can bring it the next time.

"Mr. Bloom: We cannot prove the will by these two witnesses now, as to the signature?

"The Court: If you want to take their depositions. Do you want to take their depositions now, and you can make arrangements with the reporter to have it written up.

"Mr. Bloom: All right.

"The Court: We will now take the depositions of the witnesses to the will in the matter of the Estate of Auguste Caroline Flentjen, No. 254559."

Fredericke L. Knapper was sworn as a witness for petitioner and testified that she knew decedent; that "Miss Flentjen was a customer of the store, and also a friend coming in and out of the store that was an acquaintance and she came in one day and she said, 'You two ladies will do me a favor?' I said, 'Sure.' She brought this paper. She said, 'I need two names to my will,' and that was all she said, and she opened the paper like this, and she said, 'All you need to do won't put you to any trouble, just put your names down,' and we were feeling as a friend to sign.

"Q. She told you then it was her will? A. Yes.

"Q. By the Court: Had she already signed it? A. We did not see it.

"Q. You did not see her sign? A. No; she came from home and brought this paper, like she wanted us to help her.

"Q. When you signed it you don't know whether she had signed it or not? A. No.

"Q. She did not sign it in your presence? A. No."

She testified that she signed as a witness to the will. Clara A. Ibe, the other subscribing witness, testified that decedent asked her to sign as a witness, that she did so, and that although decedent did not sign the will in her presence, she stated to the witness that it was her will. Thereupon the court stated: "We might as well not

go along with it. We might as well deny its probate. We could not make it a will. It is not properly executed. You will have to file a petition for letters of administration. Will denied probate."

Appellant urges two grounds for reversal of the order: (1) that the hearing upon the petition for probate had been continued to May 28, 1946, that the only proceeding before the court was one for the taking of depositions of the subscribing witnesses, and that there has been no trial of the issue as to whether the document is the will of decedent, and (2) that petitioner should have been given an opportunity to prove that the name of decedent appearing at the end of the will is in her handwriting. Such proof, he insists, with the testimony of the subscribing witnesses, would constitute sufficient evidence, prima facie, to prove due execution. The appeal must be sustained on both grounds.

[1] The hearing on the petition had been continued for a month. The order of continuance was not expressly or impliedly rescinded. The court did not intend to hold a hearing on the petition until legal notice had been given to the foreign heirs. The proceeding which followed was one to take depositions and nothing more. Counsel had stated before the taking of the depositions commenced that he would be unable to prove the signature of decedent by the two subscribing witnesses. Undoubtedly he was expecting to prove the genuineness of the signature by other witnesses, when the matter would again come on for hearing. He was given no opportunity to make that proof. The order denying probate was not made following a trial, but in a collateral proceeding. It was made in advance of trial and is without validity. Petitioner has not had his day in court, and this, of itself, constitutes an error of procedure which calls for a reversal of the order.

[2, 3] Even if the testimony of the subscribing witnesses had been given upon a trial, it would have been error to deny probate without affording petitioner an opportunity to make further proof. The depositions of the subscribing witnesses did not establish a want of due execution. If the evidence shows that an instrument purporting to be a will bears the signature of the testator and was declared by him to be his will to two persons who signed at the end of the will as witnesses, in his presence and at his request, the instrument is duly proved as a will. A presumption of due execution arises under these circumstances and it supplies evidence that the signature of the testator had been affixed to the will before he made his declaration and before the signatures of the subscribing witnesses were affixed. A declaration of a testator that a document which bears his signature is his will amounts to an acknowledgment of his signature so as to meet the requirement for acknowledgment of section 50 of the Probate Code. In Re Estate of Gray, 75 Cal.App.2d 386, 171 P.2d 113 (published after the order herein was made) essentially the same situation existed. The will was duly witnessed but there was an absence of proof that Mrs. Gray had signed it before presenting it to the witnesses and requesting them to sign. Of that situation it was said (75 Cal.App.2d at page 393, 171 P.2d at page 117): "Failure of execution may not be considered established in contravention of the presumption for the single reason that there is missing some element of direct proof which, if present, would have rendered it unnecessary to rely upon the presumption. In other words, in the absence of direct evidence as to whether Mrs. Gray's signature was or was not affixed before those of the subscribing witnesses, it must be assumed to have been there when she asked the witnesses to sign." It was held that upon proof of her signature the will should be admitted to probate.

[4] Here, the subscribing witnesses were not questioned as to whether the name Auguste Caroline Flentjen appeared on the will at the time they signed as witnesses. But direct proof that it was there will be unnecessary if the signature be proved to be genuine. If plaintiff produces satisfactory evidence that decedent subscribed her name at the end of the will, whether by verification of her handwriting or some other sort of proof, a prima facie case of due execution will be made out.

The order is reversed and the court is directed to set the matter for hearing after due notice, to receive evidence as to whether the name of Auguste Caroline Flentjen or Auguste C. Flentjen at the end of the will is in her handwriting, and to admit the will to probate unless it be found not to be in her handwriting.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 696

LICHTY v. WHITNEY et al.

Civ. 3647.

District Court of Appeal, Fourth District, California.

July 1, 1947.

1. Mortgages ⇐300

Where letter informed owner of first deed of trust that writer was the owner and holder of second deed of trust, and that writer offered to pay the correct amount due on first deed of trust, letter indicated that writer held some title to instrument other than the one which had been held void in superior court action, and should have put owner of first deed of trust on inquiry, and such owner, failing to accept the full amount of indebtedness, acted at his peril.

2. Mortgages ⇐605

Owners of first deed of trust which was foreclosed who made no objection to form of tender of amount required to redeem by owner of second deed of trust waived any objection with regard to form of tender.

3. Mortgages ⇐606

The holder and owner of second deed of trust was not required to disclose to owner of first deed of trust the capacity in which second trust deed owner was acting in making tender to redeem from foreclosure.

4. Mortgages ⇐605

A tender of amount required to redeem from foreclosure sale of first trust deed was not defective on ground that building company which had forfeited its right to do business in the state was the alter ego of person for whom plaintiff was merely collecting agent, where plaintiff acquired his title by execution sale under a judgment in favor of a bank against the building company and sheriff's certificate of sale was recorded before plaintiff made his tender which sale vested title in plaintiff to second deed of trust.

5. Mortgages ⇐300, 335, 372(1, 5), 595

Where owner of first deed of trust foreclosed refused to disclose or accept amount due and made no objection to form of tender by owner of second deed of trust, tender was sufficient to discharge security although obligation of debt still remained, so that trustee's sale was void and conveyed no title to owner of first trust deed, and such owner's contract in escrow did not give purchaser any equity in the property and did not defeat second trust deed owner's right to redeem.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Max Lichty against Frances A. Whitney and another for declaratory relief to determine plaintiff's right under a second deed of trust on certain property. From a judgment for defendants, plaintiff appeals.

Reversed.

Ruel Liggett, of San Diego, for appellant.

Henry W. Hache, of San Diego, for respondents.

MARKS, Justice.

Plaintiff brought this action in declaratory relief to determine and declare his rights under a second deed of trust on San Diego property.

The complaint alleged that on or about October 18, 1934, Oscar Boswell and Della Boswell, his wife, executed a deed of trust in which Robert J. Gardner was trustee and Frances A. Whitney beneficiary. The deed of trust was a first incumberance on the described property and secured pay-

ment in monthly instalments of a promissory note in the sum of $1900.00, with interest at 5% per annum. The deed of trust contained the usual powers of sale. It was duly recorded.

It was further alleged that on or about October 25, 1934, the Boswells executed a second deed of trust with like powers of sale on the same property with J. B. Coker trustee, and Southern California Home Building Company, beneficiary; that plaintiff became the owner of that deed of trust; that after plaintiff became such owner he offered to pay, and tendered to Frances A. Whitney and Robert J. Gardner the full amount of the indebtedness, including interest, secured by the first deed of trust, which tender and offer to pay was refused by them; that after such tender defendants commenced proceedings to foreclose their deed of trust; that thereupon plaintiff again tendered and offered to pay such indebtedness and interest in full which was refused; that defendants proceeded with such foreclosure and recorded a deed conveying such property thereunder. It is also alleged that defendants, although requested so to do, refused to disclose the amount of principal and interest unpaid on the promissory note necessary to pay the same in full.

The principal defense was based upon a judgment by the Superior Court of San Diego County entered in favor of defendants on April 7, 1945, in consolidated actions, wherein it was decided that plaintiff was not then the owner of the second deed of trust and the note it secured because he claimed title under an assignment purportedly executed by the Southern California Home Building Company after it had failed to pay its Corporation Franchise Tax on January 6, 1941, and had forfeited its right to do business in this State.

In the instant case the trial court found that on or about May 1, 1945, plaintiff became the owner of the second deed of trust and succeeded to the interest of the Southern California Home Building Company thereunder; that plaintiff "offered to pay to the defendants, Frances A. Whitney and Robert J. Gardner, the entire amount due them on their first trust deed; that at the time he made such offer of payment he did not know the exact amount that was due upon the said first trust deed, but offered to pay whatever was justly and properly due thereon, and that neither of the said defendants informed plaintiffs of the amount due on said trust deed, nor accepted any payment from him thereon."

It was further found "that in the month of May, 1945, at the time plaintiff tried to redeem from and pay off the said first trust deed, as aforesaid, he did not inform the defendants that he had procured a good and valid title to the aforesaid second trust deed and note by proceedings other than the aforesaid void assignment from the original beneficiary."

It was also found that at all times mentioned plaintiff was ready, able and willing to pay defendants in full; that since the trustee's sale on June 30, 1945, Mrs. Whitney was the owner of the property; that after that date Mrs. Whitney entered into an escrow agreement with a third party to sell the property to her.

The trial judge drew the following conclusions of law: That plaintiff was the owner of the second deed of trust on and after May 1, 1945, but was not entitled to "redeem" the property from the first deed of trust incumbrance; that his tender and offer of payment was "incomplete and insufficient by reason of his failure to inform defendants that he had become the owner of said second trust deed by reason of another and different transfer" from the assignment from the Southern California Home Building Company held void in the previous action; that the contract of sale between Mrs. Whitney and the third party, which was in escrow, created an equity in the property which could not be defeated by "redemption" by the plaintiff.

It is at once apparent that the judgment in favor of defendants is based solely on (1) the fact that plaintiff failed to inform defendants that he had acquired a good title to the second deed of trust and note after the judgment against him in the consolidated superior court action, and (2) the purported equity in the property created in the purchaser by the escrowed contract of sale signed by Mrs. Whitney. This must be true because all other findings made are in favor of plaintiff and

would have supported a judgment in his favor unless overcome in the two particulars mentioned.

The finding that plaintiff did not disclose the nature of his new interest in the transaction after the judgment against him in the Superior Court action and after he had acquired title to the second deed of trust on May 1, 1945, and that this failure to disclose defeated his right to pay the first indebtedness cannot be sustained either factually or legally.

[1, 2] Under date of May 15, 1945, plaintiff wrote Mrs. Whitney in part as follows: "As owner and holder of the second trust deed covering the above property I hereby tender and offer you the correct amount due on your first trust deed covering this property." As the letter informed Mrs. Whitney that plaintiff was the owner as well as the holder of the second deed of trust the inference is clear that he held some title to the instrument other than the one held void in the superior court action. This should have put defendants on inquiry before failing to accept the full amount due on the indebtedness. Mrs. Whitney failed to act at her peril. The tender was no more specific than the one held sufficient in Wiemeyer v. Southern Trust and Commerce Bank, 107 Cal.App. 165, 290 P. 70. As defendants here made no objection to the form of the tender, any objection to it on that ground was waived by them.

[3] Plaintiff was not required to disclose the capacity in which he was acting in making the tender. The same argument was made in Miller v. Lanktree, 34 Cal. App. 293, 167 P. 195, 196, and was rejected. It was there said: "We think there is no merit in this contention. If the defendant, Ella M. Murphy, in the former action was entitled to redeem in any capacity, and tendered to the purchaser at the foreclosure sale the amount required by the statute to effect such redemption, the holder of the certificate of sale was bound to accept such tender, and was not entitled to be informed in what particular capacity the redemptioner was acting. Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 648."

In this connection it should not be out of place to note that the record indicates that Mrs. Whitney seemingly was interested in making a substantial profit on the transaction. The trial court found that there was due her $1271.00, principal, together with accrued interest at five per cent per annum, from April 1, 1943, together with any taxes and costs she may have paid prior to May 1, 1945.

Plaintiff repeatedly attempted to learn the exact amount due Mrs. Whitney and offered to pay it. On July 19, 1943, Mrs. Whitney informed the attorney for plaintiff that the amount due was $8201.96. Under date of January 13, 1944, the trustee wrote the then attorney for plaintiff that the first trust deed was for sale for $2,000.00. On July 11, 1944, she wrote her attorney that the trust deed was "for sale for $2000.00 plus your fees". She at no time expressed willingness to accept the amount due and failed to disclose that amount.

Mrs. Whitney argues that the Southern California Home Building Company was the alter ego of J. B. Coker; that plaintiff was merely the collecting agent for Coker; that the transaction was permeated with some description of fraud sufficient to defeat plaintiff's action.

[4] Plaintiff acquired his title on May 1, 1945, by execution sale under a judgment in favor of the First National Trust and Savings Bank of San Diego against Southern California Home Building Company. The sheriff's certificate of sale was recorded on May 7, 1945, before plaintiff made his tender to Mrs. Whitney on May 15, 1945. The trial judge concluded that this sale vested title in plaintiff to the second deed of trust and that on May 1st he became the owner of it. This finding is sufficient answer to this argument.

The effect of a valid tender of the amount due Mrs. Whitney must be considered. In Sondel v. Arnold, 2 Cal.2d 87, 39 P.2d 793, it is said: "This action was then commenced by appellant to have the trustee's sale and resultant deed declared void on the ground that she had on the maturity date of the note made a valid ten-

der of the amount due, causing, under the provisions of section 1504 of the Civil Code, so she asserts, a cessation of interest and a discharge of the lien against the property. The cited Code section provides that: 'An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.' It has been held under this section that a tender, duly made, of the amount of an obligation, works a discharge of a lien given as collateral security therefor. Leet v. Armbruster, 143 Cal. 663, 668-672, 77 P. 653; Walker v. Houston, 215 Cal. 742, 745-747, 12 P.2d 952, 87 A.L.R. 937."

In Haile v. Smith, 113 Cal. 656, 45 P. 872, 873, it was held that: "A tender of the amount of a debt, though refused, extinguishes the lien of a pledgee, and will defeat an action to recover the property pledged. Loughborough v. McNevin, 74 Cal. 250, 14 P. 369, and 15 P. 773, [5 Am. St.Rep. 435]. 'The principle governing the subject is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or right of distress.' Tiffany v. St. John, 65 N.Y. [314], 318, [22 Am.Rep. 612]."

The case of Wiemeyer v. Southern Trust and Commerce Bank, supra, is factually similar as to the form of the tender. It was there said [107 Cal.App. 165, 290 P. 73]: "But the rights of the parties are fixed and determined by and at the time of the offer to perform the obligation, provided, of course, that the tender is sufficient. We think that in the instant case the tender and refusal without objection by respondents was effective as a discharge of the lien of the mortgage."

[5] As Mrs. Whitney refused to disclose or accept the amount due her and made no objection to the form of the tender we must conclude that it was sufficient to discharge the security although the obligation of the debt still remains. As this is an equitable action the trial court can condition a judgment in favor of plaintiff upon his payment of the debt.

As the tender released the security, the trustee's sale on June 30th was void and conveyed no title to Mrs. Whitney. Therefore she had nothing to agree to sell to the prospective purchaser. As she had nothing to sell her contract in escrow could not give the purchaser any equity in the property and such contract cannot defeat plaintiff's action nor affect his rights.

Mrs. Whitney cites cases properly holding that a tender by a stranger to the title is void and that an improper tender is of no effect. It is clear from what we have said that these cases have no bearing on the situation before us. Mrs. Whitney can recover the money due her which is all she is entitled to do.

The judgment is reversed.

BARNARD, P. J., concurs.



80 Cal.App.2d 526

PEOPLE v. COLLINS.

Cr. 4061.

District Court of Appeal, Second District, Division 3, California.

June 23, 1947.

Rehearing Denied July 8, 1947.

Hearing Denied July 22, 1947.

1. Abortion ⇐11
Criminal law ⇐507(6)

Each woman on whom defendant had allegedly performed an abortion could corroborate the other, and the fact that each had accompanied the other to defendant's office did not make them "accomplices". Pen. Code, § 1108.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Abortion ⇐8

In prosecution for abortion state was required to prove not only that certain acts

had been done which resulted in abortion but also that such acts were performed not for lawful purposes but with the intention of causing abortion.

3. Homicide ⇐144

In prosecution for murder as result of an abortion prosecution was required to establish by competent evidence that decedent's death was due to a criminal operation and the intent with which the act or acts were done.

4. Criminal law ⇐371(1)

Where a felonious intent is an essential ingredient of the crime and the accused claims that his act was accidentally, mistakenly or innocently done, or where the circumstances might support an inference that the act was lawful, it is proper practice to rebut such claim or inference by evidence of other criminal acts done by the accused in which he used similar means and which produced the same result in order to prove the criminal purpose that actuated the deed for which the accused is on trial.

5. Criminal law ⇐371(4, 9)

In prosecution on two counts for abortion and on one count for murder resulting from abortion, the evidence as to each of the crimes charged may be used in support of the proof of the others, since such evidence logically tends to prove the intent of the defendant as to the particular offense under investigation.

6. Abortion ⇐11

In prosecution on two counts for abortion, evidence sufficiently corroborated the testimony of the two women involved and showed that the acts performed by defendant on each of the women were not necessary to preserve their lives and that such acts were performed with intent to unlawfully abort them and that they resulted in causing an abortion as to each of them.

7. Homicide ⇐235

In prosecution for murder on account of death resulting from an abortion, evidence sustained conviction.

8. Criminal law ⇐386

Testimony of district attorney's stenographer who listened in and took notes over concealed microphone equipment was properly admitted.

9. Criminal law ⇐404(3)

In prosecution on two counts for abortion and one count for murder resulting in death of woman on whom abortion had been performed, admission in evidence of the defendant's catheters and surgical instruments was proper.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Samuel D. Collins was convicted on two counts of abortion and one count of murder after prior conviction of abortion, and from such convictions and from an order denying motion for a new trial, he appeals.

Affirmed.

George Stahlman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

Defendant was charged by information with two counts of abortion and one count of murder, felonies. Count I charged the commission of an abortion on the person of one Crystal Louise Hawkins, on or about July 3, 1945. Count II charged the commission of an abortion on the person of one Helen Thompson on or about June 29, 1945. Margie F. Wilson was charged as being the victim of the crime of murder under Count III on or about July 27, 1945. Each count of the information contained the additional charge of a prior conviction of abortion, a felony. Defendant pleaded not guilty to all counts and denied the prior conviction, but subsequently, and before the trial, admitted the prior conviction of abortion as charged. Following a trial by jury defendant was convicted of each of the crimes as charged in the information, and following a denial of his motions for a new trial he now appeals therefrom and from the judgments of conviction. Among other grounds of appeal defendant contends that the evidence is insufficient to sustain the verdicts and judgments.

Such being the case, a review of the evidence relied upon by the prosecution to support the verdicts and judgments is necessitated.

Mrs. Crystal Louise Hawkins, a married woman and the mother of other children, was living in the same house with Mrs. Helen Thompson. On July 3, 1945, accompanied by Helen, she went to defendant's combination home and office in Los Angeles by virtue of a previously made appointment with him. A sign over the front porch of the residence and fully visible from the street read: "Dr. S. D. Collins, D. C." Helen introduced Crystal to defendant, whereupon he took her alone into an adjacent office where Crystal told him that she was pregnant and did not want the child. Defendant then asked her if she knew how much it would cost and she thereupon paid him and he accepted the sum of $50. Defendant, while she was there, made no record of the transaction or any case history, but gave Crystal a piece of paper upon which to write her name and address, which she did. Defendant thereupon took Crystal up stairs into a bedroom, telling her to remove her underclothing, whereupon she was taken into an adjacent room which was fitted out with an examination table, a sink, a smaller table and cabinets with various instruments in them. After placing her upon the examining table defendant internally examined her private parts, telling her that she had been pregnant four months. After the examination she heard some metallic sound, he inserted something in her which felt like small scissors but from which she felt no pain. He then packed her internally with cotton, using an instrument therefor. Defendant told her she could remove the packing the following morning. Crystal then went down stairs, met Helen who had been waiting for her, and proceeded to her mother's home. On the following day the packing came out without assistance by her, together with a long rubber tube with a string attached to it. She thereupon passed blood and a partly formed fetus. She became seriously ill, went to bed, and for about a month bled heavily and passed tissue. On August 4, 1945, she telephoned defendant, made an appointment with him and went to his office, arriving there about 2:30 p. m. She then told him that Helen Thompson, the subject of count II against defendant, was in the hospital. Some conversation ensued and defendant said that they would not do anything to him except revoke his license.

Law enforcement officers had previously planted concealed microphones in defendant's residence, one in the office down stairs, and the other in his upstairs office that has been heretofore described. Recording instruments were set up in a nearby house. Police officers had been listening to conversations through this source for several days, and Officer Lynn Slaten and Lorna Adams, a District Attorney's shorthand reporter, testified, the latter from her transcribed notes, as to conversations heard over their instruments which took place in defendant's residence. Slaten had known defendant for some months and knew and recognized his voice through this apparatus. The substance of their testimony is that about 2:20 p. m., August 4, 1945, they heard defendant's doorbell ring and although part of the ensuing conversation which then took place between a man and a woman was indistinguishable, the woman's voice said something about blood poisoning. The man said "did you give my name? * * * in the first place she came to me * * * I told her her uterus is not good * * * I don't think she would tell. She has a lot of fortitude * * * have you seen her to talk to her?" Woman: "I talked to her Wednesday." Man: "You tell her I appreciate it. She is a good little woman * * * I took care of her." Woman: "I thought possibly they were going to scare her into it." Man: "Just tell her that they can't do a thing. Even if she did talk they could arrest me and cause a lot of trouble." Woman: "After all, you would be willing to save her life, I guess."

Crystal was then again examined by defendant and he found her to be bleeding heavily. He again packed her internal organs but removed the packing because of the heavy bleeding. Defendant then advised Crystal that he must take her to the Georgia Street Receiving Hospital, not to bring his name into it but to tell that she had inserted the packing herself. Slaten,

having heard this conversation, left the equipment and proceeded to the receiving hospital to await the coming of defendant and Crystal. They arrived a few minutes later and Crystal fainted en route from defendant's automobile to the receiving room and was carried in. She was then examined by Dr. George W. Nador, M. D., at the receiving hospital, who diagnosed her condition as an abortion one month ago, and that she had a "perforated uterus hemorrhaging into the abdominal cavity. Instrumentation twenty minutes ago, severe primary anemia, mild shock." The resident physician at the General Hospital, Dr. Hill, testified that his examination brought substantially the same diagnosis, including an induced abortion. The hospital records were likewise introduced in evidence.

After leaving Crystal at the receiving hospital, Officer Slaten and defendant returned to the latter's house where they were met by other police officers. They all proceeded to the second-floor treatment room where photographs of that room and others were made which were introduced in evidence. A pan at the end of the treatment table was partially filled with blood and tampons. Surgical instruments, including catheters, a bottle of ergot, a bottle of pills, and other articles there located were confiscated. The telephone in the residence, with an extension to the treatment room, was noted to be number Exposition 6551. The surgical instruments were described by Dr. Frank R. Webb as being of a type primarily used in obstetrical cases; that ergot is used to cause contraction of the muscles of the wall of the uterus, and in large doses can be used to create an abortion. Crystal was the mother of a previous child and she knew of no reason why she could not have another baby.

With reference to Count II, the evidence discloses that on June 29, 1945, Mrs. Helen Thompson, the mother of four children, visited defendant at his office-home, having previously made an appointment with him by telephone. She had known defendant for about three years. Her health was good at this date, excepting for some nausea. She told defendant she was pregnant and asked him if he would take care of her. He took her to his upstairs office, told her to take off her underclothing and she thereupon proceeded into the room which she and Crystal identified as being the same room in which they were each aborted by defendant. After placing her upon a large table, defendant took an instrument in his hand that looked like a pair of scissors, which he inserted in her vagina, and which she could feel. Defendant told her she was hard to work on. She was on the operating table about 30 to 45 minutes. Defendant thereupon inserted a tampon in her vagina. He used no gloves during any of the times he worked on her. Immediately after the operation Helen paid defendant $50 and was told by him that she would pass the fetus. A few days thereafter she did pass a fetus at her home, while Crystal Hawkins was present. Helen continued to hemorrhage for about a month, when she again visited defendant at his office. He again inserted an instrument in her vagina and took hold of something within her. He gave her medicine in a bottle from which she took a dose, and he told her to take it each morning. She continued to hemorrhage and subsequently went to the General Hospital, remaining there for ten days. She returned to her home for three days but again was compelled to go to the hospital because of continued hemorrhaging. She was treated by Dr. Wilbert Hill, M. D., at the hospital, and the hospital records were introduced in evidence. Dr. Hill diagnosed Helen's condition as an incomplete septic induced abortion. She was treated for infection of the uterus.

As to Count III, the evidence shows that Margie F. Wilson and one John Michael Delyi lived and slept together for about five or six weeks prior to Margie's death which occurred on July 27, 1945. On July 18, 1945, they attended a dance together, were weighed and he saw that she weighed 112 pounds. Some confusion exists in the testimony of Delyi as to specific dates of visits he and Margie made to the office of defendant, but the following are apparently the dates meant by him after a calendar was called to his attention. On the night of Sunday, July 22, 1945, he noticed a little

blood on Margie's underclothing, and she was sick and vomiting on that day. On the morning of Monday, July 23, 1945, after having slept the preceding night with Margie, Delyi observed the bed and it was clean of any blood spots, nor had he seen any such spots previously. Margie told him she was going to look for a doctor and on July 23rd they went to defendant's office-residence. They met defendant and he took Margie to some other part of the building while Delyi waited for her about twenty or twenty-five minutes, when she returned. Later that day Margie became quite ill, vomited, and was very weak and feverish. Later that evening Delyi observed blood spots on the sheets and her underpants were full of blood. He bought extra sanitary pads for her which she used. The following morning, July 24th, they arose from their bed and he observed more blood on the sheets and much blood in her underpants. He then took Margie to defendant's office, she went inside and returned in about fifteen minutes. They slept together again that night, and on the morning of July 25th, he observed blood all over the bed and on her clothing. He then drove Margie to defendant's office again and told defendant that Margie was very ill, whereupon defendant told him to drive his car into the driveway at the side of the house. He carried Margie into the house and defendant then took her into another room and told him to wait. Some twenty-five minutes later defendant and Margie returned and she seemed to feel better and was walking alone. Delyi urged defendant to get Margie into a hospital. Defendant said he knew of a rest home in Pasadena but to wait and see how she was and that it would not be necessary for Delyi to bring her back to see him. On the next day Margie was very weak and he again drove her to defendant's office and parked in the driveway. Margie was too weak to get out of the car, so Delyi told defendant that she was very sick and that he would have to do something about it. Defendant then gave Delyi some brown pills from a big jar, putting them into an envelope. Delyi later identified this jar of pills which the police took from defendant's office. Defendant also gave Delyi some sleeping pills for Margie. Defendant then went out to the car, felt Margie's pulse and forehead, lifted up her robe, looked at her and remarked, "everything is all right. It is clean." Delyi again insisted on taking Margie to a hospital but defendant said she was all right and to give her lots of juices, to wait until the next day to see how she was and to feed her juice by a teaspoon from a can of ordinary tomato juice the defendant gave Delyi. He asked defendant what was wrong with Margie but received no answer. He returned Margie to their home, carried her into the bed, attempted to feed her the pills and juice, but she regurgitated them. She continued to grow weaker and about midnight became extremely weak. About 3:00 a. m. on July 26th, Delyi dialed the telephone number, Exposition 6551, which number he had obtained from Margie earlier in the evening and which number corresponds with that on defendant's telephone. He talked with defendant and asked him to come to the house immediately because Margie was very ill. While he was describing the location the landlady interrupted, telling him that Margie had died. He then advised Collins of this fact and demanded that he come out to help him as he was going to call the police. Defendant promised to come, but never appeared.

On July 27, 1945, Dr. Frank R. Webb, Chief County Autopsy Surgeon, performed an autopsy on the body of Margie F. Wilson. He testified her weight was then 94 pounds and that she was a perfectly normal person with no apparent reason why she could not have a normal childbirth. Upon opening the abdomen he found an acute peritonitis. The uterus showed severe infection and evidence of recent pregnancy, although the fetus and membranes had been removed. The cervix was swollen, bruised and deeply hemorrhagic, and upon the left wall he found a partial puncture of the cervical wall. This area was bathed with pus. The condition of the infection was probably of only a few days duration and it had spread from the puncture wound in the cervical canal to the oviduct, ovary, and to the peritoneal cavity. The immediate cause of death was acute peritonitis due to septic endometritis following abortion.

Some five days later Delyi went to defendant's office and defendant told him, "I am glad that you told the police what I did," and to "just keep calm and cool and don't worry about nothing." He further told him to take it easy, that he shouldn't worry, and that he should take a trip, that he should take a vacation, and that if he wanted to take a trip he would help him whenever he was ready to go. Defendant further stated that he, defendant, should have changed his license plates because he had a little trouble before and the police were looking for him. Later that same day, at the request of Officer Lucas, Delyi telephoned Collins, made an appointment with him, went to his office and there told him he was going to take a trip and asked defendant if he could help him out. Defendant thereupon handed him $25, telling him that if he wanted to move from his residence he could and to take it easy and rest. Delyi also asked defendant what was the matter with Margie. The defendant made a gesture and replied, "If you don't know I won't tell you."

On July 30, 1945, defendant telephoned Captain Thad Brown, of the Los Angeles Police Department, who had known defendant for some twelve years. Defendant said he understood Brown wanted to talk with him and that he supposed it was about that girl who was brought to his office in a car but denied that she was ever in his office. Defendant was apprehended on August 4, 1945, when he brought Crystal Hawkins to the receiving hospital.

The defendant failed to take the witness stand and offered no defense evidence whatsoever. As a chiropractor, defendant was not licensed to practice surgery or to prescribe drugs, although the evidence discloses that he did both. People v. Collins, 4 Cal.App.2d 86, 87, 40 P.2d 542.

[1] The testimony of Crystal Hawkins as to count I, and Helen Thompson as to count II, required corroboration under section 1108 of the Penal Code, which provides that a defendant cannot be convicted for procuring or attempting to procure an abortion upon the testimony of the woman upon or with whom the offense was committed unless she is corroborated by other evidence. Each may corroborate the other, however, and the mere fact that Helen accompanied Crystal and Delyi accompanied Margie to defendant's office does not make them accomplices. People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720. So far as Delyi is concerned, this is the only part he played in the transaction with the defendant. "So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration.' * * * It may consist of * * * inferences from the circumstances surrounding the criminal transaction * * * and it need not establish the precise facts testified to by the witness whose testimony it supports." People v. Wilson, supra, 25 Cal.2d at page 347, 153 P.2d at page 723.

[2, 3] As to counts I and II it was incumbent upon the prosecution not only to prove that certain acts had been done which resulted in an abortion, but also that these acts were performed not for a lawful purpose, but with the intention of causing an abortion. People v. Coltrin, 5 Cal.2d 649, 656, 55 P.2d 1161. As to count III it was necessary for the prosecution to establish by competent evidence that the decedent died due to an operation performed upon her which was criminal in character. It was further incumbent upon the prosecution to prove the intent with which the act or acts were done.

[4, 5] As was said in People v. Clapp, 67 Cal.App.2d 197, 201, 153 P.2d 758, 760: "Where a felonious intent is an essential ingredient of the crime and the accused claims that his act was accidentally, mistakenly or innocently done, or where the circumstances might support an inference that the act was lawful, it is proper practice to rebut such claim or inference by evidence of other criminal acts done by the accused, in which he used similar means and which produced the same result, in order to prove the criminal purpose that actuated the deed for which the prisoner is on trial. * * * In such circumstances evidence of another crime is relevant if it logically tends to prove the intent of defendant in the offense under investigation although it might prove a distinct crime and prejudice the defendant before the

jury. * * * Such proof is especially permissible where the act charged is not in itself proof of the required criminal intent and other evidence of intent is necessary to complete the proof." Under the circumstances here existing the evidence as to each of the charged crimes may be used in support of the proof as to the others as such evidence logically tends to prove the intent of the defendant as to the particular offense under investigation.

[6, 7] The evidence, taken as a whole, provides the requisite corroboration, shows that the acts performed by defendant on the three women who are the subjects of the respective counts in the information were not necessary to preserve their lives, that such acts were performed with the intent to unlawfully abort them and resulted in the causing of an abortion as to each of them. As to Count 111, such evidence, together with the inferences reasonably deducible therefrom, supports the implied finding by the jury that Margie F. Wilson died due to an operation performed upon her by defendant which was of a criminal character. Defendant strongly urges that, because the evidence discloses a little blood to have been seen on the decedant's underclothing on the night before her first visit to defendant and she was sick and vomiting on that day, the inescapable conclusion is that she had been subjected to instrumentation by some one else prior to her coming to defendant. This, however, was only one of many conflicting inferences which could be drawn from the evidence and the finding of the jury thereon is conclusive. The evidence fully sustains the verdicts and judgments appealed from.

[8, 9] We find no merit in the contentions of defendant that the testimony of Lorna Adams, the district attorney's stenographer who listened in and took notes over the concealed microphone equipment, was improperly admitted into evidence. See People v. Pustau, 39 Cal.App.2d 407, 414, 103 P.2d 224. Nor do we find any prejudicial or reversible error in the refusal to give or in the giving of certain instructions to the jury or in admitting the defendant's catheters and surgical instruments into evidence.

The judgments and orders denying the motions for new trial are affirmed.

SHINN, Acting P. J., and WOOD, J., concur.



80 Cal.App.2d 806

BEDELL v. BARBER et al.

Civ. 13320.

District Court of Appeal, First District, Division 2, California.

July 11, 1947.

Rehearing Denied Aug. 9, 1947.

Hearing Denied Sept. 8, 1947.

1. Equity ⇐24

Wherever penalty or forfeiture is used merely to secure payment of debt or performance of some act or enjoyment of some right or benefit, equity, considering the payment or performance or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to damages actually resulting from nonpayment or nonperformance or nonenjoyment, according to stipulations of agreement, and test which determines whether equity will interfere in such cases is whether compensation can be adequately made for a breach of the obligation.

2. Vendor and purchaser ⇐95(2)

Vendor was not entitled to forfeiture of contract for sale of realty and to restitution of premises, where vendor's attorney, subsequent to purchaser's defaults, advised purchaser that vendor desired payments and did not want to reclaim the property and purchaser thereafter tendered payment of all sums due.

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Suit by Dora M. Burch Bedell against Tanya Barber, also known as Mrs. R. W. Barber, and others, to forfeit contract of sale of real property and for restitution of

premises. From the judgment, the plaintiff appeals.

Affirmed.

A. Q. Lomba and Fred B. Hart, both of Oakland, for appellant.

James R. Agee and Kennedy Jackson, both of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to forfeit a contract of sale of real property and for restitution of the premises. The trial court found equitable reasons to relieve defendant of her default and entered a judgment decreeing that she should pay the balance due within fifteen days upon tender of deed by plaintiff, otherwise defendant should stand foreclosed of any right or interest in the property. The plaintiff appealed from the judgment and the record does not disclose whether the deed was tendered by her or the money was tendered by defendant. If both tenders were made and accepted, or if the deed was tendered and payment was not made within the time fixed in the judgment, the appeal merely presents a moot case. If the plaintiff failed to tender a deed within the time fixed in the judgment the rights of the defendant to continue in possession and complete the sale were not stayed by the appeal. Thus the appeal presents the single question whether a vendee may be relieved from default in payments because of the equities of the particular case.

The trial court found that defendant was in default on numerous occasions in respect to her obligations under the contract; that, of the total purchase price of $22,500 plaintiff had been paid $8,700 in addition to attorney's fees amounting to $530; that plaintiff's attorney also acted as attorney for defendant for the purpose of making payments subsequent to these defaults; that he advised defendant that plaintiff desired payments and did not want to reclaim the property; that defendant thereafter tendered payment of all sums due but that plaintiff refused the payment and executed an option to sell the property to a third person. These findings are not attacked and further recital of the facts would serve no purpose.

[1] The principal upon which the case rests is stated in Pomeroy's Equity Jurisprudence, sec. 433: "Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead thereof, proportionate to the damages actually resulting from the non-payment, or non-performance, or non-enjoyment, according to the stipulations of the agreement. The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured."

The statement quoted has been universally accepted. 19 Am.Jur. p. 99; 30 C.J.S., Equity, § 55, p. 392; 12 Cal.Jur. p. 639; 25 Cal.Jur. 623.

Appellant relies on Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713; 43 L.R.A. 199, 69 Am.St.Rep. 17, which is the leading case on the rights of a vendor on a vendee's default. But that case recognizes the exception which is applicable here. See Ebbert v. Mercantile Trust Co., 213 Cal. 496, 500, 2 P.2d 776. The authority which is controlling under circumstances similar to those found here is McDonald v. Kingsbury, 16 Cal.App. 244, 247, 116 P. 380, 381, from which we quote: "Section 3275 of the Civil Code provides: 'Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.' The assurances and representations of Broderson, of which plaintiff had knowledge, could only have the effect to lull defendant into a sense of security and induce the belief that payments made after strict default would be received as though made in time. Plain-

tiff relies upon the doctrine of Glock v. Howard etc. Co., 123 Cal. [1,] 15, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, and cases therein cited and discussed as establishing plaintiff's right to claim a demand and forfeiture. We do not regard such cases as undertaking to construe the section of the Code above quoted, nor to determine rights thereunder. Glock v. Howard is a learned and exhaustive discussion and determination of the rights of the parties who stand upon and whose rights are dependent alone upon the terms of a written contract. Here the rights are dependent upon the contract and modifications thereof and the effect which should be given the acts of plaintiff as to waiver of terms and conditions expressed, as well as matters involving an estoppel to claim under the strict letter of the agreement. We are of opinion that this case clearly comes within the class contemplated by the section above referred to, and that under such section the court possessed the right from the facts found to relieve from the forfeiture."

[2] Since on the merits the judgment must be affirmed it would serve no purpose to discuss appellant's criticism of the procedure and the pleadings on which the trial was conducted. No objection was made in the trial court and plaintiff suffered no harm which could be called reversible error.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.



80 Cal.App.2d 879

NORINS REALTY CO., Inc., v. CONSOLIDATED ABSTRACT & TITLE GUARANTY CO. et al.

Civ. 15645.

District Court of Appeal, Second District, Division 3, California.

July 18, 1947.

1. Venue ⇐46

Where complaint for specific performance of agreement to sell land in San Bernardino county and for other relief stated cause of action against corporate defendant, which had principal office in such county, but failed to state cause of action against individual defendants, who were residents of Los Angeles county, merely alleging that they were stockholders and alter ego of corporate defendant without alleging facts from which it could be inferred that corporate defendant would be unable to respond to any judgment against it or that it was insolvent, order granting a motion to change place of trial from Los Angeles county to San Bernardino county was proper.

2. Corporations ⇐1

The allegation that a corporation is the alter ego of the individual stockholders is insufficient to justify the court in disregarding corporate entity in absence of allegations of facts from which it appears that justice cannot otherwise be accomplished or unless it is necessary in order to prevent fraud or injustice.

3. Corporations ⇐1

Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity.

4. Action ⇐16

The nature of an action is to be determined from character of complaint and from character of judgment which might be rendered upon a default thereto.

5. Corporations ⇐268(1)

Complaint for declaratory relief, for specific performance of corporate defendant's contract to sell land and for damages, which based its joinder of individual defendants on fact that they were stockholders of corporate defendant, without alleging that they were parties to contract or that corporate defendant was insolvent or could not respond to any judgment against it was insufficient to support a judgment against the individual defendants.

6. Venue ⇐72

Where complaint stated no cause of action against individual defendants who were residents of Los Angeles county but did state a cause of action against a cor-

porate defendant which had its principal place of business in San Bernardino county, on motion to change place of trial to San Bernardino county, it would be assumed that individual defendants were joined only for purpose of retaining cause in Los Angeles county, and in ruling upon the motion, the residence of individual defendants was not to be considered.

Appeal from Superior Court, Los Angeles county; Alfred E. Paonessa, Judge.

Action by Norins Realty Company, Inc., against Consolidated Abstract & Title Guaranty Company and others for declaratory relief, for specific performance of an agreement to sell certain land and for damages. From an order granting the motion of defendants Consolidated Abstract & Title Guaranty Company and A. E. Grow to change place of trial to San Bernardino county, plaintiff appeals.

Affirmed.

Maurice Gordon, of Los Angeles, for appellant.

Surr & Hellyer, of San Bernardino, for respondents.

SHINN, Presiding Justice.

This action was instituted in Los Angeles County against Consolidated Abstract and Title Guaranty Company, a corporation, and five named individuals. The corporation and defendant A. E. Grow appeared by demurrer and moved for transfer of the cause to San Bernardino County, where the principal place of business of defendant Consolidated was and is located, and in which the real property, which is one of the subjects of the action, is located. The motion was supported by the affidavit of A. E. Grow and no counter-affidavit was filed by plaintiff, although it was alleged in the complaint that defendant Grow and the four other individual defendants resided in the County of Los Angeles. So far as appears, these four defendants had not been served with process at the time of the hearing. Defendants' motion for an order changing the place of trial was granted and plaintiff appeals.

[1] The sole contention of plaintiff is that the five individual defendants are proper parties defendant, that the complaint states the substance of a cause of action against them and that the action is, therefore, triable in Los Angeles County, although if Consolidated had been the only defendant it would have been proper to have removed the cause to San Bernardino County.

From an examination of the complaint we are unable to discover in its allegations the existence of any cause of action against the individual defendants. The complaint is in two causes of action. It alleges that in the year 1925 Consolidated was the owner of 1171 lots in certain subdivisions and also 180 acres of unsubdivided land in the mountains of San Bernardino County; that in 1927 Consolidated organized a mutual water company, Alpine Water Users Association, for the development of water underlying said property for distribution to the purchasers of lots; that prior to August 30, 1925, Consolidated sold to various purchasers 668 of the aforesaid 1171 lots and transferred to each purchaser one share of water stock; that on October 30, 1945, Consolidated agreed to sell and plaintiff to purchase 503 lots in said subdivisions, together with one share of water stock for each of said lots, said agreement containing the following provisions: "The Vendor represents that it has made a survey of the water bearing lands and that sufficient water is or can be made available for domestic use requirements of the owners of the property embraced in parcels 1, 2, 3, 4 and 6. That Vendor has reserved certain lots in said subdivisions embraced in Schedule 'A' for the purpose of developing water for use by the owners of the property embraced in said Schedule 'A'; that Vendor agrees to convey without cost to the Vendee, said reserved lots to the Alpine Water Users Association."

It is alleged that prior to the execution of the agreement Consolidated represented and warranted to plaintiff that each of said 503 lots would be supplied with sufficient water for domestic use at an annual cost of not more than $1 per share of water stock. It is alleged that plaintiff has sold 403 lots and retains ownership of 100 and

that on the 1171 lots 260 cottages have been built; that the present water supply is insufficient to supply the 260 cottages with water for domestic use and that additional water must be developed. A controversy is alleged to exist, in that defendants contend that additional water must be developed at the expense of the water users association while plaintiff contends that the obligation to develop additional water is that of Consolidated. There are additional allegations to the effect that Alpine Water Users Association was originally granted a permit by the Commissioner of Corporations to issue 1500 shares of its stock to Consolidated for certain water bearing lots and distribution facilities and to sell 2500 shares at $10 per share to provide funds for further water development, and that in 1941 another permit was issued authorizing the issuance of 1000 shares to Consolidated in consideration for the development of additional water and the extension of the distributing system. Although it is alleged that Consolidated caused the aforesaid permits to be issued it does not appear that the proceedings taken were pursuant to any provision of its agreement with plaintiff.

The second cause of action repeats the material allegations of the first cause of action and alleges that on October 30, 1935, Consolidated gave plaintiff an option to purchase 180 acres of unsubdivided lands, adjoining said subdivisions, at a price of $100 per acre; that in 1941 plaintiff purchased under the option 38½ acres of said land and that at the time of the purchase Consolidated agreed to share equally with plaintiff the cost and expense of developing certain additional water; that plaintiff has at all times been ready, willing and able to pay its share of the costs; that Consolidated refused until December 3, 1945, to perform its obligations under the water development agreement, but that on or about December 3, 1945, Consolidated proceeded with the development of said additional water supply. It is alleged that Consolidated had extended plaintiff's option to purchase the remainder of the land to February 20, 1942; that plaintiff did not purchaser the land but insisted that its option had remained and would remain in full force and effect until Consolidated performed its obligations under the water agreement; that in the latter part of December, 1945, and later, plaintiff offered to purchase the remainder of the land but that Consolidated refused and still refuses to accept the purchase money or to convey the land, but has agreed to sell the land to a third party. It is alleged that $100 per acre was and is a fair price for the land and that plaintiff has performed all its obligations under its respective agreements. It is alleged that by reason of Consolidated's refusal to convey the land plaintiff has been damaged in the sum of $42,000. The prayer is for declaratory relief, for specific performance of the agreement to sell the remainder 180 acres, and for damages in the sum of $42,000.

In the foregoing there is nothing to connect the individual defendants with the obligations which Consolidated assumed under the contract and the option. Certain additional allegations of the complaint are relied upon by plaintiff as imposing the obligations of Consolidated upon said individual defendants. It is alleged that one Alva L. Sloan at the time of his death in 1941 was the owner of two-thirds of the stock of Consolidated and that defendant A. E. Grow owned the remainder; that the estate of Sloan was distributed in 1942 to his widow, a son and two daughters, who are named as defendants herein. It is alleged that prior to the death of Alva L. Sloan, Consolidated sold all its assets with the exception of about 140 acres of unsubdivided land, being the land which plaintiff seeks to acquire under its option, and that the proceeds of the sale of assets of Consolidated were divided between said Alva L. Sloan and defendant A. E. Grow. It is alleged that Consolidated has for a number of years been dormant and not actively engaged in business and that it has been since the death of Alva L. Sloan and is now completely controlled, dominated, managed and operated by the individual defendants, and has been at all times, and is the alter ego of its stockholders.

[2-5] Plaintiff's theory of liability on the part of the individual defendants is obscure. It appears to be that if judgment

is rendered for damages which are not recoverable from the corporation the stockholders would be liable for any deficiency and are, therefore, proper parties in the present action. It appears to be contended also that if other obligations are imposed by judgment upon Consolidated, like obligations should be imposed upon the stockholders. Plaintiff says the stockholders were joined to prevent a multiplicity of suits, but it appears to us that they were joined in order to hold the action for trial in Los Angeles County. They are not parties to the agreements, they have not guaranteed performance on the part of Consolidated, and they are accused of no fraud or wrongdoing. All that is alleged respecting them is that they are stockholders and residents of Los Angeles County. Consolidated is not alleged to be insolvent and no facts are alleged from which it can be inferred that it will be unable to respond to any judgment which may be imposed upon it. The allegation that a corporation is the alter ego of the individual stockholders is insufficient to justify the court in disregarding the corporate entity in the absence of allegations of facts from which it appears that justice cannot otherwise be accomplished. California Linoleum & Shades Supplies v. Schultz, 105 Cal.App. 471, 287 P. 980. The court will not disregard the corporate entity unless it is necessary in order to prevent fraud or injustice. 6A Cal.Jur. p. 76. Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity. Hollywood Cleaning & Pressing Co. v. Hollywood L. Service, 217 Cal. 124, 129, 17 P.2d 709; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641. The nature of the action is to be determined from the character of the complaint and from the character of the judgment which might be rendered upon a default thereto. McFarland v. Martin, 144 Cal. 771, 774, 78 P. 239; Work v. Associated Almond Growers, 76 Cal.App. 708, 245 P. 790. The allegations of the complaint are not sufficient to support a judgment against the individual defendants.

[6] Since no cause of action is stated against them it must be assumed that they were joined for the purpose of retaining the cause in Los Angeles County. In ruling upon the motion the fact that they were residents of Los Angeles County was not to be considered. Code Civil Proc. sec. 395; Konnoff v. Fraser, 62 Cal.App.2d 788, 145 P.2d 368.

The order is affirmed.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 634

In re ABDALLAH'S ESTATE.

Civ. 7354.

Sac. 5820.

District Court of Appeal, Third District, California.

June 30, 1947.

Courts ⇐200½

Where administratrix filed an affidavit claiming that another person had claimed that he was a partner with deceased but that the claim was without foundation and that such person was wrongfully withholding possession of property from administratrix, and such person asserted right, title and interest in the property and right to possession thereof by reason of fact that he was surviving partner, the Superior Court sitting as a probate court was without jurisdiction to adjudicate title to the property in controversy. Civ.Code, § 2419(d); Probate Code, § 571.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Proceeding in the matter of the Estate of Fred Abdallah, also known as F. Abdallah, Fred Paul Abdallah and Fred P. Abdallah, deceased, on affidavit of Margueriite A. Abdallah, as administratrix of the Estate of Fred Abdallah, deceased, that William K. Brown had wrongfully claimed

that he was a partner of the deceased under an oral partnership agreement, and that Brown was wrongfully withholding possession of premises from her and refusing to permit her to operate the business. From an order denying motion to dissolve temporary restraining order of the Superior Court sitting as a probate court, and from an order in the nature of a permanent injunction made by the court in the same proceeding, William K. Brown appeals.

Reversed.

W. V. Anderson, of Stockton, for appellant.

Willens & Boscoe, of Stockton, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order denying a motion to dissolve and vacate a temporary restraining order, made by the Superior Court of San Joaquin County, sitting as a probate court in the matter of the estate of Fred Abdallah, deceased; also from an order in the nature of a permanent injunction made by the same court in the same proceeding. The appeal is presented upon a record consisting of the following: An affidavit by Marguerite Abdallah, administratrix of the said estate, filed August 20, 1946, in which it was averred that the principal asset of the estate consisted of a cardroom in Stockton known as the Sutter Club, which was owned and operated by decedent during his lifetime; that since the death of decedent one John Doe Brown, a former employee of decedent, had claimed that he was a partner of Abdallah under an oral partnership agreement, and that said Brown was wilfully withholding possession of said premises from her, and refusing to permit her to operate the business, to the irreparable injury of said estate; and in which she prayed that the court restrain Brown from interfering with the business, and that, until the order to show cause could be heard, the court order the immediate removal of Brown from the premises. An order to show cause, returnable August 26, 1946, which ordered that pending the hearing on such order, Brown, his agents, etc., be restrained from interfering in any manner with the said Sutter Club, and that he remove from the said premises forthwith, and until the further order of the court. A motion filed by Brown on August 24, 1946, to dissolve and vacate the aforesaid order, on the ground that no undertaking had been required of or filed by the applicant, and that the property affected was partnership property. An affidavit by Brown filed August 26, 1946, in which he asserted that on April 18, 1946, he had paid decedent Abdallah $3,500 for an undivided one-half interest in the Sutter Club, at which time they had entered into an agreement to operate same as copartners; that they had so operated it until the death of Abdallah, and that since said death he, Brown, had remained in possession as surviving partner in an endeavor to wind up the partnership business, and that he was so engaged when on August 20, 1946, he was forcibly ejected from the premises after the issuance of the order aforesaid; that as surviving partner he was entitled to remain in possession for the aforesaid purposes; and in which he prayed that the order previously issued be vacated, that he be restored to possession, and that the administratrix be restrained from interfering with his operation of the property for the purpose of winding up the partnership affairs. Minutes of the court dated August 26, 1946, denying motion to dissolve and vacate restraining order, and reciting that testimony was received on the order to show cause and the matter continued to August 27th. Minutes of the court dated August 27, 1946, on the order to show cause, reciting that on that date further oral testimony was presented by several witnesses, after which the cause was submitted to the court; and ordering "that the estate of Fred Abdallah is sole owner of the 'Sutter Club' and William K. Brown is restrained from interfering with its business or contents; * * *."

No transcript of the testimony taken is contained in the record on appeal.

Brown's brief on appeal, though inartificially drafted, apparently is intended to state, as grounds for reversal, that the order of August 20, 1946, requiring him to remove from the premises forthwith con-

stituted an adjudication of the rights of the parties in the Sutter Club, without a hearing and without the giving of a bond by the administratrix, and that his motion to vacate same should have been granted for those reasons; and that all of the proceedings in the Probate Court in this connection were in excess of the jurisdiction of that court.

We think that a decision on the appeal rests solely upon a determination of the question of jurisdiction of the Probate Court to try the issue of title. The affidavit of the administratrix upon the strength of which the order of August 20th was made averred that Brown claimed that the Sutter Club was partnership property, and, since the affiant claimed that it was an asset of the estate, upon her own showing a question of title arose. The order ousting Brown from possession can be justified (if justifiable at all in view of the decision in Martin v. Danziger, 21 Cal.App. 563, 566, 132 P. 284), only on a conclusion that there was no partnership and that the sole ownership of the property was in the estate.

Had such a partnership existed, the ownership of the property would have been in the partnership and not in the estate, and the right to possession of the property would have been in Brown for the purpose of winding up the affairs of the partnership. See Civ. Code, sec. 2419 (d); Prob.Code, sec. 571; Estate of Grivel, 10 Cal.2d 454, 456, 74 P.2d 759; Perelli-Minetti v. Lawson, 205 Cal. 642, 651, 272 P. 573; Fong Sing v. O'Dell, 50 Cal.App. 55, 194 P. 745; Cooley v. Miller & Lux, 168 Cal. 120, 136, 137, 142 P. 83; Swanson v. Siem, 124 Cal.App. 519, 522, 523, 12 P.2d 1053; De Coe v. Johnson, 54 Cal. App. 592, 601, 202 P. 362; Andrade v. Superior Court, 75 Cal. 459, 463, 17 P. 531.

As for the hearings on August 26th and 27th upon appellant's motion to vacate the order of August 20th, and respondent's order to show cause, upon both of which dates the probate court took testimony, and which resulted in a denial of appellant's motion, and an order that the estate was the sole owner of the Sutter Club, obviously the court did, in those proceedings, proceed to try the title between the respective claimants.

In the early case of Ex parte Casey, 71 Cal. 269, 12 P. 118, it was held that the superior court, in a probate proceeding, has no power to order property in the possession of a person claiming title thereto to be delivered up to the executor or administrator; that the issue of title should be tried in an appropriate action in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title. In Re Haas, 97 Cal. 232, 234, 31 P. 893, 32 P. 327, it was said that there are many matters relating to the estates of deceased persons of which the probate court has no jurisdiction, and that the question of title to property is essentially one of them; and that when it became apparent to the probate court that matters of title to property were at issue, such matters should have been left to other courts for determination. Those decisions have been cited frequently. See Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820; Wilkerson v. Seib, 20 Cal.2d 556, 563, 127 P. 2d 904; McCarthy v. Superior Court, 64 Cal.App.2d 468, 472, 149 P.2d 55.

In Koerber v. Superior Court, 57 Cal. App. 31, 34, 206 P. 496, (hearing in Supreme Court denied), a writ of prohibition to restrain a probate court from adjudicating the title to certain personal property claimed to be the property of petitioner and also claimed to belong to the estate of a decedent was issued, and it was held that the probate court was without power to try and determine such title; and that, even though the claimant had filed an answer in the probate proceedings setting forth her claim and praying for relief, she was entitled to the writ.

In Andrade v. Superior Court, supra, on petition for writ of review, the court held that if questions arise in the course of settlement of partnership affairs which cannot be adjusted without recourse to the courts, the probate court is not the forum in which such questions can be solved, but, like other questions cognizable in courts of equity, they must be determined in the last-named courts. It was said in Estate of Olmstead, 216 Cal. 585, 587, 15 P.2d 495,

that the object of section 615 of the Probate Code is to place the executor or administrator in possession of such facts as would authorize a civil suit to restore the property held by another and claimed to belong to an estate. Also see Vigne v. Superior Court, 37 Cal.App.2d 346, 351, 99 P. 2d 589, citing the Koerber case and holding that the probate court was without jurisdiction to compel the custodian of a will to deliver up possession of same; Estate of Escolle, 134 Cal.App. 473, 476, 477, 25 P.2d 860, (hearing in the Supreme Court denied), citing the Koerber case, and affirming an order of the probate court which had refused to determine the title to certain personal property claimed by appellants to belong to the estate of decedent, and by respondents to have been given to them by decedent as a gift causa mortis; McCarthy v. Superior Court, supra, in which a writ of prohibition was issued restraining the superior court from enforcing an order directing petitioner to turn over to the executor of the will of a decedent, moneys the title to which was in dispute; In re Ochoa, 50 Cal.App.2d 457, 459, 123 P.2d 106, in which it was held that where a dispute arises between a representative of an estate and a third party as to the title to property, the court of probate cannot, in such proceeding, determine the issue, nor convict one of contempt for not obeying an order to deliver up such property, at least where his claim is supported by some evidence, for the reason that such person is entitled to be heard according to the forms of law in an appropriate tribunal (citing Koerber v. Superior Court, and Estate of Escolle, supra). Other pertinent authorities are: Estate of Gillett, 73 Cal. App.2d 588, 600, 166 P.2d 870; McCarthy v. McCarthy, 205 Cal. 184, 185, 270 P. 211; 11A Cal.Jur. 463-464, sec. 338.

Respondent concedes in her brief that in probate proceedings title to property cannot be tried as between the estate and a third party. But she asserts that this rule is not applicable here because the proceedings were for the purpose of restraining and enjoining a third party from interfering with the administratrix's administration of the estate of the decedent. She states that the principal asset of the estate was the Sutter Club, that it was her duty as administratrix to secure and preserve the property of the estate, and she was therefore required to secure possession of the club.

But these statements assume that the ownership of the Sutter Club was in the estate and not in the alleged partnership—the very question which the probate court was called upon to determine and did determine. Without so determining it would have been beyond the province of that court to hold that the administratrix was entitled to the possession, for if the property was partnership property, as such it constituted no part of the estate, and the right to possession of same was in Brown for the purpose of winding up the partnership affairs.

In adjudicating the title to the property in controversy in the probate proceeding the trial court erred. The orders appealed from are reversed.

PEEK and THOMPSON, JJ., concur.



81 Cal.App.2d 129

MAHERAS et al. v. BENNETT.

Civ. 3662.

District Court of Appeal, Fourth District, California.

July 30, 1947.

1. Evidence ⇐450(4)

In action for declaratory relief involving rights of parties under written lease of store building, oral evidence was properly received for purpose of disclosing meaning and intention of parties, where language of lease was ambiguous.

2. Appeal and error ⇐1177(9)

Where findings did not support judgment as entered and evidence was conflicting and was sufficient to support findings either way on controlling issue, and record did not indicate whether the apparent inadvertence or error was in signing the wrong findings or in signing the wrong

judgment, reviewing court would not make findings and substitute same for trial court's findings, since the error should be corrected by a new trial.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Action for declaratory relief involving rights under lease by William Maheras and another against Samuel A. Bennett. From the judgment, the defendant appeals.

Reversed.

A. T. Procopio, of San Diego, for appellant.

H. B. Daniel, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief involving the rights of the parties under a written lease of a store building. The entire controversy is as to whether this lease, by its terms, will expire on June 1, 1948, or whether the defendant, as leasee, may at his option hold the premises for an additional two years. The trial court considered the terms of the lease ambiguous, and received evidence as to the meaning and intention of the parties.

At the conclusion of the trial the court announced its intention of finding that this lease expires on June 1, 1948, and that there is no option for a further extension or renewal. About three months later, findings of fact and conclusions of law were filed finding that this lease gives the defendant an option to extend the same for two years beyond June 1, 1948. On the same day, a judgment was entered declaring that said lease ends and expires on June 1, 1948, and that the plaintiffs are entitled to the possession of the premises at that time. From this judgment the defendant has appealed.

The appellant contends that the findings do not support the judgment; that the language of the lease is not ambiguous; that oral evidence was erroneously admitted; and that in any event, the evidence was not sufficient to have sustained a finding to the effect that he was not entitled, at his option, to two additional years.

[1] While we think that the language of this lease is ambiguous and that oral evidence was properly received for the purpose of disclosing the meaning and intention of the parties, and while it appears from the record that the evidence was sufficient to have sustained findings in favor of the respondents, it clearly appears that the findings made do not support the judgment as entered.

The parties concede, that through inadvertence, the court signed the findings which were proposed by the appellant instead of signing those submitted by the respondent. That this might be true seems to be indicated by the court's direction for judgment at the close of the trial and by the judgment which was entered.

[2] The respondents ask this court to set aside the findings made and to adopt the findings which they state were proposed by them, but which do not appear in the record. The appellant, while conceding the power of this court to change or correct findings, cites a number of cases in which it has been held, broadly speaking, that this should not be done except in cases where the evidence is without conflict or where the evidence is insufficient to support the findings as made.

The evidence here was conflicting and was sufficient to support findings either way on the controlling issue. It does not affirmatively appear that the trial judge did not change his mind in the three months which intervened between the conclusion of the trial and the date the findings and judgment were signed. There is nothing in the record to show whether the apparent inadvertence or error was in signing the wrong findings or in signing the wrong judgment. Under these circumstances, this does not appear to be a proper case for this court to make findings and substitute the same for those made by the trial court. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. While it is obvious that some error here occurred it should be corrected on a new trial, and not by findings made by this court on conflicting evidence.

The judgment is reversed.

MARKS, J., concurs.

80 Cal.App.2d 590

DEE v. SAN FRANCISCO CITY & COUNTY EMPLOYEES RETIREMENT SYSTEM et al.

Civ. 13342.

District Court of Appeal, First District, Division 2, California.

June 27, 1947.

1. Husband and wife ⇐266

Evidence that spouses had no marital intercourse after the first year and for a great part of their married life they lived in separate places, that wife who was a teacher had a separate bank account in which she deposited all of her salary, that husband's earnings were generally negligible, that husband was reproached by wife for not earning his own living and that for most of their married life wife wholly supported herself and at least partly supported husband sustained finding that husband relinquished all claim to portion of wife's accumulations in retirement system as community property.

2. Husband and wife ⇐266

A husband's relinquishment of claim to wife's earnings may be proved by acts and conduct of the husband.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by James G. Dee against the San Francisco City and County Employees Retirement System and others to establish a claim to a portion of the accumulations in the San Francisco Retirement System, by Margaret Josephine Lawson, deceased. From a judgment in favor of Leo McCarthy, as executor of the last will of Margaret Josephine Lawson, deceased, plaintiff appeals.

Affirmed.

John G. Reisner, of San Francisco, for appellant.

John J. Barrett and Frank I. Barrett, both of San Francisco, for McCarthy.

John J. O'Toole, City Atty., of San Francisco, for Retirement System.

John T. McCarthy, of San Francisco, for James Voss.

DOOLING, Justice.

Plaintiff and appellant Dee married Viola Farrell in 1930. Mrs. Dee was, and continued until her death to be, a teacher in the public schools of San Francisco. She died in 1943. This action involves the claim of plaintiff to a portion of the decedent's accumulations in the San Francisco retirement system on the ground that they are community property. Before her marriage Viola Farrell had designated her mother as her beneficiary under the retirement system and this designation was never changed. The trial court found that after the marriage the earnings of Viola Dee as a school teacher, from which the deductions were made for the retirement system, were her separate property and that plaintiff relinquished all claim thereto. On these findings judgment went against plaintiff.

Plaintiff attacks the finding of relinquishment. Under the decisions we are satisfied that the finding is amply supported by the evidence. In Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, at page 791, 108 P.2d 405, at page 406, the court quoted with approval the following statement from 3 Cal.Jur.Supp. p. 643:

"While the rule is otherwise in some of the community property states, in California the husband may relinquish to the wife the right to her earnings during marriage without any consideration other than their mutual consent, and her earnings thereupon become her separate estate. Such relinquishment and mutual consent may be shown by evidence of the acts or conduct of the husband, indicating that he did not regard the earnings as community property."

[1, 2] The marriage was far from a normal one. The spouses had no marital intercourse after the first year and for a great part of their married life they lived in separate places. Mrs. Dee had her separate bank account in which she deposited

all of her salary, plaintiff's earnings were for the most part negligible and, far from asserting a community interest in the earnings of his wife, from time to time plaintiff asked her for money and was reproached by her for not earning his own living. The inference is strong that during most of their married life Mrs. Dee wholly supported herself and at least partly supported plaintiff. It is clear that she would permit no interference by him with her management of her earnings as a teacher and that he, at least tacitly, acquiesced. This statement might be amplified with corroborative details but enough has been stated to support the finding of relinquishment under the rule of Pacific Mut. Life Ins. Co. v. Cleverdon, supra, Smith v. Smith, 47 Cal.App. 650, 191 P. 60; Rayburn v. Rayburn, 54 Cal.App. 69, 200 P. 1064, and the other cases cited in those opinions, that such relinquishment may be proved by the acts and conduct of the husband.

Judgment affirmed.

NOURSE, P. J., concurs.



STEEN v. CITY OF LOS ANGELES et al.*

Civ. 15817.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

Rehearing Denied July 25, 1947.

Hearing Granted Aug. 28, 1947.

1. Action ⇐6

A city employee whose removal was sustained by Board of Civil Service Commissioners without affording him a hearing, though timely application was made therefor, had an adequate remedy by way of application to court for writ of mandate requiring the board to afford him a hearing and hence refusal to grant a declaratory judgment that he should be restored to position as city employee was not abuse of discretion. Code Civ.Proc. § 1061; St. 1925, p. 1067, § 112(a).

2. Action ⇐6
Appeal and error ⇐949

Whether declaratory relief is necessary or proper in any action therefor is within the discretion of trial court whose decision will not be disturbed on appeal in absence of a clear showing of abuse thereof. Code Civ.Proc. § 1061.

3. Municipal corporations ⇐218(8)

Under Los Angeles City Charter, a discharged city employee must be given a hearing before Board of Civil Service Commissioners within a reasonable time after he has demanded it, since charter does not fix the time within which such hearing must be afforded. St.1925, p. 1067, § 112(a).

4. Action ⇐6

Where plaintiff has an adequate remedy other than declaratory relief, refusal to grant application for a declaratory judgment is not abuse of discretion. Code Civ. Proc. § 1061.

5. Municipal corporations ⇐218(8)

If no evidence is produced before Board of Civil Service Commissoners to sustain charges against discharged city employee, the board should find that discharge was not justified. St.1925, p. 1067, § 112(a).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Otto A. Steen against the City of Los Angeles, a municipal corporation, and others, for a declaratory judgment that plaintiff should be restored to his position as a city employee. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

George E. Cryer and R. Alston Jones, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and George William Adams and T. Paul Moody, Deputies City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury

* Subsequent opinion 190 P.2d 937.

in an action for declaratory relief, to wit, that plaintiff should be restored to his position as a city employee, he appeals.

Conceded Facts

On August 17, 1943, plaintiff was served with a notice of his removal as an employee of the Department of Water and Power of defendant municipality. The notice contained a statement of the grounds of removal. On August 18, 1943, plaintiff filed with the Board of Civil Service Commissioners his application for a hearing and investigation of the charges against him. On December 14, 1943, defendant Board of Civil Service Commissioners without affording plaintiff a hearing made its order sustaining the charges against him.

Thereafter petitioner filed an application for a writ of mandate to require defendant commission to afford him a hearing before discharging him. The Supreme Court in Steen v. Board of Civil Service Commissioners, 26 Cal.2d 716, 160 P.2d 816 (three justices dissenting), held that plaintiff was entitled to such a writ and reversed a judgment of the superior court to the contrary. This decision was filed June 29, 1945, and entitled plaintiff to a writ of mandate from the superior court requiring defendant commission to grant plaintiff a hearing, but he took no further steps of any nature in such proceeding or otherwise until February 5, 1946, when the present action for declaratory relief was filed. When the instant case came on for trial, and the pendency of the mandate proceedings just referred to was urged as a defense, counsel for petitioner therein, instead of pursuing the complete, efficient and immediate remedy to which the Supreme Court had determined him to be entitled, dismissed such action.

After trial of this case, the lower court held in substance that plaintiff had a full and complete remedy available to him by way of a hearing before defendant commission, and for this reason declined to grant the declaratory relief which plaintiff sought.

Question

Has plaintiff shown error in the ruling of the trial court?

[1, 2] This question must be answered in the negative. Whether declaratory relief is necessary or proper in an action therefor is a matter within the discretion of the trial court, and its decision will not be disturbed on appeal in the absence of a clear showing of abuse thereof. Section 1061, Code Civil Procedure; California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 642, 128 P.2d 526, 141 A.L.R. 1422; Orloff v. Metropolitan Trust Company, 17 Cal.2d 484, 489, 110 P. 2d 396; City of Alturas v. Gloster, 16 Cal. 2d 46, 49, 104 P.2d 810; Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326.

In the instant case plaintiff has failed to show an abuse of discretion upon the part of the trial court. In fact the converse appears from the undisputed facts. Section 1061 of the Code of Civil Procedure provides that the trial court may refuse to exercise its power to grant declaratory relief where the evidence shows that it "is not necessary or proper at the time under *all* the circumstances." In this case plaintiff under the ruling in Steen v. Board of Civil Service Commissioners, supra, was entitled to a hearing at any time after June 29, 1945 (the date of the filing of the Supreme Court's opinion), before defendant board of commissioners, and as we have stated was entitled in such proceeding to a writ of mandate compelling such a hearing. Therefore it is obvious that he should have demanded such hearing since plaintiff was the "actor" or "plaintiff" before the respondent commission and before the superior court in the original mandamus proceeding. He was the moving party since his discharge would have become final and effective had he not filed with the commission, within five days after service upon him of the notice of discharge and the grounds thereof, a demand for a hearing and investigation.* (Steen v. Board of

* Section 112.(a) of the charter of defendant municipality reads as follows: "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than

Civil Service Commissioners, supra, 26 Cal.2d at page 720, 160 P.2d at page 816.)

[3] If respondent commission declined to act and afford plaintiff a hearing, he then had an adequate remedy by applying to the superior court for a writ of mandate to compel defendant commission to investigate the charges against him, afford him a hearing, and to report to the court its findings. (Leftridge v. City of Sacramento, 59 Cal.App.2d 516, 525, 139 P.2d 112.) There is nothing in the city charter which fixes the time limit within which plaintiff must be afforded a hearing. Therefore the general rule is applicable that he must be given a hearing within a reasonable time after he has demanded it.

[4] Thus under "all" the circumstances of the case it was neither necessary nor proper that plaintiff be granted the declaratory relief which he sought. The rule is established that where it appears that plaintiff has an adequate remedy other than through seeking declaratory relief it is not an abuse of discretion for the trial court to decline to grant plaintiff's application for a declaratory judgment. (Communist Party v. Peek, 20 Cal.2d 536, 540, 127 P.2d 889.)

LaPrade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13, 15, does not hold, as contended by plaintiff, that failure to bring removal proceedings to a hearing for a period of three years makes it the duty of the commission to find "that the charge was not justified." The case merely holds that "if no evidence is adduced sustaining the discharge the board must find that the discharge was not justified."

[5] It is self-evident that if no evidence to sustain the charges against petitioner is produced before defendant commission when it affords him a hearing said commission should find that his discharge was not justified.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J. concur.

an unskilled laborer employed by the day, shall be removed, disharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer." Statutes, 1925, chapter 5, page 1067.

80 Cal.App.2d 562

In re JACKS' ESTATE.
JACKS v. JACKS et al.
Civ. 13328.

District Court of Appeal, First District, Division 1, California.
June 26, 1947.

1. Trusts ⇐274(1)

Where trust instrument conferred discretion on trustees in determining whether particular items should be charged against income or corpus, the exercise of such power by the trustees will not be interfered with by the courts, even if the court would have exercised the power differently, in the absence of a showing that the trustees acted dishonestly or from an improper motive, or acted beyond the bounds of a reasonable judgment. St. 1941, p. 2476, § 2.

2. Wills ⇐684(10)

Where will establishing a trust provided that all taxes should be paid out of general assets of the estate and conferred discretion on the trustees in determining whether particular items should be charged against income or corpus, the trustees, after charging a federal tax deficiency to principal, did not abuse discretion in charging the interest on such deficiency to income. St. 1941, p. 2476, § 2.

3. Trusts ⇐274(2)

Generally, taxes due or at least assessed prior to trustor's death should normally be paid from principal, while taxes assessed thereafter are payable from income. St. 1941, p. 2483, § 12(1).

4. Wills ⇐684(10)

Where real property taxes against estate property for the year beginning July 1, had not been assessed at time of testatrix' death on June 26th preceding, nor were such taxes then payable, and the will gave trustees discretionary power to determine what items should be charged to income or corpus, such taxes were an ordinary, normal expense which the trustees, in their discretion, could charge to income. Revenue and Taxation Code, §§ 2192, 2605, 2606; St. 1941, p. 2476, § 2, p. 2483, § 12(1).

5. Wills ⇐684(10)

Where will naming life beneficiaries of a trust authorized the trustees in their discretion to determine what items should be charged against income or corpus, and a codicil further provided that a contract obligation of testatrix to one of life beneficiaries was to be paid out of the trust property, directing that the payments to such beneficiary under the trust were to be credited against the contract obligation, no abuse of discretion on part of trustees was shown in charging the contract payments against income rather than corpus. St. 1941, p. 2476, § 2, p. 2483, § 12(1).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Proceeding in the matter of the estate of Vida Grenville Jacks, also known as Vida G. Jacks, deceased, wherein Romie C. Jacks filed objections to the account and report of Margaret A. Jacks and Wells Fargo Bank & Union Trust Company, trustees. From an order settling the account as filed, Romie C. Jacks appeals.

Order affirmed.

Ralph W. Smith and W. H. Buckingham, both of Los Angeles, for appellant.

Pillsbury Madison & Sutro, M. D. L. Fuller and Francis N. Marshall, all of San Francisco, for respondents.

PETERS, Presiding Justice.

By the decree of distribution in the estate of Vida Jacks certain property was distributed to trustees to be held in trust as provided in the will and in the decree of distribution. Thereafter the trustees filed their "First Account and Report of Trustees, Petition for Settlement and for Instructions," and Romie C. Jacks, brother of the testatrix, filed objections thereto, contending that the trustees had acted improperly in charging certain property taxes, certain interest on a deficiency on the federal estate tax, and certain payments made to him, against the income of the trust, it being his contention that all three items should have been charged against the corpus of the trust. The lower court entered

its order settling the account as filed, holding that the three items in question were properly charged against income. From that order Romie C. Jacks appeals.

Under the will of Vida Jacks, and the decree of distribution in her estate, appellant is one of five income beneficiaries of a trust, it being provided that the trust should continue during the lives of the five beneficiaries, and upon the death of the last survivor should terminate. Appellant has no interest in the remainders in the corpus upon the termination of the trust. He, therefore, has a direct financial interest in the determination of whether any paritcular charge is made by the trustees against income or corpus.

The will of Vida Jacks was executed in October, 1940. She died June 26, 1943. There are several provisions of her will that are pertinent here. In setting up the trust, in Article Seven, subdivision (d), the testatrix provided that: "Fees and commissions of the trustees for their ordinary and usual services as such, whether on account of income or principal, other than those payable on the termination of the trust, shall be a first charge against income. In other respects the determination of the trustees shall be conclusive as to whether any payment received or charge incurred shall be credited to or charged against income or principal." The decree of distribution specifically declared that the trustees took the trust property subject to this provision.

In Article Ten of the will she provided that: "I direct that any and all estate, inheritance, and similar taxes which may be chargeable against my estate or against the gifts, devises, bequests and other interests hereunder, or any of them, shall be paid out of the general assets of my estate, it being my intention that no devisee, legatee or other beneficiary hereunder shall be required to pay personally any tax or taxes which may be imposed on account of his or her interest in my estate, and that no such tax or taxes shall be deducted from the amount of any legacy or devise herein provided for."

The facts in reference to the contract payments involved require further elaboration. At the time Vida executed her will in October, 1940, the Jacks family was composed of four sisters—Lee, Margaret, Mary and Vida (the testatrix)—and one brother—appellant Romie Jacks. Lee died on January 1, 1941. There was a dispute over her estate. On July 11, 1941, the three surviving sisters entered into a contract with appellant and his wife, and it is Vida's portion of the payments made under this contract that appellant claims should be charged to the corpus of the trust set up by Vida. Under the terms of this contract the three sisters agreed, jointly and severally, to pay to appellant the sum of $600 per month for his life, plus other sums not here involved. Appellant agreed to release Lee's estate, and the surviving sisters, from any claims he might have against it or them. The three surviving sisters agreed to release appellant from all claims they might have against him, and to hold him harmless from any claim Lee's estate might have against him. The contract contained this clause: "It is anticipated that some or all of Second, Third, and Fourth Parties [the surviving sisters] may make provision for payments to First Parties [appellant and wife] in their respective last wills and testaments, and in such event it is understood that any payments made under the provisions of each will shall be deemed to be a credit on the obligation provided for in paragraphs 1 and 2 of this agreement, not to exceed one-third (⅓) of such obligation in the case of each will."

When this contract was executed Vida had already executed her will in which, as already indicated, appellant had been named as a life income beneficiary. On the day following the execution of the contract Vida executed a codicil to her will by which, so far as pertinent here, she provided: "I hereby declare that I and my two sisters, Margaret A. Jacks and Mary Jacks Thomas, have entered into an agreement dated July 11, 1941, with my brother, Romie C. Jacks and his wife, Mabel W. Jacks, providing for certain payments to be made by me and my sisters to them. I hereby amend my said last will and testament dated October 28, 1940, so that any payments to be made thereunder to my

brother, Romie C. Jacks or to Mabel W. Jacks, his wife, shall be credited upon my obligation to him and her under said agreement of July 11, 1941, to the extent of $200 per month in the case of my brother and $100 per month in the case of his wife. In all other respects my said will of October 28, 1940, is hereby confirmed and republished."

Upon the death of Vida, which occurred June 26, 1943, appellant filed a claim against her estate based on the contract provisions. The decree of distribution in Vida's estate recognized the validity of that claim and provided that such claim, from its nature, could not be satisfied in the course of administration "but should be provided to be satisfied by the trustees." The decree further provided that as a charge on the trust "prior to the payment of any income, said trustees are hereby authorized and directed to pay to Romie C. Jacks * * * the moneys agreed to be paid" to him under the contract, and that trust income payments to appellant should be applied to Vida's obligation to him under the contract, not to exceed $200 monthly, and that if Margaret or Mary had to pay in excess of one-third of the total $600 per month due appellant under the contract the sisters might have contribution from the trustees "to the end that the payments by Margaret A. Jacks, Mary Jacks Thomas and the trustees are equal."

During administration the executors charged the $200 a month payable to appellant under the allowed claim based on the contract to income and not to corpus. During such time the executors paid to appellant $200 a month for nineteen months, or a total of $3,800. In their final account the executors asked for an order: "Determining the amount of net income in the hands of your petitioners which is distributable as such to the residuary trustees and which in turn trustees are to pay to the beneficiaries of the residuary trust." In response to this request for instruction the decree of distribution orders that the sum of $76,822.57 and some stock "constituting income of the trust" should be distributed as follows:

"To Romie C. Jacks	$12,377.28
To Margaret A. Jacks	$15,913.45
To Mary Jacks Thomas	$16,177.28
To Ernest Romie	$16,177.28
To Karl Romie	$16,177.28"

The persons above named are the five life income beneficiaries of the trust set up in Vilda's will. Margaret A. Jacks, above named, received $263.83 less than the last three named beneficiaries because of a claim of Vida's estate against her. The sum awarded to appellant as "income" of the trust is obviously $3,800 less than was given to the others, thus clearly demonstrating that under the decree of distribution in Vida's estate the money paid to appellant under the contract was charged against the income and not the corpus of the trust. This decree of distribution was rendered December 26, 1944. No appeal was taken from it, so it was, of course, final when the trustees filed herein their account and petition for instructions in February, 1946. But the decree of distribution cannot be accepted as determining that the contract payments (or the property taxes which were also charged by the executors against them) should be charged against income because the decree of distribution expressly declared: "It is further ordered, adjudged and decreed that nothing contained in this decree shall conclude this Court, upon a hearing of a petition for instructions of the Trustees in that behalf or upon a hearing of a petition which may be filed by Romie C. Jacks from determining and adjudicating whether property taxes amounting to eight thousand four hundred dollars and fifty cents ($8,400.50) which were a lien at the time of the death of the said Vida Grenville Jacks, alias, deceased, should be charged against the income of the trust or against the corpus thereof and/or whether payments aggregating three thousand eight hundred dollars ($3,800) made to Romie C. Jacks should be charged against the income or the corpus of the trust, and that this Court should have jurisdiction to hear a petition or petitions raising the questions hereinabove mentioned and to determine and adjudicate the same, and direct the Trustees to make such adjustments in charges and credits as between said Romie C. Jacks and the corpus of the trust and/or between said Romie C. Jacks and the other

life tenants of the trust as it may deem proper."

The record shows that, during the one-year period covered by the first account of the trustees which is here challenged, the trustees paid to appellant the sum of $2,400 on the contract obligation, and deducted that from what he was entitled to as a life income beneficiary of the trust. His share, as a life tenant, was $11,277.71, against which was credited the $2,400, so that as a life income beneficiary he received $8,877.71.

The petition of the trustees thus indicates that the $200 monthly payments due under the contract have been charged to income of the trust. The petition also shows that the trustees charged the property taxes in the sum of $8,400.50, and the interest on the estate tax deficiency, in the sum of $409.10 to income. The order of the court below, from which this appeal is taken, approved these allocations by the trustees.

The appellant in his opening brief, which is the only brief filed on his behalf, argues that, under the law, all three of the challenged items should have been charged against the corpus of the estate. He makes this argument in disregard of, and in fact without mentioning, the provision of Article Seven of the will, incorporated into the decree of distribution, above quoted, to the effect that the fees and commissions of the trustees, other than on termination, shall be a first charge against income and that "in other respects the determination of the trustees shall be conclusive as to whether any payment received or charge incurred shall be credited to or charged against income or principal." At the oral argument, counsel for appellant urged that if, under the law, the three challenged items would normally be charged against the corpus, such clause could not operate so as to confer discretion upon the trustees to charge the items to income. Counsel also argued that, in any event, it was an abuse of discretion on the part of the trustees to charge such items against income.

[1] Appellant has misconceived the legal effect of the clause conferring discretion on the trustees in determining whether particular items should be charged against income or corpus. If appellant's first argument above mentioned were sound, the clause in question might just as well have been omitted from the will and decree. Both reason and authority compel the conclusion that where such discretion is conferred upon trustees the exercise of such power will not be interfered with by the courts, even if the court would have exercised the power conferred differently, in the absence of a showing that the trustees acted dishonestly or from an improper motive, or acted beyond the bounds of a reasonable judgment.

That this is the law is demonstrated by the provisions of our California Principal and Income Act of 1941. Stats. of 1941, p. 2476, Chap. 898. Section 2 of that Act provides: "This act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with * * * the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this act, and *the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so,* and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this act. *The exercise by the trustee or other designated person, of such discretionary power if in good faith and according to his best judgment, shall be conclusive, irrespective of whether it may be in accordance with the determination which the court having jurisdiction would have made.*" (Italics added.)

This statutory provision is apparently based upon the Restatement of Trusts, § 187. That section provides that: "Where discretion is conferred upon trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." In comment "e" to that section appears the following: "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dis-

honestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee."

Section 233 of the Restatement is the general section relating to the allocation of receipts and expenses between corpus and income. Comment "p" to that section contains this observation: "The trustee may be given discretion in allocating receipts or expenditures to income or principal. The extent of the discretion thus conferred upon the trustee depends upon the interpretation of the trust instrument. Thus, his discretion may be limited to situations where he is in reasonable doubt whether under the law and the facts certain receipts or expenditures should be allocated to income or principal; or discretion may be conferred upon him to make such an allocation as in his opinion is fair and reasonable. The exercise by the trustee of the power thus conferred upon him is not subject to control by the court, except to prevent an abuse by the trustee of his discretion (see § 187)."

In Commissioner of Internal Revenue v. Wade, 2 Cir., 155 F.2d 918, it was held that, although the trust provided that estate taxes should be payable out of principal, the trustees had acted properly in charging interest on tax deficiencies to income, where the trust conferred discretion on the trustees "to determine whether money or property coming into its possession shall be treated as principal or income, and to charge or apportion gains, expenses and losses to principal or income, according as it may deem just and equitable." (155 F.2d at page 918.)

Under these authorities it seems obvious that the questions before this court, and the questions decided by the lower court, are not whether the three items questioned would normally be charged against income or corpus, but, in view of the broad power of discretion conferred on the trustees, whether the will and decree directed how the charges should be allocated, or whether the trustees abused their discretion in making the allocation they did. Appellant has made no showing of an abuse of discretion, but, as already pointed out, has, in his brief, simply disregarded the grant of discretion to the trustees. The will and decree, without ambiguity, vest in the trustees a complete discretion, except as limited by that clause and other provisions of the will, in allocating expenditures to principal or income. The record shows that the trustees have exercised their discretion by allocating these three expenditures to income. The will does not direct the contrary. Thus we are limited in our review to a determination of whether the record, as a matter of law, shows an abuse of discretion on the part of the trustees.

[2] That no abuse of discretion existed as to any one of the three items is too clear to require extended discussion. Even in the absence of the discretionary power in question it would probably be the law that all three items should be charged to income, but, to say the least, the questions involved are reasonably debatable. This being so, the exercise of the discretionary power cannot be successfully attacked.

First, as to the interest on the federal tax deficiency amounting to $409.10. The will and decree provided that "all estate, inheritance, and similar taxes" were to be paid out of the general assets of the estate. The federal tax deficiency was charged by the trustees to principal, but they charged the interest on such deficiency to income. The weight of authority is to the effect that interest on such taxes should be charged to income. It is true that in Matter of Clark, 169 Misc. 202, 7 N.Y.S.2d 176, the court held that if taxes should be paid from principal, so should interest thereon, but that case is out of line with many other cases, and contrary to the Restatement. In comment "e" to § 233 of the Restatement of Trusts it is stated: "Ordinary current expenses in connection with the administration and management of the trust are payable out of income. These include * * * interest on mortgages and other indebtedness."

The reason for this rule was clearly set forth in Penrose v. United States, D. C., 18 F.Supp. 413. In that case the will dir-

ected, as does the instant one, that taxes should be paid by the estate and not by the beneficiaries. As in the instant case, the trustees paid a deficiency estate tax out of principal and the interest thereon out of income. There was no discretionary power vested in the trustees as to allocation of principal and income. It was held that, as a matter of law, interest on a deficiency tax was not part of the estate tax, but was the same as interest on any other indebtedness and should be paid from income. In giving its reasons for this holding the court stated, 18 F.Supp. at page 416: "We, therefore, conclude that it was proper to pay the interest here in question out of the income of the estate rather than out of the principal which the executors had reserved for the payment of taxes. We are fortified in this conclusion by the fact that a contrary holding would be manifestly unfair to the remaindermen since delay in the payment of the tax would be entirely at their expense while the life tenants through their receipt of the income upon the principal funds reserved to pay the tax would actually benefit from the delay."

The same conclusion was reached on similar facts in Jones v. Hassett, D. C., 45 F. Supp. 195. In Commissioner of Internal Revenue v. Wade, 2 Cir., 155 F.2d 918, cited supra on the discretion point, the court, although directly holding that the trustees, as in the instant case, had complete discretion and that their choice was controlling, by way of dicta, stated "* * * we cannot find any peculiar Ohio law to guide us, for it does not help to a solution that the courts of that state have held that inheritance taxes are payable from the corpus. As a matter of equity, however, interest falling due upon an estate tax during a delay in the payment of a deficiency ought to be borne by the life beneficiary, at least so far as he has during the delay actually received income, which he would not have received had the correct tax been ascertained and paid at once."

It is clear that, so far as this item is concerned, there was no abuse of discretion in allocating this item to income rather than to principal.

[3, 4] The same legal situation exists as to the property taxes amounting to $8,400.50. These taxes were California real property taxes for the taxable year July 1, 1943 – June 30, 1944. But, says appellant, in this state, under Revenue and Taxation Code, § 2192, tax liens attach on the first Monday in March preceding the fiscal year for which they are levied. Therefore, so the argument goes, at the death of Vida on June 26, 1943, these taxes were a lien, and should have been paid from principal and not income. It is a general rule that taxes due, or at least assessed, prior to death, should normally be paid from principal (4 Bogert, Trusts and Trustees, § 804, p. 2330), while taxes assessed thereafter are payable from income. Thus § 12 (1) of the Principal and Income Act provides that: "All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal * * * shall be paid out of income." This is also the rule of the Restatement. (See comment "e" to § 233 of Restatement of Trusts.)

There can be no doubt that these taxes were a lien at the date of death, although not yet assessed or due. The lien for the taxes came into being on the first Monday in March, 1943 (Rev. & Tax.Code, § 2192), although the tax had not yet been assessed. The property assessment had to be computed by the first Monday in July (Rev. & Tax. Code, § 616); the tax would thereafter be computed and levied (§ 2152); the first installment was due November 1, 1943 (§ 2605), and the second due January 20, 1944 (§ 2606).

It is the theory of appellant that, because these taxes were a lien on the real property which comprised the trust estate prior to the death of the testatrix, the tax obligation was of an exceptional and non-ordinary nature, and hence chargeable to corpus. It is urged that where taxes are a lien at the time of death they must be a charge on that property. In support of this conclusion considerable reliance is placed on Estate of Whartenby, 2 Coff. Prob. Dec. 509, which involved the question whether taxes which were a lien but not assessed at the time of a sale should be paid by the purchaser or

seller. It was held that they should be borne by the seller. Whether that case is correct or not (a point we do not decide) is not important. It decides nothing on the question as to whether such a charge should be allocated to principal or income.

Appellant also cites In re Cronise's Estate, 167 Misc. 310, 6 N.Y.S.2d 392, in which the intermediate appellate court of New York passed upon an apportionment issue arising out of the payment of California taxes. The court in that case misinterpreted the California law. It stated that the lien of the taxes became effective on January 1, 1933, when the lien does not, in fact, come into being until the first Monday in March. It also held that when the lien came into existence it became a tax *assessed* prior to the death of the testator. Of course, under our law, a tax is not assessed at the time the tax lien comes into being. Because of this clear misapprehension of the California law, the case is only the weakest kind of augmentative authority.

Appellant's interest in income started from the date of death of the testatrix. Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. On that date, June 26, 1943, the tax had not been assessed, nor was it payable. The tax was for a fiscal year that started after the death of the testatrix. It was therefore an ordinary, normal expense that, in view of the discretionary power granted, the trustees could charge to income.

This conclusion is strengthened by another provision of the will, also incorporated into the decree of distribution. The testatrix directed the trustees in handling the trust estate to "collect and receive the income, returns, and profits thereof, and after paying all necessary costs, taxes, and other expenses incidental to or growing out of this trust, to pay out and disburse the entire net income derived from the trust estate as hereinafter directed." This provision can be interpreted as an express direction to pay the taxes out of income.

Under these circumstances it was not an abuse of discretion for the trustees to allocate this charge to income.

[5] It cannot be held, as a matter of law, that the trustees abused their discretion in allocating the contract payments to income. The appellant urges that the contract obligation pre-existed the death of the testatrix and was therefore a charge on her estate. He places considerable reliance on the direction in the decree of distribution that the contract payments were to be paid "out of the trust property." The appellant misinterprets that direction. That direction does not necessarily mean that the payments must come out of corpus. As already pointed out, the court in its decree expressly provided it was not directing from what source the contract payments should come, but was expressly reserving the power to hear a petition to determine the proper source of the payments.

Appellant likewise urges that the contract obligation was an extra-ordinary and unusual expense and therefore should be paid out of corpus. While such argument might be entitled to some weight in a case where discretion was not conferred on the trustees, it certainly cannot be held that where such discretion is conferred such charge so clearly is one against corpus that to charge it against income was, as a matter of law, an abuse of discretion. It must be remembered that by the contract and the codicil to her will the testatrix directed that payments to appellant as a life income beneficiary of the trust were to be credited against the contract obligation, not to exceed one-third of the $600 joint and several obligation of the three sisters. Those provisions certainly support the determination of the trustees. They can be reasonably interpreted to constitute a direction that such payments should be made from income.

It is quite apparent that appellant has not shown an abuse of discretion on the part of the trustees in making the allocations in question. This being so, the order must be and is affirmed.

WARD and BRAY, JJ., concur.

80 Cal.App.2d 884

In re KIMBALL'S GUARDIANSHIP. SORENSEN v. ENGLEHARDT et al.

Civ. 15793.

District Court of Appeal, Second District, Division 3, California.

July 18, 1947.

Rehearing Denied Aug. 6, 1947.

Hearing Denied Sept. 15, 1947.

1. Guardian and ward ⇐13(7)

An order appointing a guardian, when duly made and entered, becomes a decree of the court and is not invalid merely because some other person may have been lawfully entitled to letters.

2. Guardian and ward ⇐17

Where no want of jurisdiction is disclosed on the face of the record, an order appointing a guardian is not subject to collateral attack.

3. Guardian and ward ⇐17

Where petition for appointment as guardian of a minor alleged all the facts necessary to give the court jurisdiction, including an allegation that minor's father died intestate and that minor had no guardian legally appointed by will or otherwise, and order of appointment recited such allegations to be true, proof upon a second application that the second applicant had been appointed guardian by will was a collateral attack upon the first order and furnished no basis for holding the first order to be void. Probate Code, § 1405; Code Civ.Proc. § 473.

4. Guardian and ward ⇐27

The court could not appoint a second guardian until the one first appointed had been removed or his appointment vacated.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding in the matter of estate and guardianship of John Alden Kimball, a minor, wherein May A. Sorensen petitioned for confirmation of appointment as testamentary guardian of John Alden Kimball, and Frances Charlotte Engelhardt and others filed a motion to dismiss the proceedings. From an order confirming the appointment of petitioner as testamentary guardian, Frances Charlotte Engelhardt and others appeal.

Order reversed.

Lindstrom and Bartlett, of Los Angeles, for appellants.

David Spaulding, of West Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

On May 20, 1946, Frances C. Engelhardt and Beverly Hills National Bank and Trust Company were appointed guardians, respectively, of the person and estate of John Alden Kimball, the twelve year old minor involved in these proceedings. They appeal from an order made on June 19, 1946, in another department of the court, appointing May A. Sorensen, guardian of the person and estate of the minor.

Appellant Engelhardt is the maternal grandmother, while respondent Sorensen is the paternal aunt of the minor. The estate of the minor includes personal property and real property, which was formerly the separate property of his mother and was devised to him under the terms of her will. The minor's mother died July 1, 1942. Thereafter the minor remained with his father until the latter's death on May 19, 1946. On that day respondent advised appellant Engelhardt of the father's death and directed her to take custody and control of the minor. Appellant did so immediately and has at all times retained the custody of the minor. On the following day, May 20th, appellant Engelhardt filed her petition for the appointment of appellant Bank as guardian of the estate and of herself as guardian of the person of the minor. Among other matters, her petition contained an allegation, upon information and belief, that the father had died intestate and that the minor had no guardian "legally appointed by will or otherwise." On the same day, the court, in a department located in Los Angeles, after a hearing, found that since appellant Engelhardt was the grandmother of the minor and had the care and custody of the minor no notice to any other relatives residing in the State was necessary, and further found that all of the allegations of the petition were true, that Mrs. Engelhardt was a competent and

proper person to be appointed guardian of the person of the minor, and that appellant Bank was a proper institution to be appointed guardian of his estate, and made its order forthwith.

Two days later, on May 22nd, respondent Sorensen filed with the Santa Monica department of the Superior Court a petition in which she alleged that she had been appointed guardian of the minor by the will of his father and sought confirmation of her appointment as testamentary guardian. The hearing was set for May 31st and notice of the proceeding was given to appellant Engelhardt. Thereafter, on May 31st, the appellants filed a motion to dismiss the proceedings instituted by respondent. When the matter came on to be heard it was continued to the date set for the hearing of the petition for probate of the father's will. At that time the will was admitted to probate, the respondent again presented her petition for confirmation as guardian under the terms of the will, and the matters were ordered submitted. On June 19th, the trial court in the Santa Monica department made the order, from which the appeal is prosecuted.

Under section 1405 of the Probate Code a guardian may be appointed by the court only where none has been appointed by will or deed. The judge who made the first order acted in the belief that no such appointment had been made. When respondent's petition was heard with the petition to prove the father's will and it was proved that respondent was appointed guardian by the will, that appointment was confirmed by the order appealed from. The theory of this procedure was that because of the limitation of section 1405 the court was without jurisdiction to appoint appellants as guardians when an appointment of respondent by will had actually been made, even though the existence of the will was then unknown to the court. It was held that since the first order was void no steps were necessary to vacate it and that it could be ignored in the appointment of another guardian.

[1-4] Appellants' petition alleged all the facts necessary to give the court jurisdiction and it was recited in the order that all said allegations were true. An order appointing a guardian, when duly made and entered becomes a decree of the court. Sakurai v. Superior Court, 65 Cal.App. 280, 282, 223 P. 575. Such an order is not invalid merely because some other person may have been lawfully entitled to letters. In re Kandarian, 187 Cal. 479, 480, 202 P. 647. A direct attack could be made only by motion under section 473, Code of Civil Procedure, by other authorized motion to vacate the order, by appeal, or an attack could be made by suit in equity. No such attack was made and no order was made vacating the first order of appointment. Proof upon the second application that respondent had been appointed by will was a collateral attack upon the first order and furnished no basis for holding the first order to be void. Where no want of jurisdiction is disclosed on the face of the record, an order appointing a guardian is not subject to collateral attack. In re Lundberg, 143 Cal. 402, 403, 77 P. 156. The court has no power to appoint a second guardian until the one first appointed has been removed or his appointment vacated. Guardianship of Sturges, 30 Cal.App.2d 477, 501, 86 P.2d 905; In re Atkins, 121 Cal.App. 251, 255, 8 P.2d 1052.

The order is reversed.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 784

GULLEY v. DAGGETT.

Civ. 15839.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

Hearing Denied Aug. 28, 1947.

1. Appeal and error ⇐930(1)

On plaintiff's appeal from a judgment for defendant, the evidence must be viewed in the light most favorable to defendant.

2. Automobiles ⇐246(9)

Where there is an automobile accident at an intersection and one of the streets

is a through highway, it is not error for the court to instruct the jury concerning the right of way at street intersections as provided in section of the Vehicle Code relating to the right of way at intersections in general, and also to instruct the jury in accordance with the law relating to vehicles entering a through highway as set forth in another section of the Code. Vehicle Code, §§ 550, 552.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Marjorie Gulley against Walter Earl Daggett for personal injuries resulting from automobile accident. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Caryl Warner, of Los Angeles, for appellant.

Forrest A. Betts, of Los Angeles (Walter Ely, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for injuries resulting from an automobile accident, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to defendant (respondent) the essential facts are these:

Plaintiff was riding in a Ford automobile in a northerly direction on Figueroa street south of its intersection with Sepulveda boulevard. At the same time defendant was driving his Oldsmobile in a westerly direction on Sepulveda just east of the same crossing. Figueroa street was a "through highway" marked by boulevard stop signs controlling the east-west traffic crossing Sepulveda boulevard. The car in which plaintiff was riding was traveling between 40 and 45 miles per hour. The driver of the Ford first observed defendant's automobile approaching the intersection when he was 125 to 150 feet south thereof at which time the Oldsmobile appeared to be either stopped or stopping. He next observed the Oldsmobile passing across the intersection in front of him at about 8 miles per hour. He immediately put on his brakes and swerved to the left whereupon a collision resulted between the two automobiles and plaintiff was injured.

The jury returned a verdict in favor of defendant.

This is the sole question presented for our determination:

Was it prejudicial error for the trial court to instruct the jury as follows?

"Section 550 of the Vehicle Code of the State of California:

" 'Vehicle approaching or entering intersection. (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway. (b) When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.' "

[2] Where there is an automobile accident at an intersection and one of the streets is a "through highway" it is not error for the trial court to instruct the jury concerning the right of way at street intersections as provided in section 550 of the Vehicle Code relating to the right of way at intersections in general, and also to instruct the jury in accordance with the law relating to vehicles entering a "through highway" as set forth in section 552 of the Vehicle Code. (Pattisson v. Cavanagh, 18 Cal.App.2d 123, 126 et seq.,* 63 P.2d 868, 64 P.2d 945; Medeiros v. Soares, 17 Cal.App.2d 176, 179, 61 P.2d 501.)

The argument which plaintiff makes that the instructions were conflicting was also urged in Pattisson v. Cavanagh, supra. In such case the District Court of Appeal held contrary to the appellant's contention. In the same case the Supreme Court denied an application for a hearing, 18 Cal.App.2d 123, 64 P.2d 945, and in doing so expressly overruled the decision in Elmore v. County

* The provisions of sections 131(c) and 131(a) of the Vehicle Code, mentioned in the cited case, are now sections 552 and 550 respectively of the Vehicle Code.

of Lassen, 10 Cal.App.2d 229, 51 P.2d 481, which had held that instructions similar to those here in question were conflicting.

In view of the foregoing rule and the decisions in support thereof the trial court's instructions were correct.

The judgment is affirmed.

MOORE, P.J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.



80 Cal.App.2d 621

COSTELLO et al. v. BOWEN et al.

Civ. 7351.

Sac. 5817.

District Court of Appeal, Third District, California.

June 30, 1947.

1. Pleading ⇐35
Waters and water courses ⇐179(1)

Where complaint showed that defendants had constructed a dam across a natural water course or drainage channel so as to cause water to back up on plaintiffs' lands, complaint stated a cause of action notwithstanding allegation that such drainage channel had served to protect plaintiffs' lands from flood and surface waters for more than five years last past, which was properly disregarded as surplusage.

2. Waters and water courses ⇐179(4)

In action to enjoin the maintenance of a dam across a natural water course, evidence sustained finding that the dam had been placed in a natural water course and drainage channel.

3. Waters and water courses ⇐38

A "water course" is ordinarily defined as a stream containing a definite bed, banks and channel which flows into some other river, stream, lake or the sea, but none of such characteristics are essential, since a water course may exist even though it serves as a mere channel by means of which a particular water shed is drained and although it may be dry in certain seasons or despite the fact that it may not empty into any other river, stream, lake or body of water, but on the contrary, even though it terminates in some sandy basin where it disappears from sight.

See Words and Phrases, Permanent Edition, for all other definitions of "Water Course".

4. Waters and water courses ⇐38

The existence of a water course is often one of fact to be determined by a jury or the court.

5. Appeal and error ⇐1011(1)

Where the evidence concerning the existence of a water course is conflicting, the determination of the trial court will not be disturbed on appeal.

6. Trial ⇐395(9)

Where court found that defendants had built a dam across a natural water course so that water was backed up on plaintiffs' lands, the finding that plaintiffs had acquired prescriptive rights to unobstructed use of natural water course to drain their lands of flood and surface waters, was immaterial and might be disregarded, especially where it was reconcilable with certain other findings.

7. Waters and water courses ⇐167(1)

The California rule that a landowner may defend his land from flood waters by means of necessary defensive obstructions so long as they do not interfere with the current of the water in its natural channel even though other riparian owners may be damaged thereby, does not authorize a landowner under the pretext of guarding against flood water to construct and maintain a dam which intercepts and obstructs the entire flow of the stream in its normal condition.

8. Waters and water courses ⇐173

The California rule that a landowner may defend his land from flood waters by means of defensive obstructions that do not interfere with the current of water in its natural channel even though other riparian owners may be damaged thereby, is confined to "flood waters" in the strict sense which are waters escaping because of their height from the confinement of a stream and running over adjacent property, and

implicit in the definition is the element of abnormality.

See Words and Phrases, Permanent Edition, for all other definitions of "Flood Waters".

9. Waters and water courses ⇐167(1)

A lower landowner may not completely dam the natural course of a stream so as to divert the waters thereof to the damage of upper landowners, even though the flow is excessively high, for the reason that, whereas the high waters still flow in the natural channel, they have not escaped therefrom and are not deemed "flood waters" in the strict sense.

10. Trial ⇐398

The findings that a certain slough was a natural water course and that it was a natural channel upon which the plaintiffs relied to protect them from flood and surface water, were not irreconcilably conflicting.

11. Trial ⇐404(1)

Findings should be read as a whole to ascertain the intention of the court.

12. Trial ⇐395(9)

Immaterial findings may be disregarded.

13. Appeal and error ⇐1071(1)

A judgment may not be set aside unless the conflict in the findings is clear and the findings cannot be reconciled.

14. Waters and water courses ⇐177(1)

The court was warranted in enjoining the defendants from damming a stream in its regular channel so as to interfere with its natural flow and cause it to overflow and flood plaintiffs' upper lands to their damage.

15. Waters and water courses ⇐167(1), 173

Excessive storm waters which overflow the banks of a stream but which later find their way back into the stream either by drainage or by percolation as the stream subsides, are not "flood waters" against which an owner of land may defend his property by interfering with the natural flow of the stream, even though his defensive methods may damage other owners of land, but are considered waters of the stream, the natural flow of which may not be interfered with to the damage of upper riparian owners of land.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by John Costello and others against Francis Perry Bowen and Ida Bowen to restrain the defendants from constructing or maintaining a dike, dam, or other obstruction on their land in or across a natural water course or drainage channel so as to interfere with the natural flow or elevation of water or so as to cause water to flood lands of the plaintiffs. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

W. A. McGugin, of Fresno, for appellants.

C. Ray Robinson and Samuel V. Cornell, both of Merced, for respondents.

THOMPSON, Justice.

The defendants have appealed from a judgment restraining them from constructing, or maintaining, a dike, dam or other obstruction on their land in Merced County in or across a "natural water course or drainage channel," designated as "Snake Slough," in such a manner as to "interfere with the natural flow or elevation of water in said 'Snake Slough' or in such manner as or cause water to flow onto, * * * flood or become or remain impounded upon the lands of the plaintiffs."

The appellants contend that the complaint fails to state facts sufficient to constitute a cause of action; that the findings of fact do not support the conclusions of law; that the evidence fails to support the judgment, and that the injunction is ambiguous and too broad in its terms, since, in effect, it unlawfully prevents the defendants from protecting their land from unusual "flood waters".

The railroad track of the plaintiff, Southern Pacific Company, extends in a southeasterly direction from the City of Merced. For many years that company has leased from the Central Pacific Railway Com-

pany the land upon which said railroad track is constructed, and over which the lessor has operated regular daily passenger and freight trains.

At a distance of about five miles southeast from Merced the railroad track crosses the natural water channel called Snake Slough, by means of a bridge 40 feet in length. A double-lane state highway, number 99, extends adjacent to and parallel with the railroad right of way in that vicinity, on the northerly side thereof. The state highway also crosses the channel of Snake Slough by means of a bridge. Snake Slough is one of three streams which flow in parallel courses about one-half mile apart, which for many years past have served to drain the district north of said right of way. The most northerly of those water courses is Owens Creek. To the south of Snake Slough is Mariposa Creek, sometimes called Duck Slough. Those water courses converge at some distance south of the railroad track, and Owens and Mariposa creeks flow into the San Joaquin River. During the rainy season Owens Creek and Mariposa Creek sometimes overflow into Snake Slough.

For more than 14 years the plaintiffs, Mr. and Mrs. Costello and Mr. and Mrs. Heetter, have owned and resided on their separate properties north of the said railroad track and state highway, adjacent to Snake Slough near the point where that water course flows under said bridges. During all of said time Snake Slough served as a drainage canal for the protection of plaintiffs' properties.

In 1942 the defendants purchased 60 acres of land adjacent to the railroad right of way, on the southerly side thereof, across which property Snake Slough flowed unobstructed for many years. In 1944, the defendants constructed and thereafter maintained a dam or dike about four feet in height across the entire channel of Snake Slough, on their land, just south of the railroad bridge, thereby obstructing the flow of water in that channel and causing it to overflow and flood plaintiffs' lands to their damage.

This suit for injunction to restrain the maintenance of said dam, and for damages, was then commenced. The defendant answered the complaint, merely denying the material allegations thereof. No demurrer to the complaint was filed. The cause was tried with a jury, to which special issues were submitted. A verdict was returned favorable to the plaintiffs on all issues. The court thereupon adopted findings favorable to the plaintiffs and rendered judgment restraining the defendants from maintaining the dam over or across said "natural water course or drainage channel" so as to obstruct or interfere with the *natural flow of water* and to cause the water to flood or flow upon the lands of plaintiffs. No damages were allowed. From that judgment this appeal was perfected.

[1] We are of the opinion the complaint states a good cause of action for injunctive relief to restrain the defendants from constructing or maintaining the dam in question as an obstruction to the "natural water course or drainage channel" called Snake Slough, so as to cause the overflowing and flooding of plaintiffs' lands to their damage.

Paragraph VII of the complaint alleges that Snake Slough is a "natural water course and drainage course or channel," which flows adjacent to the lands of plaintiffs, Mr. and Mrs. Costello, and Mr. and Mrs. Heetter, and under the bridges across the rights of way of the state highway and the Southern Pacific Company, and thence over and across the lands of the defendants. Paragraph VII of the complaint asserts that "plaintiffs have been and now are entitled to the natural and unobstructed flow of water in and through said Snake Slough through, from and over their several lands and over and along and upon defendants' lands." Paragraph VIII of the complaint alleges that defendants constructed the dam in question in 1944 "through, over and upon said drainage channel at a point on defendants' lands near said railroad" so as to "obstruct and stop the natural flow of water in and through said drainage channel and to raise the surface of said waters above the ordinary level thereof and to cause such water to back up onto and accumulate upon plaintiffs' lands and upon said railroad and to flood the same, thereby softening, undermining and damaging" the same.

It is true that paragraph VII of the complaint also alleges that said Snake Slough served as a natural drainage channel to protect said lands from "*flood* and surface waters" for a period of "more than five years last past." We may assume the preceding allegation was an ineffectual effort to assert a prescriptive right to enjoin defendants' right to protect their land from "flood and surface waters." But the allegation with respect to "flood and surface waters" is immaterial, and may be disregarded as surplusage, since the separate allegations with respect to obstructing the natural flow of water in a drainage channel, by means of a dam which caused the flooding and overflowing of plaintiffs' land to their damage, states a valid cause of action independently of the ineffectual cause based on *flood* and surface waters. The defendants failed to demur to the complaint, or to move to strike out such immaterial portion thereof. The plaintiffs relied on their right to enjoin defendants' interference with the ordinary flow of water through the natural channel of Snake Slough. The unnecessary allegations of the complaint with regard to the flood and surface waters were properly disregarded by the court in its conclusions of law, in rendering judgment and in granting injunctive relief. Regarding the right of the court to disregard allegations of a complaint which are unnecessary and superfluous, when a valid cause of action is otherwise adequately stated, it is said in 1 Bancroft's Code Pleading, section 27, at page 63, that: "Surplusage is matter altogether superfluous and useless,—matter not essential to the claim or defense. Such matters do not vitiate the pleadings, and, although not stricken out, need not be proven but may be ignored altogether, provided the facts stated otherwise are sufficient to constitute a cause of action under the law upon which the plaintiff relies. Under the head of surplusage may be included, * * * unnecessary allegations, extraneous or immaterial matters."

We conclude that the complaint states a valid cause of action independently of the allegations in paragraph VII, regarding the flood and surface waters. That issue is immaterial.

Moreover, it will be observed that the language of paragraph VII of the complaint, to which objection is made, combines the terms "flood and *surface* waters," in claiming that plaintiffs have acquired prescriptive rights to the unobstructed use of Snake Slough channel for the protection of their lands against flood and overflow water. There is a clear distinction between unusual vagrant flood waters and mere surface waters with respect to the use and control of such waters by landowners. 1 Kinney on Irr. and Water Rights, 516, secs. 318, 319; Weinberg Co. v. Bixby, 185 Cal. 87, 96, 196 P. 25; Everett v. Davis, 18 Cal. 2d 389, 393, 115 P.2d 821; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169. In the Sanguinetti case, supra, it is said that while a lower owner of land may adopt reasonable means of protecting his land from unusual *flood* water which causes the overflowing of a natural stream, the upper owners have an easement for the unobstructed discharge of surface water, caused by rain or the melting of snow, into the channel in its natural and usual flow, and that the lower landowner has no right to intercept, divert or obstruct such *surface* water in its accustomed flow, to the injury of the upper owners of land. But the distinction between the rights with respect to the diversion from a natural stream of flood and surface water is immaterial in this case since the judgment does not affect *flood* water if any such existed. It may reasonably be assumed the witnesses did not use the term "flood water" in its technical legal sense, but rather with reference to the result of unusual precipitation of rain water which was ordinarily carried in Snake Slough channel, except for the unlawful obstruction by the defendants.

In support of the apparent conclusion of the court that "flood water", in the technical sense of *fugitive water* against which a landowner may defend his property, was not involved in this case, defendants' witness, Edward McDonald, testified: "Q. So that when you say that there were *flood waters* there, you mean they were partly high waters from the rainy season and maybe some water that come over from Mariposa Creek, isn't that what you mean? A. That

is right, we never try to distinguish flood water from rain water because we figured it was all rain water to begin with anyway."

[2-5] The trial court determined that Snake Slough is a natural water course and drainage channel. While there is a conflict of evidence in that regard, there is ample proof to support that finding. It is difficult to define the term "water course" in language that is uniformly applicable, since the topography and surrounding conditions which contribute to its existence vary greatly. In general terms it has been said to consist of a running stream of water following a regular course or channel and possessing a bed and banks. Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 P. 375; Sanguinetti v. Pock, supra; 44 Words and Phrases, Perm. Ed., 724. It is the channel through which the water of a particular district or watershed usually or periodically flows. While it is ordinarily defined as a stream, containing a definite bed, banks and channel, which flows into some other river, stream, lake or the sea, none of those characteristics is an absolute fixed factor. A water course may exist even though it serves as a mere channel by means of which a particular watershed is drained, and although it may be dry in certain seasons, or despite the fact that it may not empty into any other river, stream, lake or body of water, but, on the contrary, even though it terminates in some sandy basin where it disappears from sight. (See 25 Cal.Jur. 1032, secs. 31–38.) The question of the existence of a water course is often one of fact to be determined by a jury or the court. If the evidence in that regard is conflicting, the determination of the trial court will not be disturbed on appeal. County of Sierra v. County of Nevada, 155 Cal. 1, 8, 99 P. 371.

Regarding the nature of Snake Slough as a water course or channel which served to drain the area north of the railroad right of way, Delores Heetter, testified that for many years she had observed that the water from north of the highway "would flow and go right in there in that slough, fall back in that slough. * * * Q. You think all the water that falls up north * * * comes out under the same trestle of this slough? A. Same trestle of this slough." The maintenance of those 40 foot bridges over that channel for many years furnishes some evidence that it was a defined water course. The plaintiff, John Costello, testified that Snake Slough for more than 14 years to his knowledge had served as a water course to drain the area north of the track. This colloquy occurred:

"Q. And do you know from your 14 years experience and observation what the general fall of the county is there to the north of the right of way particularly? A. Yes, it all falls in a southwesterly direction, the natural fall of the land.

"Q. With the result that rains or waters falling in that area would normally flow in what general direction? A. It would all fall down into this slough from all around. * * *

"Q. So that if the waters were left unobstructed that fell in that area, where would they flow or pass to? A. Pass under the highway bridge and under the railroad trestle and out this way, keep going in a southwesterly direction. I don't know where they end up. They always went through there.

"Q. * * * How many years have you seen water flowing in the manner that you have described there? A. Practically every year, whenever there are any heavy rains at all."

On cross-examination Mr. Costello further testified:

"Q. Have you ever, during these times of flood over from Duck Slough [Mariposa Creek] and these heavy rains, have you seen the amount and quantity of water that entered upon Mr. Bowen's place? A. I have just seen it going under the bridge, flowing through there. I don't know where it all come from. I didn't try to track it up. * * * Lots of years large quantities went through there.

"Q. And it spread over Mr. Bowen's land? A. It didn't spread out over Mr. Bowen's land until he leveled it, when he leveled the bank, he gets it all now.

"Q. As that Snake Slough enters Mr. Bowen's place there is no defined banks, is there? A. No, because he took them off when he leveled his land.

"Q. Did you ever see them there, Mr. Costello, before he leveled? A. Yes, I did."

We conclude that the evidence supports the finding that Snake Slough is a well defined natural channel within the meaning of the term "water course" through which the waters of the area north of the railroad track in that vicinity were drained under the bridges and across the lands of the defendants, and that the defendants unlawfully obstructed the regular flow of that stream by constructing and maintaining the dam in question, to the damage of plaintiffs' properties.

[6-8] The defendants urge this court to reverse the judgment on the ground that the findings of the court that Snake Slough is a natural water course, and that it is a natural channel upon which the plaintiffs relied to protect them from *flood and surface water,* are inconsistent and irreconcilable. The court did find that plaintiffs had acquired prescriptive rights to the unobstructed use of the natural water course to drain their lands from "flood and surface waters." But the last mentioned finding is immaterial, as we have previously said. It may be disregarded. We think it may also be reconciled with the other findings that Snake Slough is a natural water course, the regular flow of which was obstructed by defendants' construction and maintenance of the dam in question, to the damage of plaintiffs' land. It may be so reconciled on the theory that the term "flood water" was not used by the court in the technical sense of extraordinary vagrant water which will not return to the stream when the high water recedes, against which the lower landowners have the right to protect their property. We recognize the fact that the California rule, contrary to that of other jurisdictions, recognizes extraordinary *flood* waters as "common enemy" against the invasion of which a landowner may defend his property by the construction of *necessary defensive obstructions* even though they may damage other riparian owners, *provided the obstructions do not interfere with the current of the water in its natural channel.* Weinberg Company v. Bixby, supra, 185 Cal. at page 95, 196 P. 25; Hellman Commercial Trust & Savings Bank v. Southern Pacific Company, 190 Cal. 626, 634, 214 P. 46; Everett v. Davis, supra; 16 A.L.R. 642, note. But that rule does not authorize a landowner, under the pretext of guarding against "flood water," to construct and maintain a dam which intercepts and obstructs the entire flow of the stream in its normal condition. The rule is stated in the Weinberg Company case as follows [185 Cal. 95, 196 P. 29]: "The doctrine of the common law relating to protection against flood overflow of rivers, and which has been adopted by the California courts, recognizes such flood waters as a common enemy which may be guarded against or warded off by one whose property is invaded or threatened *by obstructions which are merely defensive in their nature and not calculated to interfere with the current of the water in its natural channel.*" (Italics added.)

The foregoing fugitive flood water rule is confined by our Supreme Court in the Everett case, supra, to waters which have escaped from their normal channel in times of unusually high water floods, and which will not normally return to the natural channel when the waters of the stream recede. That case states, 18 Cal.2d at page 393, 115 P.2d at page 823, that: "'Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory.' Le Brun v. Richards, supra, 210 Cal. 308, 291 P. 825, [72 A.L.R. 336]. Such waters are said to be a common enemy, against which one may protect his land even to the detriment of his neighbor. But the drastic rule which allows a property owner to divert such waters to the lands of others *only applies to flood waters in the strict sense, that is, waters escaping because of their height from the confinement of a stream and running over adjacent property.* Implicit in the definition of flood waters is the element of abnormality; they are flood waters *because of their escape from the usual channels under conditions which do not ordinarily occur.*" (Italics added.)

[9] Under the limitation of the foregoing rule, a lower landowner may not completely dam the natural course of a stream so as to divert the waters thereof to

the damage of upper landowners, even though the flow is excessively high, for the reason that while the high waters still flow in the natural channel they have not escaped therefrom and are not deemed to be flood or vagrant waters in the strict sense. This limitation of the application of the California rule with respect to vagrant flood waters, is in accordance with our decisions. Hellman Commercial Trust & Savings Bank v. Southern Pacific Company, supra; Weinberg Company v. Bixby, supra. In the Hellman case it is said at page 634 of 190 Cal., at page 49 of 214 P. that, in interfering with the established natural flow of the water course: "* * * It would follow as a matter of logical consequence that neither the defendants nor anyone else would have the right to divert either the usual or the torrential, or even the exceptional and unprecedented flow of these waters from their natural and accustomed channels to another of the courses or channels of said river, if such diversion would result in precipitating upon the lands of the plaintiff an outflow of said stream which, but for such diversion, would in the main have pursued its way down the east wash or channel thereof at a distance from and without injury to plaintiff's land."

Likewise it is said in the Weinberg case, supra, that:

"We recognize the limitation in all of these cases that such right of self-protection does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel.

"The distinction, too, is recognized in this state between the flood waters of a natural water course, and the surface drainage arising from rain or melting snow, or springs and swamps before they have found their way to and become a part of a stream or river.

"As to such drainage, our courts have adopted the rule of the civil law, which places upon the proprietor of land the burden of permitting the passage over his land of the surface drainage in such a way as not to retard its flow from the lands above him, nor to concentrate and increase this flow upon the lands below."

[10-14] From the foregoing clear distinction between vagrant flood waters in the restricted and technical sense, and unusual and excessive flow within the natural channel of the stream, temporarily caused by excessive rain or melted snow, we conclude that the findings are not irreconcilably conflicting, and that the court was warranted in enjoining the defendants from damming the stream in its regular channel so as to interfere with its natural flow and causing it to overflow and flood plaintiffs' upper lands to their damage. Findings should be read as a whole to ascertain the intention of the court. Immaterial findings may be disregarded. A judgment may not be set aside, unless the conflict is clear and the findings are incapable of being reconciled. (24 Cal.Jur. 967, sec. 202.) There is no difficulty in this case in reconciling the findings to support the judgment.

[15] Excessive storm waters which overflow the banks of a stream, but which later find their way back into the stream either by drainage or by percolation, as the stream subsides, is not deemed to be "flood water" against which an owner of land may defend his property by interfering with the natural flow of the stream even though his defensive methods may damage other owners of land, but is considered as waters of the stream, the natural flow of which may not be interfered with to the damage of upper riparian owners of land. In 1 Kinney on Irrigation and Water Rights, 2d ed., 519, sec. 319, it is said: "* * * In legal parlance 'flood waters' may be defined as those waters, caused by the melting of snows or rains, which swell and overflow the banks of the water courses, and overflow lands not usually covered even in times of high water of the streams. If the water forms a continuous body with the water flowing in the ordinary channels, or if it departs from such channels animo revertendi, presently to return when the waters recede, it is flood water and to be regarded as the waters of the streams, and treated in law as such."

In 26 California Jurisprudence 284, section 496, the text which is supported by numerous California authorities, declares that: "The owner of lower land may not

obstruct a natural channel followed by surface waters, or otherwise change the natural discharge of such waters to the injury of his neighbors. Nor may he dam up a natural channel, swale or other low place, so as to prevent drainage water from reaching its natural outlet. But he has a right to protect himself against surface waters which have been turned on him by artificial means, though, as just seen, he may not turn such waters on the lands of third persons. The question as to what constitutes the natural flow to which a lower owner must submit is to be determined by natural conditions, unaffected by artificial changes and without considering the effect of floods or cloudbursts."

In the case of Cederburg v. Dutra, 3 Cal. App. 572, 86 P. 838, 840, under circumstances quite similar to the facts of this case, a judgment restraining the defendant from maintaining a dam across the channel of a stream was affirmed. The complaint alleged that plaintiffs had acquired prescriptive rights to maintain a ditch which he had constructed and used for more than five years to drain the water from a swale on his property into the main channel. The court adopted a finding to that effect. Like the present case, the dam which was constructed by the defendant practically shut off the flow of water into a slough which was found to be "the natural drainage" channel. Regarding the plaintiff's plea and the court's finding as to the alleged adverse use of the ditch constructed by plaintiff, the Appellate Court determined that: "It is not necessary to consider whether or not the finding that the ditch cut by plaintiff has been in adverse use for more than the statutory period is sustained by the evidence. *The findings as to the water course and its natural adaptation for drainage of the riparian land are sufficient to support the judgment.*" (Italics added.)

In support of the findings and judgment enjoining the defendant from maintaining the dam which obstructed the flow of water in its natural channel upon and across the lands of the defendant, the court said. 3 Cal.App. at page 575, 86 P. at page 840, that: "* * * The evidence showed that the ditch cut by plaintiff to shorten the channel at the point above defendant's land had for its object the hastening of the flow of water at that particular point, but did not injuriously affect defendant's land. It was stated in Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169, as 'settled law in this state that plaintiff as the owner of the upper land has an easement over the lower adjacent land of defendant to discharge surface water as it is accustomed naturally to flow, and defendant had no right to interrupt such flow to plaintiff's injury.' (Citing Cases.) It was said in Los Angeles [Cemetery] Ass'n v. [City of] Los Angeles, 103 Cal. 461, 37 P. 375: 'There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face or tract of land, occasioned by unusual freshets or other extraordinary causes.' In Sanquinetti v. Pock, supra, the opinion pointed out the features wanting to make the drainage there involved a water course. But here the features or characteristics of what the law defines to be water course clearly appear, and we think the evidence supports the findings."

The respondents concede that the injunction does not apply to flood water in its technical sense, against which an owner of land may protect his property by reasonable means which will not interfere with the regular flow of water in its natural channel. Neither the conclusions of law nor the judgment makes reference to flood water. We assume that the injunction does not affect flood water in its restricted and technical sense.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem, concur.

DYE et al. v. COUNCIL OF CITY OF COMPTON et al.

Civ. 15498.

District Court of Appeal, Second District, Division 3, California.

June 20, 1947.

Hearing Denied Aug. 14, 1947.

1. Municipal corporations ⇐108

The constitutional power of referendum possessed by electors of a city is identical in character with that reserved in constitution by people of the state. Elections Code, §§ 1770–1777; Const. art. 4, § 1.

2. Municipal corporations ⇐108
Statutes ⇐35½

The constitutional reservation of legislative power to be exercised by referendum has reference to legislative, as distinguished from administrative or ministerial, acts, whether of state legislature, city council or other legislative body. Const. art. 1, § 2; art. 4, § 1.

3. Municipal corporations ⇐108

Under constitution reserving referendum power to people to reject any act, or section or any part of act, passed by legislature and reserving referendum power to electors of each county, city, etc., to be exercised under procedure prescribed by law, referendum power of electors of city extends not only to ordinances and other legislative acts, however denominated as a whole, but also to sections and parts of ordinances and acts, even though statute purported to make referendum procedure applicable to ordinances as a whole and not to sections or parts thereof. Elections Code, §§ 1770–1777; Const. art. 4, § 1.

4. Constitutional law ⇐1

The Constitution is the fundamental and supreme law of state as to all matters within its scope.

5. Statutes ⇐35½

Legislative enactment for purpose of facilitating operation of self-executing referendum provision of constitution should be liberally construed in order that the constitutional power may not be defeated. Const. art. 4, § 1.

6. Constitutional law ⇐36

Legislative enactment adopted for purpose of facilitating operation of self-executing referendum provision of constitution may not restrict the referendum power. Const. art. 4, § 1.

7. Statutes ⇐35½

Statutory provisions dealing with referendum must be liberally construed in favor of power of referendum. Elections Code, §§ 1770–1777; Const. art. 4, § 1.

8. Municipal corporations ⇐108

Statute purporting to make referendum procedure applicable to ordinances as a whole and not to sections or parts of ordinances should be construed as applicable to exercise of full powers reserved to the people under constitution which permits referendum of section or parts of ordinance. Elections Code, §§ 1770–1777; Const. art. 4, § 1.

9. Municipal corporations ⇐108

Where general referendum procedure had been adopted by city charter as applicable to referendum elections, sections of omnibus license tax ordinance dealing with license taxes on motion picture theater tickets and public dance hall admissions were subject to referendum, especially where balance of ordinance had become effective and had passed beyond reach of power of referendum. St.1925, p. 1243; Elections Code, §§ 1770–1777; Const. art. 4, § 1.

10. Municipal corporations ⇐108

Where general referendum procedure had been adopted by city charter as applicable to referendum elections, such procedure was appropriate to be followed in all instances in which electors sought to exercise power of referendum reserved to them by constitution. St.1925, p. 1243; Elections Code, §§ 1770–1777; Const. art. 4, § 1.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by Stanley C. Dye and another against the Council of the City of Compton and others to compel the legislative body either to repeal certain provisions of omnibus license tax ordinance or submit the same to vote of qualified electors of city under the referendum

law. From a judgment of dismissal, the petitioners appeal.

Peremptory writ of mandate granted.

O'Melveny & Myers and Pierce Works, all of Los Angeles, Carson B. Hubbard, of Huntington Park, and Frank P. Doherty and Frank W. Doherty, both of Los Angeles, for appellants.

Ralph K. Pierson, of Compton, for respondents.

PER CURIAM.

On January 23, 1946, petitioners and appellants, Stanley C. Dye and William H. Jenner, as "residents, qualified electors, and taxpayers of the City of Compton" commenced the instant proceedings in mandamus directed against the Council of the city of Compton and its respective members (specifically named as parties respondent in the petition) to compel that legislative body either to (1) entirely repeal sections 62 and 98–E of Ordinance No. 595, or (2) submit the same to a vote of the qualified electors of the city of Compton under the referendum law; or to show cause why they had not done so. A demurrer to the petition was sustained by the trial court without leave to amend, the alternative writ discharged, the peremptory writ denied, and judgment of dismissal entered, from which judgment petitioners bring this appeal.

The facts occasioning these proceedings are the following: On November 27, 1945, the Council of the city of Compton duly and regularly enacted Ordinance No. 595. This ordinance amended section 62 of, and added six new sections, including section 98–E, to Ordinance No. 584, the omnibus license tax ordinance of the city. Section 62 imposed a 2¢ license tax upon each motion picture theatre admission, and section 98–E imposed a like tax upon public dance hall admissions. The remaining sections imposed license taxes upon persons engaged in the following businesses: retail delivery, auctioneers, trailer courts, trailer rentals, refrigeration and air conditioning, and beauty parlor establishments.

On December 26, 1945, a referendary petition directed against the adoption of sections 62 and 98–E thereof, signed by the requisite number of qualified electors of the city and in the manner prescribed by law for such referendum proceedings, was filed with the City Clerk. On January 4, 1946, she duly certified it. On January 8, 1946, this petition, together with its certification, was submitted to the Council of the city of Compton. On January 15, 1946, the council, meeting in regular session, passed a resolution denying the petition on the ground that it "should have requested the repeal of the entire ordinance rather than just sections of the ordinance" and declaring that Ordinance No. 595 should "remain in full force and effect."

The question presented by this appeal is whether a section or part of a city ordinance, as distinguished from the whole thereof, is subject to the power of referendum under the Constitution and the statutory law of California, where the state referendum procedure has been incorporated into a city charter. We have not been directed to, nor have we found, any cases in this State on this point, and so far as we know this is a case of first impression.

The power of referendum originates in article IV, section 1 of our state constitution. The first sentence of this section, which grants legislative power to the state legislature, so far as pertinent, reads as follows: "* * * the people * * * also reserve the power, at their own option, to * * * reject any act, or section or part of any act, passed by the Legislature." This section also provides that "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law." The section closes with the following significant sentence: "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

Pursuant to this section of the Constitution the Legislature established by statute a procedure for the exercise of the power of referendum by the electors of a city. This procedure may now be found in sections 1770 through 1777 of the Elections

Code. An examination of these sections discloses that they purport to make the procedure applicable to ordinances as a whole and not to sections or parts of ordinances. These sections are here applicable because the charter of the city of Compton provides that the laws of this state regarding the power of referendum are made a part of the charter and that all actions with reference thereto shall be taken in accordance with those laws save for an exception not here material. Stats.1925, p. 1243.

[1-3] The fundamental issue between the parties to these proceedings is whether article IV, section 1 of our Constitution extends the power of referendum held by the electors of a city to sections and to parts of ordinances. Respondents contend that this power does not so extend. The first reason advanced is that the section makes no specific provision therefor, in contrast to the specific provision in the first paragraph with respect to such portions of the acts of the Legislature. Appellants reply that the extension is made by reasonable implication. We agree. It has long been settled in this state that the constitutional power of referendum possessed by the electors of a city is identical in character with that reserved in the Constitution by the people of the state. Hopping v. Council of City of Richmond, 170 Cal. 605, 609, 150 P. 977; Chase v. Kalber, 28 Cal.App. 561, 568, 153 P. 397; cf. Galvin v. Board of Supervisors, 195 Cal. 686, 689, 690, 235 P. 450. While it is true that both the Hopping and Chase cases were concerned with the question as to what constitutes legislative power and not with the extent of the power of referendum otherwise, their declaration of the identity in constitutional power should be followed here. What is identical in character should be, within its limits, identical in scope. Under article I, section 2 of our Constitution all governmental power, legislative or otherwise, is derived from the people. The power of referendum is one of the legislative powers specifically reserved by the people in their grant of general legislative power to the legislative bodies representing them. The reservation of legislative power to be exercised by referendum has reference to legislative, as distinguished from administrative and ministerial acts, whether of the state legislature, city council or other legislative body. Hopping v. Council of City of Richmond, supra; Dwyer v. City Council, 200 Cal. 505, 511, 253 P. 932; Chase v. Kalber, supra, 28 Cal.App. at page 567, 153 P. 397. The section does not admit of the construction that the constitutional reservation of the power of referendum to the electors of a city is any less extensive in any particular than the same constitutional reservation in favor of the people of the state. The Constitution plainly says that it is the referendum power of the people which is further reserved to the electors of a city. The construction urged by respondents does violence to this plain language. Accordingly, we hold that the constitutional power possessed by the electors of a city extends not only to ordinances and other legislative acts, however denominated, as a whole, but also to sections and parts of those ordinances and acts.

[4-6] A further contention is made that the Elections Code makes no provision for a referendum directed against a section or part of a city ordinance. The question presented for decision thus becomes whether the sections of the Elections Code (read literally) prescribing the procedure for the exercise of the power of referendum or the constitutional reservation of that power shall prevail. Specifically the claim appears to be that a section of an ordinance may not be attacked by referendum for the reason that the procedure provided by the Elections Code applies only to entire ordinances. The Constitution is the fundamental and supreme law of this state as to all matters within its scope. Ex parte Braun, 141 Cal. 204, 211, 74 P. 780. The constitutional reservation is self-executing by its own terms. It has been held that legislative enactments for the purpose of facilitating the operation of a self-executing provision of the Constitution should be liberally construed in order that the constitutional power may not be defeated. Chester v. Hall, 55 Cal.App. 611, 617, 204 P. 237. But here it is unnecessary to rest our decision solely upon the principle just stated for the Constitution itself spells out exactly both the function and the effect of

statutes passed pursuant to the particular section involved. According to the express terms of the Constitution the only function of the applicable sections of the Elections Code is to facilitate the operation of the constitutional power of referendum; and such facilitating legislation may in no way limit or restrict that power. This constitutional limitation upon the effect of these particular statutes now before us had long been recognized. Minges v. Board of Trustees, 27 Cal.App. 15, 21, 148 P. 816; Hill v. Board of Supervisors, 176 Cal. 84, 86, 167 P. 514.

[7, 8] Moreover our courts have frequently stated that, in order to protect the constitutional power of referendum, statutory provisions dealing with it are always to be liberally construed in favor of the power. Whittemore v. Seydel, 74 Cal.App. 2d 109, 115, 168 P.2d 212; Knowlton v. Hezmalhalch, 32 Cal.App.2d 419, 434, 89 P.2d 1109; Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713. We believe that these sections of the Elections Code should be interpreted so as to avoid conflict with the Constitution. Los Angeles County v. Riley, 6 Cal.2d 625, 629, 59 P.2d 139, 106 A.L.R. 903. They are not the source of the referendum power and they cannot be construed as attempting to do what they cannot validly do, that is, prevent the exercise of the constitutional power of referendum to the full extent provided in the Constitution. They provide adequate procedure for the exercise of the constitutional power of electors of cities. They should be construed as applicable to the exercise of the full powers reserved to the people.

[9, 10] The contention advanced by respondents that to permit the exercise of the power of referendum against but two sections of an ordinance would result in untold confusion is without merit. To deny the right would require that an attack be made upon an entire ordinance in order to reach a single severable and obnoxious provision, and would result in far greater confusion. The various sections of this general amendment to the omnibus license tax ordinance of the city are not interdependent but severable. Each deals with a separate license tax, is complete in itself, and could have been enacted as a separate ordinance. The two particular sections against which the referendary petition is directed, dealing respectively with license taxes upon motion picture theatre admissions and public dance hall admissions, are definite, clear, and capable of being understood and intelligently voted upon by the electors. With the exception of these two sections Ordinance No. 595 has long since become effective and has passed beyond the reach of the power of referendum. The general referendum procedure has been adopted by the Compton charter as applicable to referendum elections and it must be held to be the appropriate procedure to be followed in all instances in which the electors seek to exercise the power of referendum reserved to them by the Constitution. Since an attack upon the two sections in question was authorized it was the duty of the city council to call the election for the repeal of those sections and to proceed as in the case of a petition directed against an entire ordinance.

We conclude therefore, that the peremptory writ should issue as prayed for and that respondents should either repeal the two sections against which the referendum is directed or submit them to a vote of the qualified electors of the city of Compton pursuant to the referendum sections of the Elections Code, and it is so ordered.



80 Cal.App.2d 798

PEOPLE v. CAMPBELL.

Cr. 4096.

District Court of Appeal, Second District, Division 3, California.

July 10, 1947.

Hearing Denied Aug. 7, 1947.

1. Infants ⇐20

Evidence sustained conviction of committing a lewd and lascivious act upon a nine year old girl, as against contention that testimony of girl was inherently improbable and not entitled to the credence

necessary to uphold conviction. Penal Code, § 288.

2. Infants ⇐20

In prosecution for committing a lewd and lascivious act upon nine year old girl, corroboration of girl's testimony was not prerequisite to a finding of guilt. Penal Code, § 288.

3. Criminal law ⇐1159(2)

Although an appellate court will not uphold judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not require reversal.

4. Criminal law ⇐1159(4)

To warrant rejection of statements given by a witness who has been believed by the trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

5. Criminal law ⇐260(11), 1159(3, 4)

Conflicts in the evidence and testimony which is subject to justifiable suspicion do not justify reversal of a judgment, since it is the exclusive province of the trial judge or jury to determine the credibility of witnesses and truth of the facts upon which a determination depends.

6. Criminal law ⇐260(11)

The fact that lewd and lascivious acts charged were of a revolting character did not prove that it was inherently improbable that defendant committed them, so as to require reversal of conviction. Pen. Code, § 288.

7. Criminal law ⇐1023(10)

Where no judgment was pronounced and probation was granted, attempted appeal from judgment would be dismissed.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Edward O. Campbell was convicted of committing a lewd and lascivious act, but no judgment was pronounced, and he appeals.

Order denying motion for new trial affirmed; attempted appeal from judgment dismissed.

Ray L. Smith, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

Appeal is taken by the defendant from the judgment and the order of the trial court denying his motion for a new trial following his conviction after trial by court of the offense of violation of section 288 of the Penal Code. No judgment was pronounced and probation was granted. The order appealed from and the judgment of conviction are attacked solely on the ground of the insufficiency of the evidence based upon the contention that the testimony of the complaining witness, a nine-year-old girl, is inherently improbable and not entitled to the credence necessary to uphold the conviction.

[1] It seems unnecessary to render a detailed recital of the evidence in the case, it being sufficient to say that there is ample direct evidence to show the commission of acts by defendant on the person of the complaining witness falling within the provisions of section 288, Penal Code, which, if not incredible, furnish adequate support for the judgment and order denying new trial. There is no material disparity in the testimony of the complaining witness and the defendant as to the circumstances and incidents leading up to the acts complained of. Such evidence discloses that they were left alone together for some twelve or thirteen minutes, they danced together, and were together at the davenport thereafter. Defendant concedes that the child was close to and directly in front of him while he was seated on the davenport, that she put her arms around his neck and he asked her if that was the way she hugged her boy friend; that she started hugging him a little harder at which time he leaned back, throwing her off balance and causing her to fall over him on the davenport; he lost his cigarette and in reaching for it bent his head down into contact with her legs. The complaining witness stated that the acts occurred by use of force upon her. Defendant argues that her testimony was not only inherently improbable but that the

commission by him of the acts of which complaint is made was physically impossible.

[2-5] Corroboration of the child's testimony is not a prerequisite to a finding of guilt. People v. Carlson, 73 Cal.App.2d 933, 936, 167 P.2d 812; People v. Spillard, 15 Cal.App.2d 649, 59 P.2d 887. The right of courts on appeal to set aside jury verdicts or judgments of a court in a case tried without a jury wherein sex crimes committed upon and with children are involved upon the ground that the testimony of the complaining witness therein is inherently improbable has been fully discussed in the recent cases of People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94, and People v. Carlson, supra. As was said by our Supreme Court in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Back v. Farnsworth, 25 Ca.App.2d 212, 219, 77 P.2d 295; Lufkin v. Patten-Blinn Lumber Co., 15 Cal.App.2d 259, 262, 59 P.2d 414; Agoure v. Spinks Realty Co., 5 Cal.App.2d 444, 451, 42 P.2d 660; Hughes v. Quackenbush, 1 Cal.App. 2d 349, 354, 355, 37 P.2d 99; Powell v. Powell, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850.)"

[6] The evidence, when reviewed in the light of the principles enunciated in the foregoing cited cases, fails to convince us that as a matter of law the testimony given by the complaining witness was either inherently improbable or that the acts of which complaint is made were impossible of commission. The fact that they were of a revolting character does not prove that it was inherently improbable that the defendant committed them. People v. Wasenius, 113 Cal.App. 106, 297 P. 966; People v. Carlson, supra, 73 Cal.App.2d at page 939, 167 P.2d 812. Furthermore, the trial judge had the opportunity of seeing and hearing the witnesses and was in a better position to evaluate the weight and sufficiency of their testimony than can possibly be disclosed by a mere reading of the written record. His denial of the defendant's motion for a new trial has again placed his stamp of approval upon the judgment of conviction. Under all of the facts and circumstances of this case and giving full consideration to the weight and sufficiency of the evidence his conclusion will not be disturbed.

[7] The order from which this appeal is taken denying defendant's motion for a new trial is affirmed. There being no judgment, the attempted appeal therefrom is dismissed.

SHINN, Acting P. J., and WOOD, J., concur.



Petition of MILLER et al.

KUCHEL, State Controller, v. MILLER.*

Civ. 15615.

District Court of Appeal, Second District, Division 2, California.

July 9, 1947.

Hearing Granted Aug. 28, 1947.

1. Husband and wife ⇐249

Property does not lose its status as community property by a conversion from personalty to realty or vice versa.

2. Husband and wife ⇐249

The character of property as separate or community property is determined by its nature at the time of its acquisition, and the character fixed at that time re-

* Subsequent opinion 187 P.2d 722.

mains unless it is thereafter changed in some manner recognized by law.

3. Husband and wife ⇐255

Real property which was purchased in California by husband after he became a resident with proceeds of drug business theretofore operated in Iowa was community property though proceeds were separate property of husband under Iowa law, since the proceeds would have been community property if acquired while domiciled in California and such proceeds for purpose of inheritance tax had status of community property as soon as husband and wife became residents of California. Gen.Laws, Act 8495, § 1(2).

4. Courts ⇐107

Where Supreme Court granted a hearing after decision by District Court of Appeal, and subsequent thereto upon stipulation of the parties and before decision by the Supreme Court the appeal was dismissed, opinion of the District Court of Appeal was a nullity.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the petition of Marguerite W. Miller and Vivien Miller for an order establishing the fact of death of Ralph H. Miller. From an order sustaining objections of Marguerite W. Miller to report of the inheritance tax appraiser, Thomas H. Kuchel, Controller of the State of California, appeals.

Affirmed.

James W. Hickey, Inheritance Tax Atty., of Sacramento, Donald R. Peck, Deputy Inheritance Tax Atty., and Morton L. Barker, both of Los Angeles, and Joseph D. Lear, Asst. Deputy Inheritance Tax Attys., of Sacramento, for appellant.

Hahn & Hahn and A. Hale Dinsmoor, all of Pasadena, for respondent.

McCOMB, Justice.

This is an appeal by the Controller of the State of California from an order of the probate court sustaining respondent's objections to the report of the inheritance tax appraiser which had held that a parcel of real property of the estate of Ralph H. Miller, deceased, was his separate property. The probate court held that the property was the community property of the decedent, thus reducing the inheritance tax from $746.06 to $207.41.

Conceded Facts

Prior to 1921 decedent and his wife were domiciled in the state of Iowa. While so domiciled in Iowa Mr. Miller accumulated certain property as a result of his earnings while engaged in the drug business. These earnings were received during marriage and the property accumulated therefrom would have been the community property of Mr. and Mrs. Miller had they then been domiciled in the state of California. Iowa is, however, a common law state and under its laws said property became the separate property of decedent.

In 1921 Mr. and Mrs. Miller came to California and established their residence which remained the state of Mr. Miller's residence until his death on April 10, 1945. At the time of his death he held property in joint tenancy with Mrs. Miller of a total value of $63,653.96, of which $36,600 was the value of real property located in California. The balance was intangible personal property. All of this property, both real and personal, represented the rents, issues, profits and reinvestments of the property acquired from Mr. Miller's earnings from the drug business while he was a resident of Iowa.

Upon Mr. Miller's death this proceeding to establish the fact of death was instituted and an inheritance tax appraiser appointed who, in arriving at the inheritance tax, treated the real property of the estate as the separate property of decedent.

Question

Was the real property in Mr. Miller's estate separate or community property?

Under the facts above stated the real property of the estate was community property and not the separate property of decedent.

This conclusion is reached by application of these established principles in the law of community property:

1) At the times herein mentioned the state inheritance tax act provided that "intangible personal property, wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either husband or wife if acquired while domiciled in this State shall be deemed to be community property." (Inheritance Tax Act of 1935, sec. 1, subd. 2; Stats.1935, chap. 358, p. 1267, Gen.Laws, Act 8495.)

[1] 2) Property does not lose its status as community property by a conversion from personalty to realty or vice versa. (Roberts v. Wehmeyer, 191 Cal. 601, 605, 218 P. 220.

[2] 3) The character of property as being either separate or community is determined by its nature at the time of its acquisition, and the character fixed at that time remains unless it is thereafter changed in some manner recognized by law. (Palen v. Palen, 28 Cal.App.2d 602, 604, 83 P.2d 36; Phelps v. Davies, 126 Cal.App. 419, 426, 14 P.2d 922.)

[3] Applying the foregoing rules to the facts of the instant case it is conceded that the consideration for the real property in question was the earnings of decedent acquired while he was domiciled in Iowa, which property would not have been his separate property and would have been community property had he acquired it while domiciled in California.

Therefore under the rule first above stated such property for the purpose of the inheritance tax had the status of community property as soon as the decedent and his wife became residents of the state of California. Since it is conceded that the real property in question was purchased with funds from such community property, under the second rule above stated, it is evident that the real property at the time of its purchase was community property and under rule three it retained its character as community property until the time of Mr. Miller's death, its nature not having been changed in one of the manners recognized by the laws of this state.

Therefore the probate court properly held such property was community property, and based the inheritance tax upon its character as such.

[4] In re Way's Estate, Cal.App., 157 P.2d 46, discussed by counsel is of no assistance in determining the problem presented to us for the reason that the Supreme Court granted a hearing after decision by the District Court of Appeal, and subsequent thereto upon stipulation of the parties and before decision by the Supreme Court the appeal was dismissed. Thus the opinion of the District Court of Appeal was a nullity and is of no force or effect. (In re Estate of Kent, 6 Cal.2d 154, 156, 57 P.2d 901.

It should also be noted that though we have reached the same conclusion as the District Court of Appeal for the first district did in Estate of Way, such case did not involve the construction of the Inheritance Tax Act, but did involve the construction of section 201.5 of the Probate Code which is somewhat similar in wording to the Inheritance Tax Act section here under consideration. However, in Estate of Way there were other questions involved aside from the construction of section 201.5 of the Probate Code, which questions are not involved in the instant case.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.



80 Cal.App.2d 790

DORAN v. HIBERNIA SAVINGS & LOAN SOC. et al.

Civ. 13368.

District Court of Appeal, First District. Division 2, California.

July 10, 1947.

1. Insane persons ⇐65

The guardian of an incompetent person becomes vested merely with the legal, not the beneficial, title of the incompetent's property, and his possession, accordingly, is but a limited and temporary possession,

as a trustee for the benefit of the incompetent. Probate Code, §§ 1400, 1460, 1580(5).

2. Joint tenancy ⇐5

In the case of a joint tenancy bank account, even the destruction of the unity of title does not terminate the joint tenancy.

3. Joint tenancy ⇐5

If money is taken from a joint tenancy account during the joint lives of the depositors, property acquired by the money so withdrawn, or another account into which the money is traced, will retain its character as property held in joint tenancy like the original fund, unless there has been a change in the character by some agreement between the parties.

4. Joint tenancy ⇐4

The assumption of possession by incompetent's guardian of two joint tenancy savings accounts in the names of the incompetent and incompetent's niece and in name of incompetent and her nephew, for the purpose of taking care of the incompetent's property, did not sever the joint tenancies, in absence of an agreement by the parties changing the character of the accounts, and therefore the niece and nephew were entitled to the proceeds of the accounts on the death of the incompetent, and the incompetent's administrator had no interest in the accounts. Gen.Laws, Act 652, § 15a.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by James Doran, as administrator of the estate of Anna A. Doran, also known as Anne A. Doran, deceased, against the Hibernia Savings & Loan Society, the Hibernia Bank, Robert M. Leveira, and Bernita Leveira to quiet title to two joint tenancy savings accounts in the Hibernia Bank. From a judgment finding that Bernita Leveira was the sole owner of one account and that Robert M. Leveira was the sole owner of the other account, and that the plaintiff's estate had no interest in either, the plaintiff appeals.

Judgment affirmed.

Cosgrove, Molinari & Tinney, of San Francisco, for appellant.

Tobin & Tobin, of San Francisco, for respondents.

GOODELL, Justice.

Anna A. Doran died intestate on December 17, 1944, leaving as heirs at law a brother, James Doran, a niece, Bernita Leveira, and two nephews, Robert M. and Joseph R. Leveira. The decedent's brother was appointed administrator of her estate and brought this suit to quiet title to two joint tenancy savings accounts in the respondent bank. The court found that respondent Bernita Leveira was the sole owner of one account, that respondent Robert M. Leveira was the sole owner of the other, and that the estate had no interest in either. From a judgment entered on those findings the administrator appeals.

On April 1, 1933, the first account was opened in the names of Anna A. Doran or Bernita Leveira, payable to either or the survivor. When the decedent died there was $3,609.80 therein.

On August 9, 1937, the second account was opened in the names of Anna A. Doran or Robert M. Leveira, payable to either or the survivor. At the time of the death there was $5,982.90 therein.

On March 24, 1943, the Superior Court, San Francisco, adjudged Anna A. Doran to be an incompetent person, and appointed the respondent Bernita Leveira guardian of her person and estate. At that time there was $2,988.25 in the first account and $6,314.96 in the second.

On June 1, 1943, the same court adjudged Anna A. Doran to be mentally ill and committed her to the State Hospital at Stockton, where she died.

It is the contention of the appellant that the adjudication of incompetency and the taking of possession of the accounts by the guardian, destroyed one of the four unities —that of possession—and thus terminated the joint tenancies.

It was stipulated that the accounts were opened in accordance with section 15a of the Bank Act, Gen.Laws, Act 652, which provides that "* * * The making of the deposit in such form (joint tenancy)

shall * * * be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor * * * may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor * * *." See also Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas.1916D, 515.

The bank and the surviving depositors are parties to this action, hence the inquiry presents itself as to what there is about the appointment of a guardian that will defeat the established intention to vest title in the surviving tenant.

[1] The reason why a guardian is needed for an incompetent person is that such person is "unable, unassisted, properly to manage and take care of * * * his property * * *." Sec. 1460, Probate Code. The very definition of a guardian seems to answer the appellant's contention, for "A guardian is a person appointed to take care of the * * * property of another * * *." Sec. 1400, Probate Code. If the guardian's duty is to *take care* of the ward's property it must follow that the guardian's possession is the ward's possession. At least it cannot be that the ward is dispossessed in the sense that the unity of possession theretofore existing is destroyed. Neither the guardian's title nor possession can be in any degree adverse to the ward's. Sec. 1580, subd. 5, Probate Code. The guardian becomes vested merely with the legal, not the beneficial, title (De Greayer v. Superior Court, 117 Cal. 640, 644, 49 P. 983, 984, 59 Am.St.Rep. 220) and his possession, accordingly, is but a limited and temporary possession, as a trustee, for the benefit of the ward. As was said in the last cited case, "He it is to whose custody the property of the ward is entrusted, and to whom the law and the ward alike look for its safe return."

What was the nature and extent of the claimed dispossession in this case? The guardian left both accounts where they were. The only change was the addition of the guardian's name. Moreover, on the guardian's own motion the accounts were frozen under section 51 of the Bank Act so as to reduce the size of the bond. No interference or dominion was exercised over the accounts by Bernita Leveira save in her fiduciary capacity. Both accounts were kept virtually in status quo. They were inventoried by the guardian as follows:

"Moneys belonging to said Incompetent which have come to the hands of the Guardian:

"Account No. 643–263 standing in the names of Anna A. Doran or Robert M. Leveira, in The Hibernia Savings and Loan Society, in the sum of...	$6,314.96
"Account No. 622–330 standing in the names of Anna A. Doran or Bernita M. Leveira, in The Hibernia Savings and Loan Society, in the sum of,.....	2,988.25"

It must be borne in mind that this contest was instituted after the death of one of the joint tenants and is between the administrator of the deceased tenant's estate, and the other joint tenant. It is not a contest waged during the lifetime of both. The difference just noted is discussed and the authorities cited in the case of Wallace v. Riley, 23 Cal.App.2d 654 at pages 662, 663, 74 P.2d 807. The cases relied on by appellant, Abrams v. Nickel, 50 Ohio App. 500, 198 N.E. 887 and Ulmer v. Society for Savings, Ohio App., 41 N. E.2d 578 (both in the Court of Appeals of Ohio), were contests carried on during the lives of the depositors. For this reason neither case is in point. Furthermore the question presented on this record, after death, as to survivorship, could not similarly arise in Ohio for there the statute (somewhat like our 15a) does not, as ours does, set up the conclusive presumption of the intention of the depositors to vest title in the survivor.

The appellant contends, further, that where one of the tenants becomes the guardian of the other and assumes control of the account "as the sole property of the guardianship estate * * * all of the joint tenancy property should be delivered to the administrator of the estate of the incompetent upon the latter's death intestate."

The guardian did not assume control "as the sole property of the guardianship

estate", nor admit, as claimed by appellant, "by her proceedings in the incompetent's guardianship that the entire moneys on deposit in the two accounts constituted the sole property of the incompetent." We have already shown that the guardian scheduled these accounts in the inventory as standing in the names of Anna A. Doran or Bernita M. Leveira in one instance, and in Anna A. Doran or Robert M. Leveira in the other. The description of the accounts in the inventory would seem to be technically correct. See Conneally v. San Francisco Savings & Loan Soc., 70 Cal. App. 180, 182, 232 P. 755. There is nothing in the proceedings to indicate that respondent Bernita Leveira intended to quitclaim or abandon her joint interest in her account, and she certainly could not do so with respect to the account in which her brother was interested.

The appellant also makes the following claim, based on the Ohio case of Ulmer v. Society for Savings, supra: "We submit that a court of equity should inquire into the respective contributions of the joint tenants and, it appearing from the guardianship proceedings that the entire moneys in the two accounts represented assets of the incompetent, for that reason the whole thereof should be delivered to the administrator of her estate." The appellant had the burden of proof in this case, and the record shows no attempt to prove the origin of the two accounts or the proportionate contributions to them. Had such attempt been made the administrator doubtless would have been met with the objection that, the creation of a joint tenancy having once been established, the prior ownership of the money which went into it was "a circumstance of no importance." See Kennedy v. McMurray, 169 Cal. 287, 293, 146 P. 647, Ann.Cas.1916D, 515; Conneally v. San Francisco Savings & Loan Soc., supra, 70 Cal.App. 180, 182, 232 P. 755.

[2, 3] In the case of a bank account it is settled in this state that even the destruction of the unity of title does not terminate the joint tenancy. Estate of Harris, 9 Cal.2d 649, 655, 72 P.2d 873; Estate of Harris, 169 Cal. 725, 147 P. 967. In Wallace v. Riley, 23 Cal.App.2d 654, 665, 74 P.2d 807, 813, supra, this court said: "Contrary to the rule of the common law * * * it has become the established principle in California that, if money is taken from a joint tenancy account during the joint lives of the depositors, property acquired by the money so withdrawn, or another account into which the money is traced, will retain its character as property held in joint tenancy like the original fund, unless there has been a change in the character by some agreement between the parties. This departure from the rule of the common law was first announced in Estate of R. T. Harris, 169 Cal. 725, 728, 147 P. 967, and, in determination of questions recently arising in the estate of his widow, was reaffirmed in Estate of Maria L. Harris, [9 Cal.2d 649], 72 P.2d 873. See, also, Estate of McCoin, 9 Cal.App.2d 480, 482, 50 P.2d 114; Lagar v. Erickson, 13 Cal.App.2d 365, 370, 56 P. 2d 1287; In re Kessler, 217 Cal. 32, 17 P. 2d 117; Young v. Young, 126 Cal.App. 306, 312, 313, 14 P.2d 580; Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 688, 38 P. 2d 790." See, also, State v. Gralewski's Estate, et al., 176 Or. 448, 159 P.2d 211, 161 A.L.R. 66 (a case where one joint tenant was adjudged insane, but that point was not raised).

[4] With such a rule insuring the integrity and continuity of a joint tenancy account, *in the absence of an agreement changing its character,* it is difficult to see how the assumption of possession by the guardian, *for the purpose of taking care of the ward's property,* could sever the joint tenancies.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

80 Cal.App.2d 769

NATIONAL AUTOMOBILE & CASUALTY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15679.

District Court of Appeal, Second District, Division 3, California.

July 8, 1947.

1. Workmen's compensation ⇐1939

The findings of the Industrial Accident Commission on questions of fact are conclusive and are not subject to review. Labor Code, § 5953.

2. Workmen's compensation ⇐1939

Where the facts are not in dispute, the Industrial Accident Commission's implied finding of sole employment by a particular employer is in reality a conclusion of law from undisputed facts, as respects review. Labor Code, § 5953.

3. Workmen's compensation ⇐1939

The District Court of Appeals, on writ of review for annulment of a compensation award, has duty of determining whether the Industrial Accident Commission has exceeded its jurisdiction by making any of its findings contrary to the evidence or without supporting substantial evidence. Labor Code, § 5952(a, d).

4. Workmen's compensation ⇐1939

Where only one inference might properly be drawn from the facts, whether claimant at time of injury was working solely in course of employment by warehouse company or working in the course of a joint employment by cooperative and warehouse company was solely a question of law, decision on which was subject to review by the court. Labor Code, §§ 5952 (a, d), 5953.

5. Workmen's compensation ⇐1072

No apportionment of liability between employers or their insurance carriers can affect a compensation claimant's rights against them.

6. Workmen's compensation ⇐239

The fact that manager of co-operative and warehouse company received his entire salary from co-operative did not establish that co-operative was his sole employer for purposes of workmen's compensation.

7. Workmen's compensation ⇐250

The fact that co-operative alone paid compensation insurance premiums upon salary of manager for co-operative and warehouse company did not establish that co-operative was his sole employer for workmen's compensation purposes.

8. Workmen's compensation ⇐239

The fact that no part of salary of manager for co-operative and warehouse company was paid to him directly by warehouse company did not prevent the existence of an employment relationship between them, for purposes of workmen's compensation.

9. Workmen's compensation ⇐201

Where compensation claimant served as manager both of co-operative and of warehouse company but his salary and compensation insurance premiums were paid entirely by the co-operative in consideration of the use by co-operative of property of the warehouse company, and where right to control and direct manager's work in detail was possessed by both co-operative and by company, employment relationship existed between manager and both of them.

10. Workmen's compensation ⇐1433

Evidence that salary and compensation insurance premiums of manager for both co-operative and warehouse company were paid by co-operative alone was insufficient to sustain finding that co-operative was manager's sole employer, in view of evidence that right to control and direct manager's work in detail was possessed by both concerns.

11. Workmen's compensation ⇐201

The dual employment of manager by co-operative and by adjoining warehouse company under agreement by co-operative to pay salary and compensation insurance premiums in consideration of use of certain warehouse property and under arrangement for manager to give all of his time to both, was joint rather than concurrent, and hence cooperative was liable equally with company for injuries sustained by manager while engaged in supervising a shipment by company on its property.

12. Insurance ⇐146(3)

Uncertainty of meaning in compensation insurance policy would be resolved

against insurance carrier as the one who drafted the policy and caused the uncertainties to exist. Civ.Code, § 1654.

13. Insurance ⇐146(1)

A policy issued pursuant to the workmen's compensation statute should be construed with the purpose of the statute in mind. Labor Code, §§ 5952(a, d), 5953.

14. Workmen's compensation ⇐1065

An employee entitled to compensation under statutes should not be excluded from coverage of employer's compensation insurance policy unless exclusion is plain and unambiguous. Labor Code, §§ 5952 (a, d), 5953.

15. Workmen's compensation ⇐1065

Where workmen's compensation insurance policy excluded persons having executive officer titles from coverage unless specifically included in classification of operations, and classification of operations included "local manager", manager who at time of injury was secretary-treasurer of employer was within coverage of policy.

Proceeding under the Workmen's Compensation Act by Frank Pitt, claimant, opposed by Glenn Growers Cooperative, Inc., and the National Automobile & Casualty Insurance Company, insurance carrier. On application by the insurance carrier for a writ of review to annul an award against carrier by the Industrial Accident Commission.

Award annulled and case returned to the Commission.

Walter B. Henretty, of Sacramento, and Henry G. Sanford, of San Francisco, for petitioner.

R. C. McKellips and John A. Rowe, Jr., both of San Francisco, for respondent Industrial Accident Commission.

Donald Gallagher, Edward C. Neely and Royle A. Carter, all of San Francisco, for respondent State Compensation Insurance Fund.

SHINN, Acting Presiding Justice.

Petitioner, the insurance carrier of Glenn Growers Cooperative, Inc., hereinafter called Cooperative, seeks annulment of an award made against it by respondent commission on the two grounds that (1) the claimant, Frank Pitt, was not at the time of his injury acting within the course of his employment by the Cooperative, and (2) was not covered by petitioner's policy of compensation insurance. In support of the first ground petitioner contends that Pitt at the time of his injury was either working solely in the course of his employment by Eibe and Huffman Warehouse Company, Inc., hereinafter called Warehouse Company, in which event petitioner should wholly escape liability, or working in the course of a joint employment by the Cooperative and the Warehouse Company, in which event petitioner's liability should be reduced proportionately. Respondent commission found, in effect, that Pitt was injured solely in the course of his employment by the Cooperative. The initial issue therefore is whether Pitt was solely employed by the Cooperative or employed both by the Cooperative and the Warehouse Company. The facts of the employment relationship between Pitt, the Cooperative, and the Warehouse Company existing at the time of the injury are not in dispute. These facts were proven by the testimony of Pitt, then the manager of both the Cooperative and the Warehouse Company, and of McGowan, president of both corporations. There is no conflict in the testimony of these two men. They were the principal, and for all practical purposes, the sole actors in the effectuation of the relationship.

The Cooperative operated a rice drier which adjoined the buildings of the Warehouse Company. Pitt served as the manager of both concerns, but his salary and the compensation insurance premiums thereon were paid entirely by the Cooperative, pursuant to an oral arrangement it had with the Warehouse Company during the entire period of Pitt's dual employment. The arrangement was that solely in return for Pitt's services as manager of the Warehouse Company, it made available its scales and a portion of its premises, including part of its warehouse, to the Cooperative. Pitt's injury occurred in the part of the warehouse used by the Warehouse Company, and at that time he was engaged in the

supervision of a shipment of rice by the Warehouse Company. However, Pitt divided his working time between the two concerns and when engaged in the work of the one, he was always on call by the other.

[1-4] As previously indicated, respondent commission found in effect that Pitt's injury occurred solely in the course of and arose out of his employment by the Cooperative. The findings and conclusions of the commission on questions of fact are conclusive and final and are not subject to review. Labor Code, sec. 5953. But here the facts are not in dispute and the commission's implied finding of sole employment by the Cooperative is in reality a conclusion of law from the undisputed facts. This court is charged with the duty of determining whether or not the commission has exceeded its jurisdiction by making any of its findings contrary to the evidence or without supporting substantial evidence. Labor Code, sec. 5952 (a), (d); Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 122, 29 P.2d 852; Hartford Accident & Indemnity Co. v. Industrial Accident Comm., 139 Cal. App. 362, 365, 33 P.2d 686; F. W. Woolworth Co. v. Industrial Accident Comm., 17 Cal.2d 634, 636, 111 P.2d 313. In cases involving the question whether the claimant was an employee or an independent contractor, the rule has been evolved that this question, which frequently is one of both law and fact, becomes solely one of law when but one inference can be reasonably drawn from all the facts. Schaller v. Industrial Accident Comm., 11 Cal.2d 46, 50, 51, 77 P.2d 836; Yucaipa Farmers Co-op. Ass'n v. Industrial Accident Comm. 55 Cal.App.2d 234, 238, 130 P.2d 146; Crown City Lodge etc. v. Industrial Accident Comm., 10 Cal.App.2d 83, 86, 87, 51 P.2d 143. We believe that this rule by analogy fits the situation before us. The only inference that may properly be drawn from the facts of the instant case is the one of dual employment of Pitt by the Cooperative and the Warehouse Company. Petitioner is therefore entitled to object to the erroneous discharge by the commission of the insurance carrier of the Warehouse Company. Hartford Accident & Indemnity Co. v. Industrial Accident Comm., 8 Cal.2d 589, 591, 67 P.2d 105.

[5-10] The commission's legal conclusion of sole employment by the Cooperative cannot be sustained. As will be developed more fully, its referee's holding to that effect involved a patent misconstruction of the purpose and effect of the arrangement between the Cooperative and the Warehouse Company as to Pitt's employment. Moreover, the holding was based upon the erroneous conception that the employers could by agreement between themselves control the matter of their liability. This conception runs counter to the now well-established principle in workmen's compensation cases in this state that no apportionment of liability between employers or their insurance carriers can affect a claimant's rights against them. National Automobile Ins. Co. v. Industrial Accident Comm., 23 Cal.2d 215, 221, 143 P.2d 481; American Motorists Ins. Co. v. Industrial Accident Comm., 8 Cal.2d 585, 588, 67 P.2d 103. Finally, as will be amplified, the facts of the employment relationship before us, when analyzed, point clearly to the conclusion of dual employment rather than single employment. The fact that Pitt received his entire salary from the Cooperative does not establish that concern to be his sole employer. Guarantee Ins. Co. v. Industrial Accident Comm., 22 Cal.2d 516, 520, 139 P.2d 905; Independence Indemnity Co. v. Industrial Accident Comm., 203 Cal. 51, 58, 262 P. 757. The fact that the Cooperative alone paid the compensation insurance premiums upon Pitt's salary is likewise inconclusive. American Motorists Ins. Co. v. Industrial Accident Comm., supra. Similarly, the fact that no part of Pitt's salary was paid to him directly by the Warehouse Company does not prevent the existence of an employment relationship between them. Department of Natural Resources v. Industrial Accident Comm., 216 Cal. 434, 438, 14 P.2d 746; Union Lumber Co. v. Industrial Accident Comm., 12 Cal.App.2d 588, 595, 596, 55 P.2d 911; Claremont Country Club v. Industrial Accident Comm., 174 Cal. 395, 398, 163 P. 209, L.R.A.1918F, 177. The terms of the arrangement between the Cooperative and the Warehouse Company as to Pitt's employment show that no part of the services rendered by him to either concern was gratuitous and that the Ware-

house Company in reality bore its share of the cost of his services by furnishing to the Cooperative, in return for Pitt's services to the Warehouse Company, the use of certain of its property rent free. The right to control and direct Pitt's work in detail, whether exercised or not, was possessed by both concerns and gave rise to an employment relationship between Pitt and both of them. Industrial Indemnity Exchange v. Industrial Accident Comm., 26 Cal.2d 130, 135, 156 P.2d 926. The commission's finding to the effect that the Cooperative was Pitt's sole employer is contrary to and unsupported by the evidence.

[11] The dual employment of Pitt being established, there remains the question whether as a matter of law such employment was concurrent or joint. The Cooperative claims that Pitt's dual employment was concurrent and therefore that at the time of his injury he was acting only within the course of his employment by the Warehouse Company. It is true that at the time of his injury Pitt was in the portion of the warehouse used by the Warehouse Company rather than the Cooperative and was engaged in supervising a shipment of rice by the Warehouse Company in which the Cooperative had no interest. Consequently his work at the moment of injury was directly for and under the immediate control of the Warehouse Company. Moreover, the more usual bases for the holding of joint employment do not exist here. So far as the record shows there was no joint hiring. Cf. Page Engineering Co. v. Industrial Comm., 322 Ill. 60, 152 N.E. 483, 485. These two employers were not engaged in some species of joint enterprise for their mutual benefit. See New York Indemnity Co. v. Industrial Accident Comm., 126 Cal.App. 37, 41, 14 P.2d 160; Ragos v. Industrial Accident Comm., 83 Cal.App. 313, 316, 256 P. 487. Pitt was not engaged at the moment of his injury in the common work of both. See Press Pub. Co. v. Industrial Accident Comm., 190 Cal. 114, 118, 210 P. 820; San Francisco-Oakland Terminal Rys. v. Industrial Accident Comm., 180 Cal. 121, 125, 179 P. 386; Standard Acc. Ins. Co. v. Industrial Accident Comm., 123 Cal.App. 443, 444, 11 P.2d 401; Stresenreuter, Inc. v. Industrial Comm., 322 Ill. 787, 152 N.E. 548; Butler v. Industrial Comm., 50 Ariz. 516, 73 P.2d 703, 706; Perry Canning Co. v. Industrial Comm., 75 Utah 1, 281 P. 467, 469. On the other hand, the elements of concurrent employment do not exist here. Pitt's employers did not act independently of each other in their employment of him. Cf. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 418, 156 P. 491, Ann.Cas.1917E, 390. There was not a separate and individual employment of him by each. Cf. Becker v. Industrial Accident Comm., 212 Cal. 526, 533, 298 P. 979; Kinsman v. Hartford Courant Co., 94 Conn. 156, 108 A. 562. His duty to serve the one was not independent of his corresponding duty to serve the other. Cf. Bamberger Elec. R. Co., v. Industrial Comm., 59 Utah 257, 203 P. 345, 346; Kirkpatrick v. Yeamans Motor Co., 143 Kan. 510, 54 P.2d 960, 964.

The answer to the legal question whether the dual employment of Pitt was concurrent or joint turns upon the correct construction of the purpose and effect of the arrangement between Pitt's two employers concerning his employment. The fact that Pitt, under the arrangement, was carried only on the payroll of the Cooperative does not militate against the conclusion of joint employment. San Francisco-Oakland Terminal Rys. v. Industrial Accident Comm., supra, 180 Cal. at pages 125, 126, 179 P. 386. As previously indicated, under the arrangement the Warehouse Company in reality bore the cost of Pitt's services to it. It is true that Pitt's services to his two employers was several in the sense that he did not do the particular work of both simultaneously. But just as the burden of his salary was shared between them, so were his services likewise shared between them. He did not give a specific portion of his working time to each but all of it to both. Cf. Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N.W. 810, 811, 30 A.L.R. 993. This is shown by Pitt's testimony that when working for the one, he was always on call by the other. McGowan, the common president of the two employers and apparently Pitt's immediate superior, also understood the purpose and effect of the arrangement to be one of joint employment of Pitt. That is the plain purport of his testimony to the effect that

when injured Pitt was performing not only his duties as manager of the Warehouse Company but also his duties as manager of the Cooperative, pursuant to the arrangement between the two concerns. That arrangement was such that his employment for each corporation required him also to work for the other. It is a reasonable inference from the testimony of these two men regarding Pitt's employment relationship to the two concerns that had his services to the one been unsatisfactory, the other would have terminated its end of the dual employment as well—in short, that his employment by them was joint. Cf. San Francisco-Oakland Terminal Rys. v. Industrial Accident Comm., supra, 180 Cal. at page 124, 179 P. 386. To reword the language of Mr. Justice Shenk in the somewhat comparable but decidedly weaker case of Hartford Accident & Indemnity Co. v. Industrial Accident Comm., 202 Cal. 688, 692, 262 P. 309, 58 A.L.R. 1392, the service Pitt was performing at the time of his injury was in furtherance of the arrangement made for the mutual benefit of his joint employers and was incidental thereto. The service being joint, the employment was joint. Where employment is joint, it is not the rule in this state to impose liability solely on the employer whose particular work was being done at the moment of injury. Hartford Accident & Indemnity Co. v. Industrial Accident Comm., supra; cf. Murphy Supply Co. v. Fredrickson, 206 Wis. 210, 239 N.W. 420, 422.

[12-15] Petitioner, the insurance carrier of the Cooperative, takes the further position that, notwithstanding the joint employment of Pitt by both the Cooperative and the Warehouse Company, it should be discharged from liability because the policy issued by it to the Cooperative in effect at the time of Pitt's injury did not cover him. Petitioner rests this position upon the admitted fact that Pitt was at the time of his injury an executive officer of the Cooperative, namely, its secretary-treasurer, and upon the further fact that by the express terms of the policy all persons having executive officer titles, irrespective of their particular titles and irrespective of the work they performed, were excluded from the coverage of the policy "unless specifically included by statement in the schedule of operations of the Declarations or specifically insured by Endorsement attached to this Policy." The record shows that the second exception to the executive officer exclusion was not satisfied, but the parties on this appeal differ as to whether the first exception was satisfied. Apparently all agree that "schedule of operations" as used in the first exception means "classification of operations." The classification of operations included "local manager" and the controversy centers upon the point whether Pitt was specifically included within the classification of operations, within the meaning of the exception, when such inclusion was not by name or executive officer title but simply as "local manager." It is conceded that "local manager" meant Pitt.

The policy is silent as to what is required in order that a person be "specifically included" in the schedule (classification) of operations. In giving the proper effect to this silence, a reliable guide is found in the contrasting language used in the corresponding exception to the companion exclusions of firm members and relatives. These expressly provide that the person or relative must be specifically named in the classification of operations. The fact that no such requirement was made in the exclusion before us indicates that no such specific naming was intended. Similarly, in view of this exact language in the companion exclusion exceptions, it is reasonable to conclude that if inclusion by executive officer title had been desired, it would have been enunciated. Cf. National Automobile Ins. Co. v. Industrial Accident Comm., 19 Cal.2d 540, 542, 543, 122 P.2d 1. This silence plainly occasions uncertainty of meaning. All such uncertainties must be resolved against petitioner, the party who drafted the policy, as the one causing the uncertainties to exist. Civil Code, sec. 1654; Ocean etc. Corporation Ltd. v. Industrial Accident Comm., 194 Cal. 127, 132, 228 P. 1; Maryland Casualty Co. v. Industrial Accident Comm., 178 Cal. 491, 494, 173 P. 993; United States Fidelity & Guarantee Co. v. American Building etc. Co., 7 Cal.App.2d 683, 688, 46 P.2d 984. Petitioner's contention that the classification of operations is intended to serve an

entirely different purpose is beside the point. It chose to give to that provision the additional function here in dispute. Petitioner's final argument that the classification of operations must be read as subject to the various exclusions because the policy so provides is argument in a complete circle. We are told to go first to the exclusion, then to the classification and then back to the exclusion. The most that can be said for such an argument is that it renders the meaning of all these provisions ambiguous on this point, and under the rule of law just stated such ambiguities must be resolved against petitioner. A policy issued pursuant to our workmen's compensation statutes should be construed with the purpose of such legislation in mind. Maxfield Wilton etc. v. Industrial Accident Comm., 19 Cal.App.2d 606, 609, 65 P.2d 1354. An employee entitled to compensation under these statutes should not be excluded from the coverage of his employer's workmen's compensation insurance policy unless that exclusion be plain and unambiguous. We conclude that Pitt came within the first exception to the executive officer exclusion and that petitioner's policy covered him at the time of his injury.

The award is annulled and the case is returned to the commission for such further proceedings as may be necessary for a proper apportionment of liability between these employers and their insurance carriers.

WOOD, J., and KINCAID, J. pro tem., concur.



80 Cal.App.2d 751

In re KILES' GUARDIANSHIP.
KILES v. SOUTAR.
Civ. 15665.

District Court of Appeal, Second District, Division 1, California.
July 8, 1947.

1. Parent and child ⇐2(4)

Where there is substantial evidence sustaining the finding that father is not a fit and proper person to have care and custody of his minor child, the action of the trial court will not be set aside except for an abuse of discretion. Probate Code, §§ 1406, 1407.

2. Guardian and ward ⇐10

Where maternal grandfather was unable to care for the child personally and petitioned for appointment of himself as guardian with intention of giving custody of child to others and court found that child's father was incompetent to be the guardian of child, appointment of grandfather as guardian was an abuse of discretion.

3. Guardian and ward ⇐13(1)

In passing on petition for appointment of guardian of child, the child's best interests must be the primary concern of the court.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the guardianship of Christine Joyce Kiles on the petition of Edward D. Soutar, which was opposed by Frank Cortez Kiles. From a judgment appointing the petitioner as guardian of the person of the infant, the contestant appeals.

Judgment reversed, and cause remanded for further proceedings in conformity with opinion.

A. H. McConnell, of Long Beach, for appellant.

Joseph A. Ball and George A. Hart, Jr., both of Long Beach, for respondent.

DORAN, Justice.

The present appeal is from a judgment appointing Edward D. Soutar as guardian of the person of Christine Joyce Kiles who is the minor child of the appellant, Frank Cortez Kiles. Edward D. Soutar is the maternal grandfather of the child. Christine Joyce Kiles was born August 12, 1944, to appellant and Jean Marie Kiles, husband and wife. From the briefs of both parties it appears that on December 2, 1945, at Long Beach, California, the appellant "shot and killed his wife, Jeanne Marie Kiles,

the mother of said minor child". Immediately thereafter Edward D. Soutar, the maternal grandfather, placed the child in the home of Mr. and Mrs. D. C. Gann of Long Beach where the child now resides.

On December 14, 1945, the respondent grandfather filed a petition setting forth the above facts and asking to be appointed guardian. On December 25, 1945, the appellant father, then incarcerated in the county jail, filed an answer and objection praying that "the petition of Edward D. Soutar for appointment of himself as guardian * * * be denied, and that contestant herein, Frank Cortez Kiles, father of said minor, be appointed guardian of the person" of said child. The father further asked "That said minor be temorarily placed in the custody of her paternal grandparents, Frank Cortez Kiles, Sr., and his wife, at Decota, California, until the criminal action now pending against contestant be finally disposed of."

The matter came on for hearing on December 24, 1945, and was then continued until January 25, 1946, and again until January 31, 1946, for the purpose of obtaining reports of the Juvenile Department concerning the appellant's parents, Mr. and Mrs. Joseph M. Kiles, Sr. and for the taking of further testimony. After hearing all the evidence, the trial court found "that the said Frank Cortez Kiles is not a competent, fit or proper person to have the custody of said minor child. * * * that on February 26, 1946, the said Frank Cortez Kiles was sentenced to, and is now confined in, the State Penitentiary at San Quentin, California, upon his plea and the finding of the court that he was guilty of murder of Jeanne Marie Kiles." The court further found that Edward D. Soutar, the maternal grandfather, was a proper person to be appointed guardian of the minor child, and rendered judgment accordingly.

The appellant's brief states the question involved on this appeal as follows: "Was the trial court guilty of an abuse of discretion in granting the petition of the maternal grandfather of a two-year old motherless, female, minor child, for Letters of Guardianship of the person of said child, over the written protest and objections of the natural father of said child." Appellant's main contention is "that the testimony of the petitioner and respondent (Edward D. Soutar) shows clearly and concisely that he was in no position, due to his home surroundings to perform the duties incident to the trust imposed, and that if granted letters it was his intention to place the child in the care and keeping of a Mr. and Mrs. Gann, non-relatives of the child, permanently, or to use his own words 'as long as it lives.'"

The record discloses that Edward D. Soutar, who was appointed guardian, is a divorced man; that Soutar had no facilities to keep the child and did "not want to now; if I had a home of my own I would, but I cannot. I am looking out for the welfare of the child." Concerning Mr. and Mrs. Gann who had the actual custody, Soutar testified, "I have known Mr. Gann for four years and ever since I first met him I have always respected him as one of the finest men I ever knew, and when I met Mrs. Gann I thought the same of her, * * * I have never in my life seen a finer home, and people who respected one another more, and that is why I always, since that time, like to have the baby in a home like that. * * * I intend to keep it (the child) there as long as it lives." The report of the probation officer concerning the Gann home is favorable and indicates that the child is receiving good care there. A favorable report was also made by the Alameda County probation officer in reference to the home of appellant's parents in Decota, California where appellant desired that the child should be placed.

The appellant, testifying at the hearing, expressed the desire that the child should not be placed under the guardianship of Mr. Soutar, but admitted that if the child should be awarded to appellant, the latter was "not in a position to take care of it", and would place the child with appellant's parents, Mr. and Mrs. Joseph M. Kiles, Sr. The respondent's brief comments on the cross examination of appellant to the effect that the latter had previously made statements indicating a want of affection and respect for the parents, including a letter to

appellant's wife which stated, "I hate them more than you do. I don't want them. I want your kind of people that mind their own business". Appellant explained these statements by saying that they were made in an attempt to get the wife to return after a separation.

It is argued by appellant that "the petition of Respondent for Letters of Guardianship was not made in good faith * * * (but) to circumvent the provisions of Section 1407 Probate Code, which provides that a relative of a minor has a priority of right to the guardianship of a minor as against a non-relative. * * * The real party in interest was Mr. and Mrs. Gann, * * * and Soutar never intended to perform the duties of guardian * * * but to turn the child over to the Ganns 'for life' and that the Ganns would be the actual guardians." In this connection, and as showing that the trial court "agreed with the contention * * * that the Ganns and not Soutar were the real parties in interest," appellant quotes the following statement made by Judge Jeffery at the hearing:

"The Court: As I understand it, Mr. White, this is tantamount to a guardianship by the Ganns. I like the looks of the Ganns. * * * The Ganns are not asking for the custody of the child; Soutar is asking for the custody of the child and he is really not the real party in interest."

Section 1406 of the Probate Code provides that "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare." Section 1407 further provides that "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given," first, "to a parent," and thereafter, "to a relative." In the instant litigation, as hereinbefore indicated, the mother of the child is dead, and the father, convicted of killing the mother, has been held by the trial court to be incompetent to act as guardian.

[1] It is true, as commented on in respondent's brief, quoting from In re Bensfield, 102 Cal. App. 445, 451, 283 P. 112, 115, that "When there is substantial evidence that sustains the finding that the father is not a fit and proper person to have the care and custody of his minor child, the determination of the question is largely in the discretion of the trial court. Estate of Bedford, 158 Cal. 145, 110 P. 302. Unless this discretion is abused, the action of the court will not be set aside." In the Bensfield case, the appellate court affirmed an order appointing the mother's sister-in-law as guardian where the mother was dead and the court found substantial evidence to the effect that the child's father by reason of his drinking habits, etc., was not a proper person to act as guardian.

The appellant's argument in the present case, it should be noted, is not directed against the qualifications of Mr. and Mrs. Gann to act as custodians of the child Christine. In its strictly legal aspect, then, the complaint may be reduced to the proposition that there was a manifest abuse of discretion in granting a nominal guardianship to the grandfather who had no facilities to care for the child, which nominal or vicarious guardianship was, in the language of the trial judge, "tantamount to a guardianship by the Ganns." It appears that there is substantial merit in this contention.

[2] If, in the opinion of the trial judge, the evidence justified a finding that the father was not a competent person to act as guardian, and that the best interests of the child would be served by the appointment of Mr. Gann or Mrs. Gann as guardian (a matter upon which no opinion is here expressed), then it seems that such an appointment should have been made directly. As the matter stands, however, Mr. and Mrs. Gann, non-relatives of the child, have no responsibility to the Probate Court or to the minor; on the other hand, the legal guardian is at most, serving in a mere nominal capacity. Certainly the law does not contemplate such an arrangement, nor can it be said that the best interests of the child are being served thereby. As commented upon in appellant's brief, under the present unsatisfactory arrangement, "there is no obligation upon the Ganns to feed, clothe or educate the child, and they can turn it back to Soutar any time they see fit, regardless of his ability to properly care for it."

[3] No citation has been presented which in any way tends to justify or authorize what may be termed a "synthetic" guardianship, and the dangers attendant upon establishing such a precedent are obvious and numerous. Moreover, while the trial court, as an individual, might "like the looks of the Ganns," and might well be of the expressed opinion that "probably they think a great deal of the child," nevertheless there was clearly a judicial duty of the highest nature to make a direct appointment of such a guardian as would insure the proper protection of the child's interest. The welfare of a minor child is, and always has been the primary concern of the courts, to be determined in accordance with the facts and circumstances of each particular case.

The respondent's assertion that "An abuse of discretion is never presumed, and it must be affirmatively established," quoted from Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032, 1033, is doubtless correct, but in the instant case for the reasons hereinbefore given, such abuse is clearly apparent. The books abound in definitions of judicial discretion and attempts to set forth what will constitute an abuse of such discretion. "Discretion when applied to a court of justice means sound discretion guided by law." 4 Burr. 529, Vol. 1, Bouvier's Law Dictionary, Rawle's Third Revision, p. 884. At page 94 of the same volume, abuse of discretion is said to be "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence." In Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366, it is said that abuse of discretion "does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered." Again, in Black's Law Dictionary, at page 11, occurs the following: "Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion."

For the reasons stated the judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concur.

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